



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

### Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

### About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



**HARVARD LAW SCHOOL  
LIBRARY**















NATIONAL REPORTER SYSTEM—STATE SERIES

THE  
SOUTHEASTERN REPORTER

VOLUME 102  
PERMANENT EDITION

COMPRISING ALL THE DECISIONS OF  
THE SUPREME COURTS OF APPEALS OF VIRGINIA AND WEST  
VIRGINIA, THE SUPREME COURTS OF NORTH CAROLINA  
AND SOUTH CAROLINA, AND THE SUPREME  
COURT AND COURT OF APPEALS  
OF GEORGIA

WITH KEY-NUMBER ANNOTATIONS

MARCH 13 — JUNE 5, 1920

KF  
135  
.56  
.56

ST. PAUL  
WEST PUBLISHING CO.  
1920

**COPYRIGHT, 1920**  
**BY**  
**WEST PUBLISHING COMPANY**  
**(102 S.E.)**



# JUDGES

## OF THE COURTS REPORTED DURING THE PERIOD COVERED BY THIS VOLUME

---

### **GEORGIA—Supreme Court.**

**WILLIAM H. FISH, CHIEF JUSTICE.**  
**MARCUS W. BECK, PRESIDING JUSTICE.**

**ASSOCIATE JUSTICES.**

**SAMUEL C. ATKINSON.**  
**HIRAM WARNER HILL.**  
**S. PRICE GILBERT.**  
**WALTER F. GEORGE.**

### **Court of Appeals.**

*Division No. 1.*

**NASH R. BROYLES, CHIEF JUDGE.**

**JUDGES.**

**ROSCOE LUKE.**  
**O. H. B. BLOODWORTH.**

*Division No. 2.*

**W. F. JENKINS, PRESIDING JUDGE.**

**JUDGES.**

**ALEXANDER W. STEPHENS.**  
**CHARLES W. SMITH.**

### **NORTH CAROLINA—Supreme Court.**

**WALTER CLARK, CHIEF JUSTICE.**

**ASSOCIATE JUSTICES.**

**PLATT D. WALKER.**  
**GEORGE H. BROWN.**  
**WILLIAM A. HOKE.**  
**WILLIAM R. ALLEN.**

### **SOUTH CAROLINA—Supreme Court.**

**EUGENE B. GARY, CHIEF JUSTICE.**

**ASSOCIATE JUSTICES.**

**DANIEL E. HYDRICK.**  
**RICHARD C. WATTS.**  
**THOMAS B. FRASER.**  
**GEORGE W. GAGE.**

### **VIRGINIA—Supreme Court of Appeals.**

**STAFFORD G. WHITTLE, PRESIDENT.<sup>1</sup>**  
**JOSEPH L. KELLY, PRESIDENT.<sup>2</sup>**

**JUDGES.**

**JOSEPH L. KELLY.<sup>2</sup>**  
**FREDERICK W. SIMS.**  
**ROBERT R. PRENTIS.**  
**MARTIN P. BURKS.**  
**STAFFORD G. WHITTLE.<sup>1</sup>**  
**EDWARD W. SAUNDERS.<sup>3</sup>**

### **WEST VIRGINIA—Supreme Court of Appeals.**

**WILLIAM N. MILLER, PRESIDENT.<sup>1</sup>**  
**L. JUDSON WILLIAMS, PRESIDENT.<sup>2</sup>**

**JUDGES.**

**GEORGE POFFENBARGER.**  
**WILLIAM N. MILLER.<sup>1</sup>**  
**L. JUDSON WILLIAMS.<sup>2</sup>**  
**CHARLES W. LYNCH.**  
**HAROLD A. RITZ.**

<sup>1</sup> Ceased to be President January, 1920.  
<sup>2</sup> Became President January, 1920.

<sup>3</sup> Took office February 22, 1920.



# CASES REPORTED

	Page		Page
Acme Mfg. Co. v. McPhail (N. C.).....	611	Atlantic Paper & Pulp Corporation v. Johnson (Ga. App.).....	87
Adams v. State (Ga. App.).....	372	Atlantic Paper & Pulp Corporation v. Owens (Ga. App.).....	37
Adams v. State (Ga. App.).....	902	Atwood, Brantley v. (Ga.).....	822
Adams Motor Co. v. Cler (Ga.).....	440	Augusta Southern R. Co., Usry v. (Ga. App.) .....	184
Addison, Kirkland v. (Ga. App.).....	548		
Ajax Coal Co., Hunt v. (W. Va.).....	603	Baggett v. Garrett (Ga.).....	358
Alabama Great Southern R. Co., Wright v. (Ga.) .....	821	Bailey, Maynard v. (W. Va.).....	480
Albert v. Colonial Fire Underwriters of Hartford, Conn. (W. Va.).....	859	Bailey v. Miller County (Ga. App.)....	178
A. L. Black Coal Co., Geo. E. Warren Co. v. (W. Va.).....	672	Bailey, State v. (N. C.).....	406
Alexander v. Easterling (Ga. App.).....	455	Baird, Feather v. (W. Va.).....	294
Alexander, Speer v. (Ga.).....	150	Baker Lumber Co. v. Atlantic Mill & Lumber Co. (Ga. App.).....	185
Alexander v. State (Ga. App.).....	878	Bank of Adrian, Lester v. (Ga. App.)...	846
Alexander v. State (Ga. App.).....	880	Bank of Baconton, Cowan v. (Ga. App.)...	371
Allan, Heeke v. (Va.).....	653	Bank of Baconton v. De Berry (Ga. App.)	371
Allen v. Brooke (Ga. App.).....	832	Bank of Bremen, Cheney v. (Ga. App.)...	903
Allen, Pugh v. (N. C.).....	394	Bank of Dahlonga, Gainesville Grocery Co. v. (Ga. App.).....	912
Allman, Godwin v. (Ga. App.).....	645	Bank of Hazlehurst, Wilcox v. (Ga. App.)	45
Allred, Holbert v. (Ga. App.).....	192	Banks v. State (Ga.).....	519
Aman v. Dover & S. R. Co. (N. C.).....	392	Banks v. State (Ga. App.).....	843
American Machinery Co., Floding v. (Ga. App.) .....	193	Banner Window Glass Co. v. Barriat (W. Va.) .....	726
American Nat. Bank v. Anderson (Ga. App.) .....	923	Barber v. State (Ga. App.).....	879
American Nat. Bank, Anderson v. (Ga.)..	534	Barksdale, Harrison v. (Va.).....	789
American Realty Co. v. Bramlett (Ga. App.) .....	873	Barksdale, Jordan v. (Ga.).....	823
Amerson, Harley v. (Ga.).....	350	Barlow, Ice v., two cases (W. Va.).....	127
Anderson v. American Nat. Bank (Ga.)..	534	Barnard v. Du Pree (Ga.).....	422
Anderson, American Nat. Bank v. (Ga. App.) .....	923	Barnum Iron Works v. Prescott Const. Co. (W. Va.) .....	830
Anderson, Cornelius v. (Ga. App.).....	925	Barrett v. Maynard (Ga.).....	896
Anderson, Sparks v. (Ga.).....	423	Barriat, Banner Window Glass Co. v. (W. Va.) .....	726
Andrews, Benson v. (Ga.).....	148	Bartell v. Edwards (S. C.).....	210
Andrews, Merchants' Nat. Bank v. (N. C.)	500	Barton, Robison v. (S. C.).....	16
Andrews v. Savannah (Ga. App.).....	875	Basnight, Morris v. (N. C.).....	389
Armstrong v. Harper (Ga. App.).....	463	Bass, Southern Exp. Co. v. (Ga. App.)...	168
Armstrong, Marietta Mining Co. v. (Ga. App.) .....	451	Bateman Co. v. Macon Nat. Bank (Ga. App.) .....	548
Arnold, Stevens Lumber Co. v. (N. C.)...	409	Baynes v. State (Ga. App.).....	874
Asa G. Candler, Inc., Thompson v. (Ga. App.) .....	374	Beattie v. City Council of City of Greenville (S. C.).....	751
Ash v. People's Bank (Ga. App.).....	134	Beavers, Wagner v. (W. Va.).....	668
Atkinson v. Sommer (Ga. App.).....	454	Beck v. Wilkins-Ricks Co. (N. C.).....	813
Atkinson v. State (Ga. App.).....	878	Bell v. Harrison (N. C.).....	200
Atlanta, B. & A. R. Co., Gill v. (Ga. App.)	457	Bell, Higdon v. (Ga. App.).....	546
Atlanta Coca-Cola Bottling Co. v. Danne-man (Ga. App.).....	542	Bell v. State (Ga. App.).....	845
Atlanta Journal Co. v. Knowles (Ga. App.) .....	191	Bellinger v. Jones (Ga. App.).....	843
Atlanta Loan & Saving Co. v. Norton (Ga.)	536	Benjamin v. State (Ga.).....	427
Atlanta Loan & Saving Co. v. Norton (Ga. App.) .....	539	Bennett, Cleland v. (Ga. App.).....	39
Atlantic Coast Line R. Co., Corbett v. (Ga. App.).....	464	Bennett v. Hendricks (Ga. App.).....	467
Atlantic Coast Line R. Co., Goff v. (N. C.)	320	Benson v. Andrews (Ga.).....	148
Atlantic Coast Line R. Co. v. Grantham (Ga. App.).....	379	Bentley v. Bentley (Ga.).....	21
Atlantic Coast Line R. Co., Kellers v. (S. C.) .....	11	Berrien County, Paulk v. (Ga. App.).....	172
Atlantic Coast Line R. Co., Thompson v. (S. C.).....	11	Bias, Irons v. (W. Va.).....	126
Atlantic Coast Line R. Co., Walker v. (S. C.) .....	513	Bibb Brick Co. v. Central of Georgia R. Co. (Ga.).....	521
Atlantic Coast Line R. Co., Welch v. (S. C.) .....	786	Bibb Mfg. Co. v. Thornton (Ga. App.)...	465
Atlantic Coast Line R. Co., Wheeler v. (Ga.) .....	823	Bingham v. Haines (Ga. App.).....	923
Atlantic Mill & Lumber Co., Thomas N. Baker Lumber Co. v. (Ga. App.).....	135	Bird v. Trapnell (Ga.).....	151
Atlantic Paper & Pulp Corporation v. Bowen (Ga. App.).....	86	Birrell, Elliott v. (Va.).....	762
		Black Coal Co., Geo. E. Warren Co. v. (W. Va.).....	672
		Blackmon v. Williams (S. C.).....	324
		Blackwell, Stephens v. (Ga. App.).....	452
		Board of Canvassers of City of Montgomery, State v. (W. Va.).....	104
		Board of Com'rs of Pitt County, Elks v. (N. C.).....	414
		Board of Education of Town Dist., Wy-song v. (W. Va.).....	733

	Page		Page
Boatright v. Boatright (Ga.).....	424	Carless, Chesapeake & Potomac Tel. Co. of Virginia v. (Va.).....	569
Boice v. Finance & Guaranty Corporation (Va.).....	591	Carmichael, Stackhouse v. (S. C.).....	783
Boone Timber Co., G. Elias & Bros. v. (W. Va.).....	488	Carolina Power & Light Co., City of Raleigh v. (N. C.).....	614
Booth, Jones v. (Ga.).....	832	Carothers v. James Stewart & Co. (N. C.)..	615
Bostick & Bro. v. Laurinburg & S. R. Co. (N. C.).....	882	Carter, Commonwealth v. (Va.).....	58
Bowen, Atlantic Paper & Pulp Corporation v. (Ga. App.).....	36	Carter v. Norton (Ga. App.).....	648
Boyd, Waters v. (N. C.).....	196	Carter v. Price (W. Va.).....	685
Bracey v. State (Ga. App.).....	377	Central Bank & Trust Corporation, Bruce v. (Ga.).....	344
Bragg, Fourth Nat. Bank v. (Va.).....	649	Central of Georgia R. Co., Bibb Brick Co. v. (Ga.).....	521
Bramlett, American Realty Co. v. (Ga. App.).....	873	Central of Georgia R. Co. v. Dean (Ga. App.).....	45
Brannen, Foundation Co. v. (Ga. App.)....	833	Central of Georgia R. Co. v. Hoban (Ga. App.).....	46
Brantley v. Atwood (Ga.).....	822	Central of Georgia R. Co. v. Moore (Ga. App.).....	168
Breuer, State v. (S. C.).....	15	Central of Georgia R. Co. v. Poole (Ga. App.).....	461
Brewer, Conley v. (W. Va.).....	607	Central of Georgia R. Co., Robinson v. (Ga.).....	532
Brewton, Seaboard Air Line Ry. v. (Ga.)	439	Chafin v. Main Island Creek Coal Co. (W. Va.).....	291
Brewton, Seaboard Air Line Ry. v. (Ga. App.).....	920	Chambers v. North River Line (N. C.)..	198
Brickell v. Hines (N. C.).....	309	Charleston Milling Co., Moultrie Grocery Co. v. (Ga. App.).....	31
Bright, Callison v. (W. Va.).....	675	Chatham Bank & Trust Co., Liberty Banking Co. v. (Ga. App.).....	844
Brinson, Fields v. (N. C.).....	305	C. H. Bateman Co. v. Macon Nat. Bank (Ga. App.).....	548
Broadway Nat. Bank, Duncan v. (Va.)....	577	Cheatwood, O'Neil v. (Va.).....	596
Brooke, Allen v. (Ga. App.).....	832	Cheney v. Bank of Bremen (Ga. App.)..	908
Brooks, Myers v. (Ga. App.).....	369	Chesapeake & O. R. Co., Keathley v. (W. Va.).....	244
Brooks, Ricks v. (N. C.).....	207	Chesapeake & Potomac Tel. Co. of Virginia v. Carless (Va.).....	569
Brotherton v. Robinson (W. Va.).....	700	Chew v. Jones (Ga.).....	524
Brown v. Friedberg (Va.).....	468	Citizens' Bank v. N. C. Hoyt & Co. (Ga. App.).....	837
Brown, Griggs v. (Va.).....	212	Citizens' Banking Co. v. Jones (Ga. App.)	872
Brown v. Harden (Ga.).....	864	City Council of Charleston v. Terry Fish Co. (S. C.).....	13
Brown v. Jackson (N. C.).....	739	City Council of City of Greenville, Beattie v. (S. C.).....	751
Brown, Knight v. (Ga.).....	825	City Council of City of Greenville, Stone v. (S. C.).....	755
Brown v. Smith (Ga.).....	813	City of Atlanta, Grossman v. (Ga. App.)..	847
Brown v. State (Ga.).....	449	City of Atlanta v. Gulf Paving Co. (Ga. App.).....	558
Brown v. State (Ga. App.).....	450	City of Atlanta, National Surety Co. v. (Ga. App.).....	175
Brown v. Wilcox (Ga.).....	818	City of Bainbridge, Magnuson v. (Ga. App.).....	459
Brown Loan & Abstract Co. v. Willis (Ga.)	814	City of Blakely v. Hilton (Ga.).....	340
Brown & Brown, Haynes-Hanson Shoe Co. v. (Ga. App.).....	185	City of Columbus, Russell v. (Ga. App.)...	381
Broyles v. State (Ga. App.).....	381	City of Macon v. Road Com'rs of Bibb County (Ga.).....	867
Bruce v. Central Bank & Trust Corporation (Ga.).....	344	City of Ocilla, Purvis v. (Ga.).....	241
Brydon & Bro., Fairview Fruit Co. v. (W. Va.).....	231	City of Parkersburg v. Kanawha Traction & Electric Co. (W. Va.).....	116
Bryson v. Cler (Ga.).....	442	City of Raleigh v. Carolina Power & Light Co. (N. C.).....	614
Buchholz v. Commonwealth (Va.).....	760	City of Richmond v. Rose (Va.).....	561
Buckeye Cotton Oil Co. v. Everett (Ga. App.).....	167	City of Sandersville v. Moye (Ga. App.)..	552
Buckhorne Land & Timber Co. v. Yarbrough (N. C.).....	630	City of Savannah, Andrews v. (Ga. App.)..	875
Bullington v. Fields (Ga. App.).....	453	City of Thomasville, Lambeth v. (N. C.)...	775
Bunch, Southern R. Co. v. (Ga. App.).....	462	City of Wheeling, Hood v. (W. Va.).....	259
Burgess, White Flame Coal Co. v. (W. Va.).....	690	Clark, Keystone Pecan Co. v. (Ga.).....	352
Burkhalter v. Roach (Ga.).....	832	Clark, Southern States Phosphates & Fertilizer Co. v. (Ga. App.).....	42
Burnett, State v. (N. C.).....	711	Clark v. State (Ga. App.).....	914
Burney, W. T. Rawleigh Medical Co. v. (Ga. App.).....	358	Clarke, Walker v. (Ga.).....	822
Burns, Nestor v. (W. Va.).....	227	Clay v. State (Ga. App.).....	367
Burton v. Burton (S. C.).....	282	Cleland v. Bennett (Ga. App.).....	39
Butler, Mooty v. (Ga. App.).....	842	Clements v. Southern R. Co. (N. C.).....	399
		Cler, Adams Motor Co. v. (Ga.).....	440
Cadden, Independent Order of Puritans v. (Ga. App.).....	454	Cler, Bryson v. (Ga.).....	442
Cain v. Kanawha Traction & Electric Co. (W. Va.).....	119	Cler, Savannah Paige Co. v. (Ga.).....	442
Caison v. Groover (Ga. App.).....	38	Cline v. McAdoo (W. Va.).....	218
Callison v. Bright (W. Va.).....	675	Cline v. Southern R. Co. (S. C.).....	641
Camden Run Drainage Dist., Sawyer v. (N. C.).....	273	C. M. Elliott & Co. v. Johnson (W. Va.)...	681
Cameron & Barclay Co., Drury v. (Ga. App.).....	373		
Camp, Flanigan & Toole, Elrod v. (Ga.)..	357		
Camp, McFarlin v. (Ga.).....	349		
Campbell v. Campbell (N. C.).....	737		
Candler, Inc., Thompson v. (Ga. App.)....	374		
Cantrell, Johnson v. (Ga.).....	821		
Cantrell, Ward v. (Ga. App.).....	922		
Carden v. Sons and Daughters of Liberty (N. C.).....	610		

# CASES REPORTED

ix

(102 S.E.)

	Page		Page
C. M. Keys Commission Co., Miller v. (Ga. App.).....	555	Denman, Lang v. (Ga. App.).....	136
Cobb, Landers v. (Ga.).....	428	Dennard v. Farmers' & Merchants' Bank (Ga.).....	356
Cochran v. Meeks (Ga. App.).....	550	Dent v. Dent (S. C.).....	715
Cockfield, Middleton v. (S. C.).....	328	Denton v. Parsons (Ga.).....	353
Coker v. Duncan (S. C.).....	18	Detroit Steel Products Co. v. Daily Telegraph Printing Co. (W. Va.).....	139
Cole, Frisbee v. (N. C.).....	890	De Vane v. De Vane (Ga.).....	145
Colonial Fire Underwriters of Hartford, Conn., Albert v. (W. Va.).....	859	Dillingham v. National Council, Junior Order of United American Mechanics (S. C.).....	721
Columbian Nat. Life Ins. Co. v. Mulkey (Ga.).....	346	Director General of Railroads, Grant v. (S. C.).....	854
Commander v. Provident Relief Ass'n (Va.).....	89	District Grand Lodge No. 7, G. U. O. of O. F., Connor v. (N. C.).....	881
Commercial Bank v. Dasher (Ga. App.).....	177	Dixie Cotton Co. v. Jackson (Ga. App.).....	841
Commissioners of Cleveland County v. Sidney Spitzer & Co. (N. C.).....	778	Dixon v. Hyde (Ga. App.).....	910
Commonwealth, Buchholz v. (Va.).....	760	D. L. Taylor & Co., Jones v. (N. C.).....	397
Commonwealth v. Carter (Va.).....	58	Dodd, McVay Bros. v. (Ga. App.).....	363
Commonwealth, Heth v. (Va.).....	66	Donnelly, Hite v. (W. Va.).....	478
Commonwealth, King v. (Va.).....	757	Donohoe, Michael v. (W. Va.).....	803
Commonwealth, Martin's Ex'rs v. (Va.).....	77	Dooley v. Wilbanks (Ga. App.).....	365
Commonwealth, Martin's Ex'rs v. (Va.).....	724	Doss, Wooten v. (Ga. App.).....	647
Commonwealth v. Patterson (Va.).....	569	Douglas v. Forrester (Ga.).....	347
Commonwealth, Pennington v. (Va.).....	758	Dover & S. R. Co., Aman v. (N. C.).....	392
Conley v. Brewer (W. Va.).....	607	Dowell v. Raleigh Sav. Bank & Trust Co. (N. C.).....	893
Connor v. District Grand Lodge No. 7, G. U. O. of O. F. (N. C.).....	881	Dowling v. Doyle (Ga.).....	27
Cooper Furniture Co., Lark v. (S. C.).....	788	Doyle, Dowling v. (Ga.).....	27
Cope v. Pettit (Ga. App.).....	833	Drake v. Spencer (N. C.).....	893
Copelan v. Kimbrough (Ga.).....	162	Drury v. Cameron & Barclay Co. (Ga. App.).....	373
Copeland v. Pyles (Ga. App.).....	552	Dubberly v. Tillman (Ga. App.).....	879
Corbett v. Atlantic Coast Line R. Co. (Ga. App.).....	464	Dubose, Terry Shipbuilding Corporation v. (Ga. App.).....	844
Cornelius v. Anderson (Ga. App.).....	925	Duncan v. Broadway Nat. Bank (Va.).....	577
Corona v. De Laval Separator Co. (Ga. App.).....	44	Duncan, Coker v. (S. C.).....	18
Cottle v. Johnson (N. C.).....	769	Duncan, Wessinger v. (S. C.).....	6
Cowan v. Bank of Baconton (Ga. App.).....	371	Dunham v. Western Union Tel. Co. (W. Va.).....	113
Cowan v. Cowan (N. C.).....	613	Dunson v. State (Ga. App.).....	899
Cox v. Davis (W. Va.).....	236	Du Pree, Barnard v. (Ga.).....	422
Cozart, Hudson v. (N. C.).....	278	Eagles-House Realty Co., Etheridge v. (N. C.).....	609
Crawford v. Hunt (Ga. App.).....	834	Easterling, Alexander v. (Ga. App.).....	455
Crawley v. State (Ga.).....	898	Eclipse Coal Co., Standard Coal Co. v. (Ga. App.).....	137
Croom v. Murphy (N. C.).....	706	Edwards, Bartell v. (S. C.).....	210
Crosby v. Parker (Ga.).....	446	Edwards v. Sands (Ga.).....	426
Crosby, Parker v. (Ga.).....	446	Edwards v. State (Ga. App.).....	847
Crystal Coal & Coke Co., Farley v. (W. Va.).....	265	Eicher, Patton v. (W. Va.).....	124
Cuba v. State (Ga. App.).....	830	Elberton & E. R. Co., Ficklen v. (Ga. App.).....	376
Cumming v. Cumming (Va.).....	572	Elias & Bro. v. Boone Timber Co. (W. Va.).....	488
Cumming, Southern Exp. Co. v. (Ga. App.).....	456	Elks v. Board of Com'rs of Pitt County (N. C.).....	414
Custard v. McNary (W. Va.).....	216	Ellington v. Ricks (N. C.).....	510
C. V. Truitt Co., Hogg v. (Ga.).....	826	Elliott v. Birrell (Va.).....	762
Daily Telegraph Printing Co., Detroit Steel Products Co. v. (W. Va.).....	139	Elliott & Co. v. Johnson (W. Va.).....	681
Dalton Council No. 30, J. O. U. A. M., Gilbert v. (Ga. App.).....	831	Ellis v. Floyd County (Ga. App.).....	181
Damron, State v. (W. Va.).....	238	Ellison v. Mattison (S. C.).....	723
Daniels, Luckey v. (Ga. App.).....	902	Elrod v. Camp, Flanigan & Toole (Ga.).....	357
Danneman, Atlanta Coca-Cola Bottling Co. v. (Ga. App.).....	542	Elrod, Grubbs v. (Ga. App.).....	908
Danzley v. State (Ga. App.).....	915	Eminent Household of Columbian Woodmen v. Eppes (Ga. App.).....	174
Darley v. Starr (Ga.).....	819	Empire Cotton Oil Co. v. Penny (Ga. App.).....	556
Dasher, Commercial Bank v. (Ga. App.).....	177	English Lumber Co. v. Wachovia Bank & Trust Co. (N. C.).....	205
Davidson, Southeastern Mut. Fire Ins. Co. v., two cases (Ga. App.).....	460	Eppes, Columbian Household of Columbian Woodmen v. (Ga. App.).....	174
Davis, Cox v. (W. Va.).....	236	E. T. Barnum Iron Works v. Prescott Const. Co. (W. Va.).....	860
Davis v. Davis (N. C.).....	270	Etheridge v. Eagles-House Realty Co. (N. C.).....	609
Davis v. Gibson (Ga. App.).....	466	Eunice v. Reliance Fertilizer Co. (Ga. App.).....	371
Davis v. Gibson (Ga. App.).....	467	Evans v. Lott (Ga. App.).....	556
Davis, Hancock v. (N. C.).....	269	Evans v. State (Ga. App.).....	43
Davis, Hightower v. (Ga. App.).....	34	Evans, Wooten v. (Ga.).....	352
Davis v. State (Ga.).....	445	Everett, Buckeye Cotton Oil Co. v. (Ga. App.).....	167
Davis v. State (Ga. App.).....	378	Everett, Wester v. (Ga.).....	159
Davis v. State (Ga. App.).....	840	Fairview Fruit Co. v. H. P. Brydon & Bro. (W. Va.).....	231
Davisboro Fertilizer Co. v. Wyatt (Ga. App.).....	840		
Day, Jarman v. (N. C.).....	402		
Dean, Central of Georgia R. Co. v. (Ga. App.).....	45		
De Berry v. Bank of Baconton (Ga. App.).....	871		
De Laval Separator Co., Corona v. (Ga. App.).....	44		

	Page		Page
Fairmont Wall Plaster Co. v. Nuzum (W. Va.)	494	Goodson, Love v. (Ga.)	429
Falcone, Savannah Electric Co. v. (Ga. App.)	551	Goolsby v. State (Ga.)	355
Fallin v. Locomotive Engineers' Mut. Life & Accident Ins. Ass'n (Ga. App.)	177	Graham v. Maryland Mut. Life Ins. Co. (Ga. App.)	32
Fannin County v. Pack (Ga.)	166	Graniteville Mfg. Co. v. Renew (S. C.)	18
Fannin County v. Pack (Ga. App.)	167	Grant v. Director General of Railroads (S. C.)	854
Farley v. Crystal Coal & Coke Co. (W. Va.)	285	Grantham, Atlantic Coast Line R. Co. v. (Ga. App.)	879
Farmers' & Merchants' Bank, Dennard v. (Ga.)	356	Gravett v. State (Ga.)	426
Farrell v. Universal Garage Co. (N. C.)	617	Gray v. Seaboard Air Line R. Co. (S. C.)	512
Feather v. Baird (W. Va.)	294	Green v. Hines (Ga. App.)	899
Fentress, Norfolk Southern R. Co. v. (Va.)	588	Green, Mathews v. (Ga. App.)	364
Ficklen v. Elberton & E. R. Co. (Ga. App.)	376	Green v. Ruffin (N. C.)	634
Fidelity & Deposit Co. of Maryland, Morrison v. (Ga.)	354	Green v. State (Ga.)	813
Fields v. Brinson (N. C.)	305	Green v. State (Ga. App.)	384
Fields, Bullington v. (Ga. App.)	453	Greene, Seaboard Air Line R. Co. v. (Ga. App.)	757
Finance & Guaranty Corporation, Boice v. (Va.)	591	Greenleaf Johnson Lumber Co. v. Valentine (N. C.)	774
Finch's Will, In re (N. C.)	737	Greenleaf Johnson Lumber Co., Wynne v. (N. C.)	403
Finley & Seymour, Southern R. Co. v. (Va.)	559	Greenville Pub. Co., State v. (N. C.)	318
First Nat. Bank v. Jacobs (W. Va.)	491	Griffin v. Hines (Ga. App.)	380
First Nat. Bank v. Tarboro Cotton Factory (N. C.)	195	Griffin, Westbrook v. (Ga. App.)	453
First Nat. Bank v. Wade (Ga. App.)	838	Griggs v. Brown (Va.)	212
Fisher v. Shands (Ga. App.)	190	Griggs v. State (Ga. App.)	877
Fisher, Shaw v. (S. C.)	325	Groover, Caison v. (Ga. App.)	38
Fisher, Smith v. (Ga. App.)	170	Groover, Tillman v. (Ga. App.)	879
Fitzpatrick, State v. (W. Va.)	111	Grossman v. Atlanta (Ga. App.)	847
Flesher, Quinn v. (W. Va.)	300	Grubbs v. Elrod (Ga. App.)	903
Fletcher, Whiddon v. (Ga.)	350	Gulf Paving Co., City of Atlanta v. (Ga. App.)	558
Floding v. American Machinery Co. (Ga. App.)	193	Gulf Refining Co. v. McKernan (N. C.)	505
Floyd County, Ellis v. (Ga. App.)	181	Guyan Valley Coal Co., Thurmond v. (W. Va.)	221
Floyd County, Salmon v. (Ga. App.)	364	Haines, Bingham v. (Ga. App.)	923
Forrester, Douglas v. (Ga.)	347	Hall v. Garvin (S. C.)	1
Foster, Rome Ry. & Light Co. v. (Ga. App.)	845	Hall, Lang v. (Ga. App.)	877
Fouche, Roddenberry v. (Ga. App.)	869	Hall, State v. (W. Va.)	694
Foundation Co. v. Brannen (Ga. App.)	833	Hamilton v. State (Ga. App.)	43
Fourth Nat. Bank v. Bragg (Va.)	649	Hammer Lumber Co. v. Seaboard Air Line Ry. (N. C.)	508
Fox, Home Bank v. (S. C.)	643	Hancock v. Davis (N. C.)	269
Friedberg, Brown v. (Va.)	468	Hancock, Rector v. (Va.)	663
Friedman v. Ice Delivery Co. (Ga. App.)	380	Hand, Metropolitan Life Ins. Co. v. (Ga. App.)	647
Frisbee v. Cole (N. C.)	890	Handshaw, McElveen v. (Ga. App.)	382
Fuller, Jones v. (Ga. App.)	550	Happ Bros. Co. v. Montgomery (Ga. App.)	555
Fumston, Jones v. (Ga. App.)	541	Harden, Brown v. (Ga.)	864
Furtick, Sunshine v. (S. C.)	784	Harley v. Amerson (Ga.)	350
Futch, Quelch v. (N. C.)	497	Harman, Harrison v. (W. Va.)	224
Gainesville Grocery Co. v. Bank of Dah-lonega (Ga. App.)	912	Harman, Pocahontas Coal & Coke Co. v. (W. Va.)	224
Gardner v. State (Ga. App.)	376	Harper, Armstrong v. (Ga. App.)	463
Garner v. State Banking Co. (Ga.)	442	Harris, Johnson v. (Ga. App.)	133
Garrett v. Baggett (Ga.)	358	Harris, Raines v. (Ga.)	827
Garvin, Hall v. (S. C.)	1	Harris v. State (Ga.)	159
Gatlin v. Norfolk-Southern R. Co. (N. C.)	779	Harris v. Turner (N. C.)	502
Gauldin v. Madison (N. C.)	851	Harrison v. Barksdale (Va.)	789
Gay v. Woodmen of the World (N. C.)	195	Harrison, Bell v. (N. C.)	200
G. Elias & Bro. v. Boone Timber Co. (W. Va.)	488	Harrison v. Harman (W. Va.)	224
Geo. E. Warren Co. v. A. L. Black Coal Co. (W. Va.)	672	Harrison v. Maxwell Bros. (Ga. App.)	372
George, State v. (S. C.)	284	Hart v. Metropolitan Discount Co. (Ga. App.)	375
Georgia Ry. & Power Co. v. Shaw (Ga. App.)	904	Hart v. Sikes (Ga.)	831
Gibbs, State v. (S. C.)	333	Hartford Fire Ins. Co., Long v. (Ga. App.)	379
Gilbert v. Dalton Council No. 30, J. O. U. A. M. (Ga. App.)	831	Haskins, Otwell v. (Ga. App.)	839
Gill v. Atlanta, B. & A. R. Co. (Ga. App.)	457	Hawker, Miller v. (W. Va.)	470
Gillespie v. Gillespie (Ga.)	824	Hawkins v. Hawkins (Ga.)	431
Gillespie, Jarrell v. (Ga. App.)	370	Haynes-Henson Shoe Co. v. Brown & Brown (Ga. App.)	185
Gillespie, Pocahontas Coal & Coke Co. v. (W. Va.)	224	Headley v. Maxwell Motor Sales Corporation (Ga. App.)	374
Gilstrap v. Leith (Ga. App.)	169	Heater v. Lloyd (W. Va.)	228
Glawson, Mathis v. (Ga.)	351	Heeke v. Allan (Va.)	655
Godwin v. Allman (Ga. App.)	645	Henderson v. Leviton (Ga. App.)	839
Goff v. Atlantic Coast Line R. Co. (N. C.)	320	Hendricks, Bennett v. (Ga. App.)	467
Goldsboro Lumber Co., Pigford v. (N. C.)	389	Hendrix v. State (Ga. App.)	377
		Hersman v. Roane County Court (W. Va.)	810
		Heth v. Commonwealth (Va.)	66
		Hickman, Putnal v. (Ga.)	430
		Hicks, State v. (N. C.)	388

# CASES REPORTED

(102 S.E.)

xi

	Page		Page
Higdon v. Bell (Ga. App.).....	546	Jefferson Standard Life Ins. Co., Hughes v. (Ga. App.) .....	463
Hightower v. Davis (Ga. App.).....	34	Jenkins v. Jenkins (Ga.).....	425
Hill v. Hill (Ga.).....	151	Jenkins v. State (Ga.).....	330
Hill v. State (Ga.).....	440	Jernigan v. Jernigan (N. O.).....	310
Hill v. West (Ga. App.).....	358	Johnson, Atlantic Paper & Pulp Corporation v. (Ga. App.).....	37
Hilton, City of Blakely v. (Ga.).....	340	Johnson v. Cantrell (Ga.).....	821
Hilton v. Wilcox (Ga.).....	129	Johnson, C. M. Elliott & Co. v. (W. Va.).....	681
Hines, Brickell v. (N. C.).....	309	Johnson, Cottle v. (N. C.).....	769
Hines v. Green (Ga. App.).....	899	Johnson v. Harris (Ga. App.).....	133
Hines, Griffin v. (Ga. App.).....	380	Johnson v. State (Ga.).....	439
Hines, Jones v. (W. Va.).....	143	Johnson v. Todd, two cases (W. Va.).....	697
Hines, Kelley v. (Ga. App.).....	921	Jones, Bellinger v. (Ga. App.).....	843
Hines, Keystone Mfg. Co. v. (W. Va.)...	106	Jones v. Booth (Ga.).....	832
Hines v. Swint (Ga. App.).....	647	Jones, Chew v. (Ga.).....	524
Hines v. Wilson (Ga. App.).....	646	Jones, Citizens' Banking Co. v. (Ga. App.).....	372
Hite v. Donnally (W. Va.).....	478	Jones v. D. L. Taylor & Co. (N. C.).....	397
Hite, Stump v. (W. Va.).....	926	Jones v. Fuller (Ga. App.).....	550
Hitt, Lang v. (Ga. App.).....	136	Jones v. Funston (Ga. App.).....	541
Hoban, Central of Georgia R. Co. v. (Ga. App.) .....	46	Jones v. Hines (W. Va.).....	143
Hodges v. Murkison (Ga. App.).....	134	Jones v. Jones (Ga.).....	827
Hodges v. Summerlin (Ga.).....	129	Jones v. Laramore (Ga.).....	526
Hodges v. Thompson (Ga. App.).....	879	Jones v. Stapler (Ga. App.).....	34
Hodgin v. North Carolina Public Service Co. (N. C.).....	748	Jones v. State (Ga. App.).....	846
Hodgson v. Hodgson (Ga.).....	523	Jones v. State (Ga. App.).....	907
Hogg v. C. V. Truitt Co. (Ga.).....	826	Jones Bros., Smith v. (Ga. App.).....	463
Holbert v. Alfred (Ga. App.).....	192	Jones' Ex'r, Withers v. (Va.).....	68
Holloway & Co., Upton & Walker v. (Va.)	54	Jordan v. Barksdale (Ga.).....	823
Hollowell v. Manley (N. C.).....	386	Jordan v. State (Ga.).....	424
Home Bank v. Fox (S. C.).....	643	Journegan, Roe v. (N. C.).....	498
Hood, Louisville & N. R. Co. v. (Ga.)...	521	J. T. Bostick & Bro. v. Laurinburg & S. R. Co. (N. C.).....	882
Hood, Louisville & N. R. Co. v. (Ga. App.) .....	133		
Hood v. Wheeling (W. Va.).....	259	Kagay-Marshall Realty Co., Hopewell Heights Development Co. v. (Va.)....	582
Hopewell Heights Development Co. v. Kagay-Marshall Realty Co. (Va.).....	582	Kaigler, Kaminer v. (S. C.).....	20
Hotel Equipment Co., Mackle Const. Co. v. (Ga. App.) .....	868	Kaminer v. Kaigler (S. O.).....	20
Howard, Lamb v. (Ga.).....	436	Kanawha Traction & Electric Co., Cain v. (W. Va.) .....	119
Howard, Lamb v. (Ga. App.).....	133	Kanawha Traction & Electric Co., City of Parkersburg v. (W. Va.).....	116
Howard, Louisville & N. R. Co. v. (Ga. App.) .....	456	Keathley v. Chesapeake & O. R. Co. (W. Va.).....	244
Howell v. Southern R. Co. (S. C.).....	856	Kellers v. Atlantic Coast Line R. Co. (S. O.).....	11
Hoyt & Co., Citizens' Bank v. (Ga. App.)	837	Kelley v. Hines (Ga. App.).....	921
H. P. Brydon & Bro., Fairview Fruit Co. v. (W. Va.).....	231	Kelley v. Ramey (Ga. App.).....	455
Hudson v. Cozart (N. C.).....	278	Keys Commission Co., Miller v. (Ga. App.)	555
Huey & Martin Drug Co., National City Bank v. (S. C.).....	516	Keystone Coal & Coke Co., Lenhart v. (W. Va.) .....	215
Huggins, Sharpe v. (S. C.).....	788	Keystone Mfg. Co. v. Hines (W. Va.)....	106
Hughes v. Jefferson Standard Life Ins. Co. (Ga. App.).....	463	Keystone Pecan Co. v. Clark (Ga.).....	352
Hughes v. McDermitt (W. Va.).....	767	Kimbrough, Copelan v. (Ga.).....	162
Humphrey v. State (Ga. App.).....	911	King v. Commonwealth (Va.).....	757
Hunnicutt v. Reed (Ga.).....	421	King, T. J. & W. R. Lightfoot v. (Ga. App.) .....	468
Hunt v. Ajax Coal Co. (W. Va.).....	603	Kirkhart v. United Fuel Gas Co. (W. Va.)	806
Hunt, Crawford v. (Ga. App.).....	884	Kirkland v. Addison (Ga. App.).....	548
Hunt, Southern R. Co. v. (Ga. App.)....	757	Kiser, Spry v. (N. C.).....	708
Hunter, Merchants' & Planters' Nat. Bank v. (S. C.) .....	720	Kittle v. Kittle (W. Va.).....	799
Huntington Development & Gas Co., Roberts v. (W. Va.) .....	98	Klein, Mullens Realty & Insurance Co. v. (W. Va.).....	677
Hyde, Dixon v. (Ga. App.).....	910	Knight v. Brown (Ga.).....	825
		Knowles, Atlanta Journal Co. v. (Ga. App.) .....	191
Ice v. Barlow, two cases (W. Va.).....	127	Kornahrens, Meier v. (S. O.).....	285
Ice Delivery Co., Friedman v. (Ga. App.)	380		
Independent Order of Puritans v. Cadden (Ga. App.).....	454	Lamb v. Howard (Ga. App.).....	133
Ingram v. State (Ga. App.).....	452	Lamb v. Howard (Ga.).....	436
Irons v. Bias (W. Va.).....	126	Lambeth v. Thomasville (N. C.).....	775
		Landers v. Cobb (Ga.).....	428
Jackson, Brown v. (N. C.).....	739	Lang v. Denman (Ga. App.).....	136
Jackson, Dixie Cotton Co. v. (Ga. App.)	841	Lang v. Hall (Ga. App.).....	877
Jackson v. Jackson (Ga.).....	348	Lang v. Hitt (Ga. App.).....	136
Jackson, Monk v. (Ga. App.).....	382	Lang v. Sapp (Ga.).....	867
Jackson v. State (Ga. App.).....	373	Laramore, Jones v. (Ga.).....	526
Jacobs, First Nat. Bank v. (W. Va.).....	491	Lark v. Cooper Furniture Co. (S. O.).....	786
Jakar v. Jakar (S. C.).....	337	Laurinburg & S. R. Co., J. T. Bostick & Bro. v. (N. C.).....	882
James v. State (Ga.).....	425	Lee v. Sumter Pine & Cypress Co. (S. O.)	2
James Stewart & Co., Carothers v. (N. C.) .....	615	Legg v. Legg (Ga.).....	829
Jarman v. Day (N. O.).....	402	Leggett v. Fridgen (Ga.).....	829
Jarrell v. Gillespie (Ga. App.).....	370	Leith v. Gilstrap (Ga. App.).....	169

	Page		Page
Lemmon v. Scaggs (W. Va.)	122	Massey, Rushin v. (Ga. App.)	456
Lenhart v. Keystone Coal & Coke Co. (W. Va.)	215	Mathews v. Green (Ga. App.)	364
Lester v. Bank of Adrian (Ga. App.)	846	Mathis v. Glawson (Ga.)	351
Leviton, Henderson v. (Ga. App.)	839	Mattison, Ellison v. (S. C.)	723
Lewis, Hubbard & Co., Security Realty Inv. Co. v. (W. Va.)	702	Maxwell Bros. v. Harrison (Ga. App.)	372
Lewis, Oliver v. (Ga.)	146	Maxwell Motor Sales Corporation, Headley v. (Ga. App.)	374
Lewis v. State (Ga. App.)	367	Maynard v. Bailey (W. Va.)	480
Lewis, State Board of Medical Examiners v. (Ga.)	24	Maynard, Barrett v. (Ga.)	896
Liberty Banking Co. v. Chatham Bank & Trust Co. (Ga. App.)	844	Maynard v. Wight (Ga. App.)	375
Lightfoot v. King (Ga. App.)	468	Mayo Milling Co., Vaughan v. (Va.)	597
Little, Appeal of (N. C.)	499	Meany v. Priddy (Va.)	470
Littlefield, Town of Adel v. (Ga.)	433	Medlin v. State (Ga.)	826
Lloyd, Heater v. (W. Va.)	228	Meekins, Swift & Co. v. (N. C.)	138
Locomotive Engineers' Mut. Life & Accident Ins. Ass'n, Fallin v. (Ga. App.)	177	Meeks, Cochran v. (Ga. App.)	550
Long v. Hartford Fire Ins. Co. (Ga. App.)	379	Meier v. Kornahrens (S. C.)	285
Long v. State (Ga. App.)	359	Melton-Rhodes Co., Miller v. (N. C.)	782
Long v. State (Ga. App.)	364	Merchants' Nat. Bank v. Andrews (N. C.)	500
Lott, Evans v. (Ga. App.)	556	Merchants' & Planters' Nat. Bank v. Hunter (S. C.)	720
Love v. Goodson (Ga.)	429	Metropolitan Discount Co., Hart v. (Ga. App.)	375
Louisville & N. R. Co. v. Hood (Ga. App.)	133	Metropolitan Life Ins. Co. v. Hand (Ga. App.)	647
Louisville & N. R. Co. v. Hood (Ga.)	521	Michael v. Donohoe (W. Va.)	803
Louisville & N. R. Co. v. Howard (Ga. App.)	456	Middleton v. Cockfield (S. C.)	328
Loyd v. State (Ga. App.)	378	Middleton, McIntosh Land & Timber Co. v. (Ga. App.)	171
Luckey v. Daniels (Ga. App.)	902	Middleton v. Rigsbee (N. C.)	780
Lumbermen's Mut. Ins. Co. v. Southern R. Co. (N. C.)	417	Miles v. Walker (N. C.)	884
Lumpkin, Sherry v. (Va.)	658	Miller v. C. M. Keys Commission Co. (Ga. App.)	555
McAdoo, Cline v. (W. Va.)	218	Miller v. Hawker (W. Va.)	470
McBride v. State (Ga.)	865	Miller v. Melton-Rhodes Co. (N. C.)	782
McCay, Wren v. (S. C.)	9	Miller, Moore v. (N. C.)	627
McConnon & Co., Stanfield v. (Ga. App.)	908	Miller v. Starcher (W. Va.)	809
McDermitt, Hughes v. (W. Va.)	767	Miller, State v. (W. Va.)	303
McDilda, Sikes v. (Ga. App.)	880	Miller County, Bailey v. (Ga. App.)	178
McDowell v. Southern R. Co. (S. C.)	639	Mills v. Virginian R. Co. (W. Va.)	604
McElveen v. Handshaw (Ga. App.)	382	Milltown Lumber Co. v. Milltown (Ga.)	435
McFarland v. McFarland (Ga. App.)	37	Minshaw v. State (Ga. App.)	906
McFarlin v. Camp (Ga.)	349	Mitchell v. Southern Bell Telephone & Telegraph Co. (Ga.)	346
McIntosh, Roane v. (Ga.)	129	Mitchem v. Williams (Ga. App.)	870
McIntosh Land & Timber Co. v. Middleton (Ga. App.)	171	Monk v. Jackson (Ga. App.)	382
Mackall, McKenzie v. (W. Va.)	118	Monongalia County Court, Ryan v. (W. Va.)	731
McKenzie v. Mackall (W. Va.)	118	Monroe, Perry v. (Ga.)	356
McKenzie v. Southern R. Co. (S. C.)	514	Monroe Coal Mining Co., Watson-Loy Coal Co. v. (W. Va.)	485
McKernan, Gulf Refining Co. v. (N. C.)	505	Montgomery, Happ Bros. Co. v. (Ga. App.)	555
McKinne, Union Trust Co. v. (N. C.)	385	Moore v. Central of Georgia R. Co. (Ga. App.)	168
Markle Const. Co. v. Hotel Equipment Co. (Ga. App.)	868	Moore v. Miller (N. C.)	627
McMillan, Simpson v. (Ga.)	825	Moore v. State (Ga. App.)	916
McNary, Custard v. (W. Va.)	216	Mooty v. Butler (Ga. App.)	842
Macon Hardwood Lumber Co. v. National Union Fire Ins. Co. (Ga. App.)	180	Morgan, Ogleshorpe Savings & Trust Co. v. (Ga.)	528
Macon Nat. Bank, C. H. Bateman Co. v. (Ga. App.)	548	Morris v. Basnight (N. C.)	389
Macon News Printing Co., Ryle v. (Ga. App.)	835	Morris v. Risk (W. Va.)	725
McPhail, Acme Mfg. Co. v. (N. C.)	611	Morris, Southern States Life Ins. Co. v. (Ga. App.)	179
McVay Bros. v. Dodd (Ga. App.)	363	Morrison v. Fidelity & Deposit Co. of Maryland (Ga.)	354
Magers, Palmer v. (W. Va.)	100	Moseley, Wilson v. (S. C.)	330
Magnuson v. Bainbridge (Ga. App.)	459	Most Worshipful Grand Lodge of North Carolina, F. & A. A. M., Norwood v. (N. C.)	749
Main Island Creek Coal Co., Chafin v. (W. Va.)	291	Motes v. Phillips (Ga. App.)	137
Malsby & Co. v. Widincamp (Ga. App.)	178	Moultrie Grocery Co. v. Charleston Milling Co. (Ga. App.)	81
Manley, Hollowell v. (N. C.)	386	Moye, City of Sandersville v. (Ga. App.)	552
Marietta Ice & Coal Co. v. Western & A. R. Co. (Ga. App.)	182	Mulkey, Columbian Nat. Life Ins. Co. v. (Ga.)	346
Marietta Mining Co. v. Armstrong (Ga. App.)	451	Mullens Realty & Insurance Co. v. Klein (W. Va.)	677
Marion County Court, Wells v. (W. Va.)	472	Murkison, Hodges v. (Ga. App.)	134
Martin, Wright v. (Ga.)	156	Murphy, Croom v. (N. C.)	706
Martin Ex'rs v. Commonwealth (Va.)	77	Murphy, State v. (S. C.)	288
Martin's Ex'rs v. Commonwealth (Va.)	724	Myers v. Brooks (Ga. App.)	369
Maryland Mut. Life Ins. Co., Graham v. (Ga. App.)	32	National City Bank v. Huey & Martin Drug Co. (S. C.)	516
Mashburn, Powers v. (N. C.)	893		
Massachusetts Bonding & Insurance Co., Smith v. (N. C.)	887		



# CASES REPORTED

(102 S.E.)

xiii

	Page		Page
National Council, Junior Order of United American Mechanics, Dillingham v. (S. C.)	721	Price, Carter v. (W. Va.)	685
National Surety Co. v. Atlanta (Ga. App.)	175	Price v. Norfolk-Southern R. Co. (N. C.)	308
National Union Fire Ins. Co. v. Macon		Priddy, Meany v. (Va.)	470
Hardwood Lumber Co. (Ga. App.)	180	Pridgen, Leggett v. (Ga.)	829
N. C. Hoyt & Co., Citizens' Bank v. (Ga. App.)	837	Pritchett, Southern Exp. Co. v. (N. C.)	618
Nelson v. Rhem (N. C.)	395	Prosser v. Prosser (S. C.)	787
Nestor v. Burns (W. Va.)	227	Provident Relief Ass'n, Commander v. (Va.)	89
Newberry v. State (Ga. App.)	368	Pruitt, Seaboard Air Line R. Co. v. (Ga. App.)	182
Newman, State v. (W. Va.)	122	Pugh v. Allen (N. C.)	394
Newsome v. Smith (Ga. App.)	841	Purvis v. Ocilla (Ga.)	241
Newsome v. State (Ga. App.)	876	Putnal v. Hickman (Ga.)	430
Norfolk Southern R. Co. v. Fentress (Va.)	588	Pyles, Copeland v. (Ga. App.)	552
Norfolk-Southern R. Co., Gatlin v. (N. C.)	779	Quelch v. Futch (N. C.)	497
Norfolk-Southern R. Co., Price v. (N. C.)	308	Quinan v. Standard Fuel Supply Co. (Ga. App.)	543
Norfolk & W. R. Co., Schuster v. (W. Va.)	476	Quinn v. Flesher (W. Va.)	300
North Carolina Public Service Co., Hodgins v. (N. C.)	748	Raines v. Harris (Ga.)	827
North River Lane, Chambers v. (N. C.)	198	Raleigh, C. & S. R. Co., Southern Stock Fire Ins. Co. of Greensboro v. (N. C.)	504
Norton, Atlanta Loan & Saving Co. v. (Ga. App.)	536	Raleigh Sav. Bank & Trust Co., Dowell v. (N. C.)	896
Norton, Atlanta Loan & Saving Co. v. (Ga. App.)	539	Ramey, Kelley v. (Ga. App.)	455
Norton, Carter v. (Ga. App.)	648	Rardin v. Rardin (W. Va.)	295
Norwood v. Most Worshipful Grand Lodge of North Carolina, F. & A. A. M., (N. C.)	749	Raskin v. State (Ga. App.)	875
Nuzum, Fairmont Wall Plaster Co. v. (W. Va.)	494	Rawleigh Medical Co. v. Burney (Ga. App.)	358
Ocean Accident & Guarantee Corporation v. Piedmont Ry. & Electric Co. (N. C.)	636	R. D. Holloway & Co., Upton & Walker v. (Va.)	54
Oetter v. Oetter (Ga.)	818	Rector v. Hancock (Va.)	663
Oettinger, Zucker v. (N. C.)	413	Reddick v. State (Ga.)	847
Oglethorpe Savings & Trust Co. v. Morgan (Ga.)	528	Reddick v. State (Ga. App.)	132
Oliver v. Lewis (Ga.)	146	Redding v. State (Ga. App.)	845
O'Neil v. Cheatwood (Va.)	596	Reed, Hunnicutt v. (Ga.)	421
Ottwell v. Haskins (Ga. App.)	839	Reliance Fertilizer Co., Eunice v. (Ga. App.)	871
Owens, Atlantic Paper & Pulp Corporation v. (Ga. App.)	37	Renew, Graniteville Mfg. Co. v. (S. C.)	18
Pack, Fannin County v. (Ga.)	166	Reynolds v. State (Ga. App.)	879
Pack, Fannin County v. (Ga. App.)	167	Rhem, Nelson v. (N. C.)	396
Palmer v. Magers (W. Va.)	100	Richter v. White (N. C.)	497
Parker v. Crosby (Ga.)	446	Ricks v. Brooks (N. C.)	207
Parr Shoals Power Co., Suber v. (S. C.)	335	Ricks, Ellington v. (N. C.)	510
Parsons, Denton v. (Ga.)	353	Ridley v. Ridley (Ga. App.)	918
Patterson, Commonwealth v. (Va.)	569	Rigsbee, Middleton v. (N. C.)	780
Patton v. Eicher (W. Va.)	124	Rion, Wateree Power Co. v., two cases (S. C.)	331
Paulk v. Berrien County (Ga. App.)	172	Risk, Morris v. (W. Va.)	725
Payne v. State (Ga. App.)	359	Roach v. Burkhalter (Ga.)	832
Pennington v. Commonwealth (Va.)	758	Road Com'rs of Bibb County, City of Macon v. (Ga. App.)	867
Penny, Empire Cotton Oil Co. v. (Ga. App.)	556	Roane v. McIntosh (Ga.)	129
People's Bank, Ash v. (Ga. App.)	134	Roane County Court, Hersman v. (W. Va.)	810
Perry v. Monroe (Ga.)	356	Roberson v. State (Ga. App.)	378
Perry v. Perry (N. C.)	772	Roberts v. Huntington Development & Gas Co. (W. Va.)	93
Perry, State v. (N. C.)	277	Roberts v. Ward (W. Va.)	96
Pettit, Cope v. (Ga. App.)	833	Robinson, Brotherton v. (W. Va.)	700
Phillips, Motes v. (Ga. App.)	137	Robinson v. Central of Georgia R. Co. (Ga.)	532
Pidcock v. West (Ga. App.)	360	Robinson, Pope v. (Ga.)	350
Piedmont Ry. & Electric Co., Ocean Accident & Guarantee Corporation v. (N. C.)	636	Robinson, Snider v. (W. Va.)	482
Pierce v. Smith (Ga. App.)	648	Robinson v. State (Ga. App.)	830
Pigford v. Goldsboro Lumber Co. (N. C.)	389	Robison v. Barton (S. C.)	16
Pitts Banking Co., Planters' Gin & Warehouse Co. v. (Ga. App.)	183	Roddenberry v. Fouché (Ga. App.)	869
Pitts v. State (Ga. App.)	381	Roe v. Journegan (N. C.)	498
Planters' Bank & Trust Co. v. Lumberton (N. C.)	629	Rome Ry. & Light Co. v. Foster (Ga. App.)	845
Planters' Gin & Warehouse Co. v. Pitts Banking Co. (Ga. App.)	183	Rome Ry. & Light Co. v. Thomas (Ga. App.)	38
Pocahontas Coal & Coke Co. v. Gillespie (W. Va.)	224	Rose, City of Richmond v. (Va.)	561
Pocahontas Coal & Coke Co. v. Harman (W. Va.)	224	Ruffin, Green v. (N. C.)	634
Poole, Central of Georgia R. Co. v. (Ga. App.)	461	Rushin v. Massey (Ga. App.)	456
Pope v. Robinson (Ga.)	350	Russell v. Columbus (Ga. App.)	381
Powers v. Mashburn (N. C.)	893	Rust & Shelburne Sales Co., Truitt v. (Ga. App.)	645
Prescott Const. Co., E. T. Barnum Iron Works v. (W. Va.)	860	Ryan v. Monongalia County Court (W. Va.)	731
		Ryle v. Macon News Printing Co. (Ga. App.)	835
		Salios v. Swift (Ga. App.)	869
		Salisbury & S. R. Co. v. Southern Power Co. (N. C.)	625
		Salmon v. Floyd County (Ga. App.)	364

	Page		Page
Salvation Army, Wright v. (Ga. App.)...	41	Southern R. Co., McDowell v. (S. C.)...	639
Sanders, Scott v. (Ga. App.).....	370	Southern R. Co., McKenzie v. (S. C.)...	514
Sands, Edwards v. (Ga.).....	426	Southern States Life Ins. Co. v. Morris	179
Sapp v. Lang (Ga.).....	807	(Ga. App.).....	
Savannah Electric Co. v. Falcone (Ga.	551	Southern States Phosphates & Fertilizer	42
App.).....		Co. v. Clark (Ga. App.).....	
Savannah Electric Co., Smith v. (Ga. App.)	548	Southern Stock Fire Ins. Co. of Greens-	504
Savannah Paige Co. v. Cler (Ga.).....	442	boro v. Raleigh, C. & S. R. Co. (N. C.)	
Sawyer v. Camden Run Drainage Dist. (N.	273	Spaulding v. State (Ga. App.).....	907
C.).....		Sparks v. Anderson (Ga.).....	423
Saylor v. State (Ga. App.).....	924	Speer v. Alexander (Ga.).....	150
Scaggs, Lemmon v. (W. Va.).....	122	Spencer, Drake v. (N. C.).....	893
Schuster v. Norfolk & W. R. Co. (W. Va.)	478	Spencer v. Wills (N. C.).....	275
Scoggins v. State (Ga. App.).....	39	Spitzer & Co., Commissioners of Cleveland	778
Scoggins v. State (Ga.).....	520	County v. (N. C.).....	
Scott v. Sanders (Ga. App.).....	370	Spry v. Kiser (N. C.).....	708
Seaboard Air Line R. Co. v. Brewton (Ga.)	439	Stackhouse v. Carmichael (S. C.).....	783
Seaboard Air Line Ry. v. Brewton (Ga.	920	Standard Accident Ins. Co. v. Walker (Va.)	585
App.).....		Standard Coal Co. v. Eclipse Coal Co.	137
Seaboard Air Line R. Co., Gray v. (S. C.)	512	(Ga. App.).....	
Seaboard Air Line R. Co. v. Greene (Ga.	757	Standard Fuel Supply Co., Quinan v. (Ga.	543
App.).....		App.).....	
Seaboard Air Line Ry., Hammer Lumber	508	Stanfield v. McConnon & Co. (Ga. App.)	908
Co. v. (N. C.).....		Stanford v. State (Ga. App.).....	381
Seaboard Air Line R. Co. v. Pruitt (Ga.	182	Stapler, Jones v. (Ga. App.).....	84
App.).....		Starcher, Miller v. (W. Va.).....	809
Security Realty Inv. Co. v. Lewis, Hubbard	702	Starr, Darley v. (Ga.).....	819
& Co. (W. Va.).....		State, Adams v. (Ga. App.).....	872
Sessoms, State v. (N. C.).....	194	State, Adams v. (Ga. App.).....	902
Shands, Fisher v. (Ga. App.).....	190	State, Alexander v. (Ga. App.).....	878
Sharpe v. Huggins (S. C.).....	788	State, Alexander v. (Ga. App.).....	880
Shaw v. Fisher (S. C.).....	325	State, Atkinson v. (Ga. App.).....	878
Shaw, Georgia Ry. & Power Co. v. (Ga.	904	State v. Bailey (N. C.).....	406
App.).....		State, Banks v. (Ga.).....	519
Shelton v. State (Ga.).....	355	State, Banks v. (Ga. App.).....	843
Shelton v. Sydnor (Va.).....	83	State, Barber v. (Ga. App.).....	879
Sherry v. Lumpkin (Va.).....	658	State, Baynes v. (Ga. App.).....	874
Shiver & Aultman, Tift v. (Ga. App.)...	47	State, Bell v. (Ga. App.).....	845
Shoaf, State v. (N. C.).....	705	State, Benjamin v. (Ga.).....	427
Shorter v. Shorter (Ga.).....	863	State v. Board of Canvassers of City of	104
Sidney Spitzer & Co., Commissioners of	778	Montgomery (W. Va.).....	
Cleveland County v. (N. C.).....		State, Bracey v. (Ga. App.).....	377
Sikes v. Hart (Ga.).....	831	State v. Breuer (S. C.).....	15
Sikes v. McDilda (Ga. App.).....	880	State, Brown v. (Ga.).....	449
Simpson v. McMillan (Ga.).....	825	State, Brown v. (Ga. App.).....	450
Sledge v. State (Ga. App.).....	31	State, Broyles v. (Ga. App.).....	381
Small, Wilson v. (Ga. App.).....	370	State v. Burnett (N. C.).....	711
Smith, Brown v. (Ga.).....	813	State, Clark v. (Ga. App.).....	914
Smith v. Fisher (Ga. App.).....	170	State, Clay v. (Ga. App.).....	367
Smith v. Jones Bros. (Ga. App.).....	463	State, Crawley v. (Ga.).....	898
Smith v. Massachusetts Bonding & Insur-	887	State, Cuba v. (Ga. App.).....	830
ance Co. (N. C.).....		State v. Damron (W. Va.).....	238
Smith, Newsome v. (Ga. App.).....	841	State, Danzley v. (Ga. App.).....	915
Smith, Pierce v. (Ga. App.).....	648	State, Davis v. (Ga.).....	445
Smith v. Savannah Electric Co. (Ga. App.)	548	State, Davis v. (Ga. App.).....	378
Smith, Washington Exch. Bank v. (Ga.	45	State, Davis v. (Ga. App.).....	840
App.).....		State, Dunson v. (Ga. App.).....	899
Snider v. Robinson (W. Va.).....	482	State, Edwards v. (Ga. App.).....	847
Snipes v. Wood (N. C.).....	619	State, Evans v. (Ga. App.).....	43
Sommer, Atkinson v. (Ga. App.).....	454	State v. Fitzpatrick (W. Va.).....	111
Sons and Daughters of Liberty, Carden v.	610	State, Gardner v. (Ga. App.).....	876
(N. C.).....		State v. George (S. C.).....	284
Southeastern Fair Ass'n v. Wong Jung	32	State v. Gibbs (S. C.).....	333
(Ga. App.).....		State, Goolsby v. (Ga.).....	355
Southeastern Grain & Live Stock Co.,	849	State, Gravett v. (Ga.).....	426
Turner v. (N. C.).....		State, Green v. (Ga.).....	813
Southeastern Mut. Fire Ins. Co. v. David-	460	State, Green v. (Ga. App.).....	384
son, two cases (Ga. App.).....		State v. Greenville Pub. Co. (N. C.).....	318
Southern Bell Telephone & Telegraph Co.,	346	State, Griggs v. (Ga. App.).....	877
Mitchell v. (Ga.).....		State v. Hall (W. Va.).....	694
Southern Exp. Co. v. Bass (Ga. App.).....	168	State, Hamilton v. (Ga. App.).....	43
Southern Exp. Co. v. Cumming (Ga. App.)	456	State, Harris v. (Ga.).....	159
Southern Exp. Co. v. Pritchett (N. C.)...	616	State, Hendrix v. (Ga. App.).....	377
Southern Power Co., Salisbury & S. R. Co.	625	State v. Hicks (N. C.).....	388
v. (N. C.).....		State, Hill v. (Ga.).....	440
Southern R. Co. v. Bunch (Ga. App.).....	482	State, Humphrey v. (Ga. App.).....	911
Southern R. Co., Clements v. (N. C.).....	399	State, Ingram v. (Ga. App.).....	452
Southern R. Co., Cline v. (S. C.).....	641	State, Jackson v. (Ga. App.).....	373
Southern R. Co. v. Finley & Seymour	559	State, James v. (Ga.).....	425
(Va.).....		State, Jenkins v. (Ga.).....	830
Southern R. Co., Howell v. (S. C.).....	856	State, Johnson v. (Ga.).....	439
Southern R. Co. v. Hunt (Ga. App.).....	757	State, Jones v. (Ga. App.).....	846
Southern R. Co., Lumbermen's Mut. Ins.	417	State, Jones v. (Ga. App.).....	907
Co. v. (N. C.).....		State, Jordan v. (Ga.).....	424

# CASES REPORTED

(102 S.E.)

IV

	Page		Page
State, Lewis v. (Ga. App.)	367	Thomas, Yoho v. (W. Va.)	236
State, Long v. (Ga. App.)	359	Thomas N. Baker Lumber Co. v. Atlantic	
State, Long v. (Ga. App.)	364	Mill & Lumber Co. (Ga. App.)	135
State, Loyd v. (Ga. App.)	378	Thompson v. Asa G. Candler, Inc. (Ga.	
State, McBride v. (Ga.)	365	App.)	374
State, Mathews v. (Ga. App.)	364	Thompson v. Atlantic Coast Line R. Co.	
State, Medlin v. (Ga.)	326	(S. C.)	11
State v. Miller (W. Va.)	303	Thompson, Hodges v. (Ga. App.)	379
State, Minshew v. (Ga. App.)	906	Thompson v. State (Ga. App.)	453
State, Moore v. (Ga. App.)	916	Thompson v. State (Ga. App.)	834
State v. Murphy (S. C.)	288	Thornton, Bibb Mfg. Co. v. (Ga. App.)	465
State, Newberry v. (Ga. App.)	368	Thrasher v. State (Ga. App.)	363
State v. Newman (W. Va.)	122	Thurmond v. Guyan Valley Coal Co. (W.	
State, Newsome v. (Ga. App.)	876	Va.)	221
State, Payne v. (Ga. App.)	359	Tierney v. United Pocahontas Coal Co. (W.	
State v. Perry (N. C.)	277	Va.)	249
State, Pitts v. (Ga. App.)	381	Tift v. Shiver & Aultman (Ga. App.)	47
State, Raskin v. (Ga. App.)	375	Tillman, Dubberly v. (Ga. App.)	879
State, Reddick v. (Ga.)	347	Tillman v. Groover (Ga. App.)	879
State, Reddick v. (Ga. App.)	132	T. J. & W. R. Lightfoot v. King (Ga. App.)	468
State, Redding v. (Ga. App.)	845	Todd, Johnson v., two cases (W. Va.)	697
State, Reynolds v. (Ga. App.)	879	Tooke v. State (Ga. App.)	906
State, Roberson v. (Ga. App.)	378	Town of Adel v. Littlefield (Ga.)	433
State, Robinson v. (Ga. App.)	830	Town of Gibson, Davis v. (Ga. App.)	466
State, Saylor v. (Ga. App.)	924	Town of Gibson, Davis v. (Ga. App.)	467
State, Scoggins v. (Ga.)	520	Town of Lumberton, Planters' Bank &	
State, Scoggins v. (Ga. App.)	39	Trust Co. v. (N. C.)	629
State v. Sessoms (N. C.)	194	Town of Madison, Gauldin v. (N. C.)	851
State, Shelton v. (Ga.)	355	Town of Milltown, Milltown Lumber Co. v.	
State v. Shoaf (N. C.)	705	(Ga.)	435
State, Sledge v. (Ga. App.)	31	Towson v. Towson (Va.)	48
State, Spaulding v. (Ga. App.)	907	Trapnell, Bird v. (Ga.)	131
State, Stanford v. (Ga. App.)	381	Truitt v. Rust & Shelburne Sales Co. (Ga.	
State v. State Board of Control (W. Va.)	688	App.)	645
State, Strickland v. (Ga. App.)	383	Truitt Co., Hogg v. (Ga.)	826
State, Thompson v. (Ga. App.)	453	Tucker v. State (Ga. App.)	880
State, Thompson v. (Ga. App.)	834	Turner, Harris v. (N. C.)	502
State, Thrasher v. (Ga. App.)	363	Turner v. Southeastern Grain & Live	
State, Tooke v. (Ga. App.)	905	Stock Co. (N. C.)	849
State, Tucker v. (Ga. App.)	880	Turner v. State (Ga. App.)	847
State, Turner v. (Ga. App.)	847	Union Trust Co. v. McKinne (N. C.)	385
State v. United States Fidelity & Guaranty		United Fuel Gas Co., Kirkhart v. (W. Va.)	806
Co. (W. Va.)	683	United Pocahontas Coal Co., Tierney v.	
State v. Walker (N. C.)	404	(W. Va.)	249
State, Walls v. (Ga. App.)	43	United States Fidelity & Guaranty Co.,	
State, Webster v. (Ga. App.)	916	State v. (W. Va.)	683
State, Williams v. (Ga. App.)	875	Universal Garage Co., Farrell v. (N. C.)	617
State, Winokur v. (Ga. App.)	902	Upton & Walker v. R. D. Holloway & Co.	
State v. Wiseman (N. C.)	706	(Va.)	54
State, Woodall v. (Ga. App.)	913	Usry v. Augusta Southern R. Co. (Ga.	
State, Wright v. (Ga. App.)	834	App.)	184
State Banking Co., Garner v. (Ga.)	442	Valentine, Greenleaf Johnson Lumber Co.	
State Board of Control, State v. (W. Va.)	688	v. (N. C.)	774
State Board of Medical Examiners v. Lew-		Vaughan v. Mayo Milling Co. (Va.)	597
is (Ga.)	24	Virginian R. Co., Mills v. (W. Va.)	604
Stephens v. Blackwell (Ga. App.)	452	Wachovia Bank & Trust Co., English Lum-	
Stevens Lumber Co. v. Arnold (N. C.)	409	ber Co. v. (N. C.)	205
Stewart v. Workman (W. Va.)	474	Wade, First Nat. Bank v. (Ga. App.)	836
Stewart & Co., Carothers v. (N. C.)	615	Wagner v. Beavers (W. Va.)	668
Stocks v. Stocks (N. C.)	306	Walker v. Atlantic Coast Line R. Co. (S.	
Stone v. City Council of City of Greenville		C.)	513
(S. C.)	755	Walker v. Clarke (Ga.)	822
Strickland v. State (Ga. App.)	383	Walker, Miles v. (N. C.)	884
Stuard Lumber Co. v. Taylor (Ga.)	894	Walker, Standard Accident Ins. Co. v.	
Stump v. Hite (W. Va.)	926	(Va.)	585
Suber v. Parr Shoals Power Co. (S. C.)	335	Walker, State v. (N. C.)	404
Summerlin, Hodges v. (Ga.)	129	Wall v. Wall (Ga.)	822
Sumter Pine & Cypress Co., Lee v. (S. C.)	2	Walls v. State (Ga. App.)	43
Sunshine v. Furtick (S. C.)	784	Ward v. Cantrell (Ga. App.)	922
Swift, Salios v. (Ga. App.)	869	Ward, Roberts v. (W. Va.)	96
Swift & Co. v. Meekins (N. C.)	138	Ward v. Ward, two cases (Ga. App.)	35
Swint, Hines v. (Ga. App.)	647	Warren Co. v. A. L. Black Coal Co. (W.	
Sydnor, Shelton v. (Va.)	83	Va.)	672
Tarboro Cotton Factory, First Nat. Bank		Washington Exch. Bank v. Smith (Ga.	
v. (N. C.)	195	App.)	45
Taylor, Stuard Lumber Co. v. (Ga.)	894	Waterree Power Co. v. Rion, two cases (S.	
Taylor & Co., Jones v. (N. C.)	397	C.)	331
Terry Fish Co., City Council of Charleston		Waters v. Boyd (N. C.)	106
v. (S. C.)	13	Watson-Loy Coal Co. v. Monroe Coal Min-	
Terry Shipbuilding Corporation v. Dubose		ing Co. (W. Va.)	485
(Ga. App.)	844	Waycaster v. Waycaster (Ga.)	353
Thomas, Rome Ry. & Light Co. v. (Ga.			
App.)	38		

	Page		Page
Webster v. State (Ga. App.).....	916	Willis, Brown Loan & Abstract Co. v. (Ga.) .....	814
Wehrle v. Wheeling Traction Co. (W. Va.) .....	289	Wills, Spencer v. (N. C.).....	275
Welch v. Atlantic Coast Line R. Co. (S. C.) .....	786	Wills, Yost v. (W. Va.).....	723
Welch, Wilkins-Ricks Co. v. (N. C.).....	316	Wilson, Hines v. (Ga. App.).....	646
Wells v. Marion County Court (W. Va.)...	472	Wilson v. Moseley (S. C.).....	330
Wessinger v. Duncan (S. C.).....	6	Wilson v. Small (Ga. App.).....	370
West, Hill v. (Ga. App.).....	358	Winokur v. State (Ga. App.).....	902
West, Pidcock v. (Ga. App.).....	360	Wiseman, State v. (N. C.).....	706
Westbrook v. Griffin (Ga. App.).....	453	Withers v. Jones' Ex'r (Va.).....	68
Wester v. Everett (Ga.).....	159	Wong Jung, Southeastern Fair Ass'n v. (Ga. App.).....	32
Western Union Tel. Co., Dunham v. (W. Va.) .....	113	Wood, Snipes v. (N. C.).....	619
Western & A. R. Co., Marietta Ice & Coal Co. v. (Ga. App.).....	182	Woodall v. State (Ga. App.).....	913
Western & A. R. Co. v. Williams (Ga. App.) .....	186	Woodmen of the World, Gay v. (N. C.)...	195
Wheeler v. Atlantic Coast Line R. Co. (Ga.)	823	Wooten v. Doss (Ga. App.).....	647
Wheeling Traction Co., Wehrle v. (W. Va.) .....	289	Wooten v. Evans (Ga.).....	352
Whiddon v. Fletcher (Ga.).....	350	Workman, Stewart v. (W. Va.).....	474
White, Richter v. (N. C.).....	497	Wren v. McCay (S. C.).....	9
White Flame Coal Co. v. Burgess (W. Va.) .....	690	Wright v. Alabama Great Southern R. Co. (Ga.) .....	821
Widincamp, Malsby & Co. v. (Ga. App.)..	178	Wright v. Martin (Ga.).....	156
Wiggins' Will, In re (N. C.).....	499	Wright v. Salvation Army (Ga. App.)....	41
Wight, Maynard v. (Ga. App.).....	375	Wright v. State (Ga. App.).....	834
Wilbanks, Dooley v. (Ga. App.).....	365	W. T. Rawleigh Medical Co. v. Burney (Ga. App.) .....	358
Wilcox v. Bank of Hazlehurst (Ga. App.)	45	Wyatt, Davisboro Fertilizer Co. v. (Ga. App.) .....	840
Wilcox, Brown v. (Ga.).....	818	Wynne v. Greenleaf Johnson Lumber Co. (N. C.).....	403
Wilcox, Hilton v. (Ga.).....	129	Wysong v. Board of Education of Town Dist. (W. Va.).....	733
Wilkins-Ricks Co., Beck v. (N. C.).....	313	Yarbrough, Buckhorne Land & Timber Co. v. (N. C.).....	630
Wilkins-Ricks Co. v. Welch (N. C.).....	316	Yoho v. Thomas (W. Va.).....	236
Williams, Blackmon v. (S. C.).....	324	Yost v. Wills (W. Va.).....	728
Williams v. Mitchem (Ga. App.).....	870	Zucker v. Oettinger (N. C.).....	413
Williams v. State (Ga. App.).....	875		
Williams v. Western & A. R. Co. (Ga. App.) .....	186		

THE  
SOUTHEASTERN REPORTER  
VOLUME 102

---

(113 S. C. 182)

**HALL v. GARVIN et al.** (No. 10386.)

(Supreme Court of South Carolina. Jan. 27, 1920.)

**1. PRINCIPAL AND AGENT ⇐159(1, 2)—LIA-  
BILITY OF DOER OF WRONG AND ONE CONCUR-  
RING THEREIN.**

If one defendant committed a wrong on plaintiff by removing his property, it is immaterial to his liability whether he did so as agent for another, and, if such other concurred in the wrong, both are responsible, be they principals or principal and agent.

**2. VENUE ⇐72—CHANGE IN ACTION TO RE-  
COVER CHATTEL TO COUNTY OF FORECLOSING  
MORTGAGEE'S RESIDENCE FROM THAT OF RESI-  
DENCE OF PURCHASER PROPERLY DENIED.**

In an action for recovery of a skidder brought against two defendants of different counties, one the mortgagee of the skidder, the other the purchaser at foreclosure sale, in view of the allegations of the complaint, not shown to be untrue, that the mortgagee concurred in the sale and removal of the skidder by the purchaser in the county of such purchaser's residence, motion for change of venue to the county of the mortgagee's residence was properly denied.

Appeal from Common Pleas Circuit Court of Aiken County; Edward McIver, Judge.

Action by Perry Hall against R. G. Garvin and G. W. Greene, Jr. From an order denying motion for change of venue, or, in the alternative, to strike the moving defendant's name off the record, defendants appeal. Order affirmed.

Brown & Bush, of Barnwell, for appellants.

J. B. Salley, of Aiken, for respondent.

GAGE, J. Action against Garvin, of Aiken, and Greene, of Barnwell, for the recovery of a skidder situate in Aiken. The venue was laid in Aiken.

The defendant Greene moved on two affidavits: (1) To change the venue to Barnwell; and (2) failing in that, to strike Greene's name off the record. The motion was refused, and the appeal makes the same ques-

tions here; and we consider them inversely.

[1] If the allegations of the complaint are true, then Greene has committed a wrong on the plaintiff, and his name ought therefore not to be stricken out. The complaint charges that, while Garvin took the skidder out of the plaintiff's possession in Hampton, yet Greene knew of the act and concurred in it, and that Greene held the mortgage which operated to move the skidder, and effected the sale of it under the mortgage.

It is immaterial that the complaint also charged in totidem verbis that Garvin was agent of Greene; that is mere technology. If Garvin committed a wrong, it is wholly immaterial so far as he is concerned whether he did so as agent for another; he must answer for his act. And, if the other concurred in the wrong, both are responsible, be they principals or principal and agent.

Greene rests his right to be stricken off the complaint on *Adams v. Fripp*, 108 S. C. 236, 94 S. E. 109. He contends that it manifestly appears from his affidavits that Garvin had no interest in the transaction save as he was acting for Morris the sheriff of Barnwell. But so much is not correct. Garvin's own affidavit recites that he "was desirous of purchasing a skidder outfit." The inference is allowable that he went with Morris the sheriff to get hold of the skidder; and the inference is strengthened in the light of the allegation of the complaint (not yet denied) that Garvin did purchase the skidder at a sale under Greene's mortgage.

[2] The change of venue is sought upon the ground that the allegations of the complaint which charge that Greene and Garvin concurred in their alleged wrongful conduct are shown to be manifestly untrue by the affidavits of the movants. And reliance is put upon the recent case of *Simmons v. Wall and Lowman*, reported in 96 S. E. 493. In that case the uncontradicted proof of the movants was that Lowman was not even present at the accident complained of; and the complaint had not charged that he concurred in the alleged wrongful conduct of Wall. Not so in the instant case.

The law must be applied to the facts in

every case; and a slight change of the facts casts a very different horoscope of the law.

Both exceptions are overruled, and the order of the circuit court is affirmed.

GARY, O. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

(113 S. C. 190)

LEE et al. v. SUMTER PINE & CYPRESS CO. et al. (No. 10337.)

(Supreme Court of South Carolina. Jan. 26, 1920.)

**1. APPEAL AND ERROR ¶901 — APPELLANT MUST SATISFY COURT THAT FINDING IS AGAINST PREPONDERANCE OF EVIDENCE.**

An appellant has the duty of satisfying the court that the finding of fact complained of is against the preponderance of the testimony.

**2. LANDLORD AND TENANT ¶230(1)—RENT NOT RECOVERABLE WITHOUT PLEADING DEFAULT.**

A judgment for unpaid rent cannot be sustained where the complaint did not allege that defendant had breached its contract to pay rent.

**3. LANDLORD AND TENANT ¶110(1)—TENANT MAY TERMINATE LEASE BY ABANDONING CONTRACT WITHOUT THIRTY DAYS' NOTICE.**

Where tenants paid rent up to the time they abandoned their contract, the abandonment sufficiently terminated the lease without giving 30 days' notice.

Appeal from Common Pleas Circuit Court of Sumter County; Hayne F. Rice, Judge.

Action by R. D. Lee, I. C. Strauss, and Davis D. Moise, as executors, against the Sumter Pine & Cypress Company and others. Judgment for plaintiffs, and the named defendant appeals. Affirmed as modified.

The decree of the court below reads as follows:

On February 2, 1909, and some time prior thereto, the Rocky Bluff Cypress Company, a corporation owned by J. L. Scarborough and James H. Scarborough, defendants, was conducting a lumber manufacturing business on the north side of Rocky Bluff swamp in said state and county; and, in addition to the machinery and equipment necessary for converting logs into lumber, they also owned quite a large quantity of standing timber of different kinds, with tramways, cars, etc., used to move the logs from the woods to the point where their sawmill was located.

On the said date the Rocky Bluff Lumber Company entered into a written agreement to sell the said plant with all of its equipments, including the use of the tramways and all of their timber rights, to the Sumter Pine & Cypress Company, one of the defendants and a South Carolina corporation. And on February 9, 1909, a deed consummating the said agreement was executed by said Rocky Bluff Lumber

Company, by which they conveyed all of the said property, together with certain easements pertaining thereto, to the defendant the Sumter Pine & Cypress Company. The performance of the conditions of said contract and of the said deed of conveyance on the part of the said Rocky Bluff Lumber Company was guaranteed by the said J. H. Scarborough and H. L. Scarborough; they signing the said contract and the said deed, along with the said Rocky Bluff Lumber Company. The said contract and the said deed contained also quite a number of conditions and stipulations to be performed by the said Sumter Pine & Cypress Company, which conditions and stipulations will hereinafter be adverted to in the consideration of the issues now before us. A part of the purchase price of said property was paid in cash and notes, and a part was to be paid as the timber was manufactured into lumber. In order to secure the deferred payments and to secure also the faithful performance of the terms and conditions of the sale, the said Sumter Pine & Cypress Company in the same deed hereinafter referred to executed and delivered to the defendant a mortgage on all of said property so conveyed to them. Marion Moise, of said county, became the owner of the said mortgage and of all of the said rights of Rocky Bluff Lumber Company and J. L. Scarborough and J. H. Scarborough, which it and they acquired under the said contract and mortgage.

In 1910 said Marion Moise died leaving of force his last will and testament, and the plaintiffs are the duly qualified executors of said will. Since the commencement of this action, the defendant J. H. Scarborough has died, and R. O. Purdy has been duly appointed the administrator of his estate and made a party defendant to this action.

The said executors began this action in January, 1912, alleging various and sundry breaches of the terms of said contract of sale and of said mortgage, and asking for judgment against the defendant Sumter Pine & Cypress Company in the sum of \$30,892.68 as sums due under the said contract and mortgage, including therein actual and punitive damages, and asking also that said Sumter Pine & Cypress Company be enjoined and restrained from removing and disposing of any of the said property until the termination of this action, and for other relief not necessary to state at this point; asking also judgment against the other defendants for foreclosure of the mortgage and the sale of the property.

The defendants the Sumter Pine & Cypress Company answered, denying any breaches of the terms and conditions of the said contract and mortgage, and denying that they were due plaintiffs any sums whatever, and setting up various defenses to the action.

The defendant H. L. Scarborough and R. O. Purdy, administrator, answered, adopting the allegations of the complaint as their answer.

The testimony was taken before the master of said county, and the cause was argued before me at Sumter on December 3, 1914, and the record and written arguments and authorities were later forwarded to me at Aiken.

The contract price for the sawmill plant and the equipments was \$12,000, of which sum \$4,500 was paid in cash and balance in notes

which have also been paid. The timber, however, was to be paid for at the rate of \$2.50 per thousand feet, long measure, as cut and delivered at mill, and it is over the timber and damage to the tramways used in conveying same to the said mill that the contention arose.

The purposes for which said mortgage was given are set out on pages 10-16 of the instrument signed by all of said parties, which said instrument is both a deed of conveyance and a mortgage as follows: "To secure the payment of promissory notes given for part of the purchase money of said sawmill plant—to secure the payment of the sums of money reserved by the party of the second part, out of the purchase of the timber hereinabove conveyed," "to secure the faithful performance of the terms of the contract on behalf of the party of the second part." The said deed also provides that its terms are not to abrogate or change any of the provisions of the contract of February 2d, above referred to, but that the latter is to be deemed and taken as part and parcel of the said deed.

The contract of February 2d provides that in case any difference shall arise between the parties such differences shall be settled by arbitration, and the defendants Sumter Pine & Cypress Company claim that, as no attempt at arbitration was made by plaintiffs, they have no standing in this court. This position cannot be sustained. The evidence shows that the defendants were prepared to dismantle the mill and dispose of all their personal property covered by said mortgage without regard to any claim held against it by the plaintiffs, and were prevented from doing this by an order of this court. But independently of this, no agreement to arbitrate can oust this court of jurisdiction. *Jones v. Power Co.*, 92 S. O. 263, 75 S. E. 452, Ann. Cas. 1914B, 293.

The vendors guaranteed that the aggregate of the timber sold should not be less than 11,000,000 feet on the following tracts, Gaylord, Westberry, Richardson, Dick, R. M. Edens, Du Bose, H. L. Scarborough and McLaughlin inclusive, and in order to secure the purchasers from inconvenience or loss on account of any shortage in the amount of lumber so guaranteed 25 cents per thousand feet was to be retained by said purchasers out of the proceeds of said timber, until it shall be definitely determined by actual cut as to whether or not the timber would run short. If there proved to be a less amount than guaranteed, the purchasers were to have the option of either retaining the 25 cents per thousand feet as liquidated damages, or of calling upon the vendors to make good the shortage or substituting other timber satisfactory to the purchasers. The said contract also contained a provision that the Sumter Pine & Cypress Company shall not be obligated to cut or lumber land, where, on account of previous lumbering or scattered growth, lumber must be prosecuted at a loss. I am not attempting here to state the literal terms of the contract and deed, but I am referring to same in a general way only.

Some time before the commencement of this action, the said Sumter Pine & Cypress Company, finding that they were losing money on the operation of the mill, ceased operations, and prepared to go out of business. In their answer they allege that they lost money on the

operations of the mill and also that they had added something like \$9,000 worth of machinery and appliances to that purchased from the Rock Bluff Lumber Company. They alleged that the timber sold fell far short of the amount guaranteed, and that their failure to operate successfully was due to the shortage in timber and its scattered condition; and alleged further that they were absolved from their contract to cut any more of said timber, and, as above stated, denied owing plaintiffs any sum under the said contract or mortgage. They alleged, further, in answer to an allegation of the complaint that they had cut only the best of the timber and had conducted operations in a wasteful manner, that, where timber was cut by them, it was cut clean and in accord with the spirit of the said contract.

The evidence satisfies me that the Scarborroughs were perfectly honest in their belief that there was more than 11,000,000 feet of timber on the aforesaid tracts of land conveyed, when they entered into said contract; but a consideration of all of the evidence bearing on the point satisfied me that they were mistaken, and that there was not, at the time of the execution of the deed conveying the timber, as much of said timber as was guaranteed to be there. But the contention of the defendants Sumter Pine & Cypress Company, that the scattered and inaccessible situation of the timber conveyed prevented their cutting and manufacturing same at a profit and absolved them from continuing to cut said timber, cannot be sustained. Such a construction of the contract would place the vendors in the position of guarantors that the said Sumter Pine & Cypress Company should make the transaction a paying one, with no powers given the vendors to direct or control the lumber operations. Some of the officers of the said Sumter Pine & Cypress Company were experienced mill and timber men, and examined the timber and mill situation and the tramways and other property conveyed, and went into the transaction with their eyes open.

As to the physical properties conveyed, the only uncertain condition confronting them was to the quantity of timber, and this they secured themselves against by the provision in the contract hereinabove referred to; neither can the provision on page 7 of the contract, which provides that the failure of the first and third parties to said contract to make substitution of timber in case of shortage, as above mentioned, shall destroy the mortgage lien, avail the defendants Sumter Pine & Cypress Company, even though there was less than 11,000,000 feet of pine timber, because the parties of the first and third part had the right to make good the deficiency which they were never given the opportunity of doing. The provision as to cutting scattered or inaccessible timber does not refer to the bulk of the timber conveyed but to isolated or undesirable trees or bunches of trees, where good lumbering would require them to be left on account of the unusual expense to be incurred in getting them out and to the mill.

There is abundant evidence showing that with proper management the Sumter Pine & Cypress Company would have operated successfully, or at least should have done so; but I do not think that this can affect the issues before us, because, as we have already seen, the vendors did not guarantee to the purchasers any profit

on their mill and timber operations. The failure of the pine timber to aggregate 11,000,000 did not absolve the said Sumter Pine & Cypress Company from their contract to cut and pay for the timber actually conveyed.

It is true, as shown by the evidence, that the larger the amount of timber that can be moved successfully without changing the appliances for handling same, the greater the profit, and that it is therefore always desirable in such operations to have the timber to be handled as concentrated as may be. But, as already stated, the Sumter Pine & Cypress Company had the whole situation before them when they entered into the contract and relied upon their own judgment and cannot now be heard to complain.

The Sumter Pine & Cypress Company also contended that only the pine timber was purchased. This is true as to the contract of February 2, 1909, and the guaranty of 11,000,000 feet referred to pine timber exclusively, but the deed of February 9th carries all the timber owned by the vendors on the tracts mentioned, and includes the hard woods owned by the vendors on the said lands.

The Sumter Pine & Cypress Company also contend that the following clause in said deed conclusively shows that only the pine was conveyed to it: "The timber conveyed is that described in and agreed to be conveyed by the contract hereinbefore referred to and all of same is to be cut and removed from said land under the terms hereof and of said contract."

When we refer to a description of the timber sold as set out in said deed, we find the following: On the Gaylord contract: "All the sawed timber, etc." On the Robert M. Edens contract: "All the pine timber 6 inches in diameter and upwards in size, etc." On the Gertrude E. Richardson tract: "All of the timber suitable for sawmill purposes, etc." On the Hattie Du Bose: "All of the pine timber, standing, lying or being on the low land or swamp land (excepting only the hill land, etc.)." "All the pine timber and trees standing and lying on the entire plantation and lands known as the Lee-McLaughlin place, etc., and the Glenwood (Dick) place." "All of the swamp pine timber standing or lying, etc." The two Westberry tracts: "All of the saw pine or cypress timber, etc." On the H. L. Scarborough tract: "All of the timber suitable for sawmill purposes, etc."

The evidence shows that on the R. M. Edens tract there was only about 50,000 feet of pine and 194,000 feet of hard wood. On the Richardson, Du Bose, Westberry, and Lee-McLaughlin tracts, pine almost exclusively, and on the H. L. Scarborough, 1,017,000 feet of hard wood and a little over one-fourth that amount of pine. It is unquestioned that the terms "all sawmill timber" "all timber suitable for sawmill purposes," include hard wood, and that the latter term included poplar, red gum, cypress, oak, black gum, tupelo, etc. and practically all timbers on said land suitable for manufacturing into lumber, except yellow pine.

An inspection of the terms used in describing the kind of timber will show that, if we accept the contention of the Sumter Pine & Cypress Company that the pine alone on all the tracts described is conveyed, then we do violence to the terms of the written deed itself, in which, before the description of the property conveyed in the deed, is found the following sentence

showing what was intended to be conveyed by the deed: "All of the timber now owned by said parties respectively, in the parcels and by the persons as follows." Description elsewhere referred to in this decree.

It is not the province of the court to make, change, or alter the terms of the contracts of parties, but to construe and enforce them when called upon to do so. Since the deed of February 9th is to include the terms of the contract of February 2d, we should, if possible, harmonize any apparent conflict in any of the provisions found in the said two instruments. A circumstance worthy of consideration in the construction of said deed is that in the contract of February 2d appears a provision that the deed shall contain an option by which the said Sumter Pine & Cypress Company should have the right to purchase hard woods on said lands at any time within 90 days from the date of said conveyance.

The deed, when written, contains no reference to any such option, but does contain the descriptions of the timber as above set forth.

It seems to me, then, that there is no other reasonable inference to be drawn from the circumstances mentioned than that the parties intended to substitute for said option the outright purchase of said hardwood, and said purchase was included in this deed. The witness H. L. Scarborough says that the reason there was no option put in the deed was because the deed included in its term the sale of the said hard woods. He says, further, an agreement to include the said hard woods in the sale was reached between the contract of February 2d and the deed of February 9th. One of the witnesses for the defendants accounts for the description in the deed by saying that they were copied from other deeds. This witness also denied that there was any purchase of the hard wood; but independent of what the witnesses testified to on the point, when we recall what has already been said in regard to the importance of location, when handling timber, I think a fair construction of the following clause in the deed, "The timber hereby conveyed and agreed to be conveyed by the contract herein referred to, etc.," to be the intention to fix the location, rather than the kind of timber.

There is no positive evidence of any price agreed upon for the hard wood, except that Mr. J. L. Scarborough testified that it was understood that the average price of the hard wood was to be the same as that of pine. But if this evidence of Mr. Scarborough is not to be taken and the court is called upon to determine what should be paid by the said Sumter Pine & Cypress Company for said hard wood, it will determine that there should be paid a reasonable market price. Some witnesses testified that the kind of hard woods on the land described were worth less than pine, and some testified that they were worth more. I think, therefore, to fix the value of said hard woods at the same figure as the pine will be just and reasonable. All of the notes given in part payment for the mill, logging, lumbering, equipment, etc., having been paid, the inquiry is, now, as to what is due on the said timber contract.

There is great discrepancy in the figures of the different estimators as given in evidence before the master, as to how much timber was on the land described in the deed of conveyance



(192 S.E.)

after the Sumter Pine & Cypress Company quit business. When, however, we compare the estimates of the witness L. L. Parker, with that of Mr. H. L. Scarborough, it will be found that there is a remarkably close agreement between the two. The estimates also of Mr. Cole, a veteran estimator of large experience, approached those of Mr. Scarborough and Mr. Parker. These facts, coupled with the facts also that Mr. Scarborough is thoroughly familiar with the lands on which said timber is located, and the further fact that Mr. Scarborough is well and most favorably known to me as a thoroughly responsible man, induces me to accept his estimates on said timber as more nearly accurate than the other estimators, even though he be an interested party. Taking Mr. Scarborough's said estimates and following the terms of the deed, we have the following:

	Hardwoods	Pine
All timber, Gaylord tract.....	1,017,000	25,000
Pine only, Robert M. Edens.....		194,200
All timber, Gertrude E. Richardson		1,000,000
All pine timber Hattie Du Bose....		152,400
All pine timber, Lee-McLaughlin....		650,000
All swamp pine Glenwood (Dick)....		36,735
Pine and cypress Westberry.....	24,500	84,000
All timber suitable for sawmill purposes, H. L. Scarborough.....	1,385,000	300,000
	3,422,500	2,442,135

To the above must be added 500,000 feet lying on the ground on the Richardson tract and which the evidence showed could have been used, or should have been cut and used by the Sumter Pine & Cypress Company, and which had deteriorated until it is now almost, if not quite, a total loss. This brings the grand total of timber for which the Sumter Pine & Cypress Company is liable to the plaintiffs up to 5,369,635 feet.

The plaintiffs, in their complaint, also contend that a great deal of damage was done by cutting the best and leaving inferior timber, and that a great many of the logs cut and delivered at the mill were not measured or paid for. There is no evidence of these matters before me, upon which the court could reach any definite and intelligent conclusion.

The Sumter Pine & Cypress Company having retained the 25 cents per thousand feet, during the time they continued in business, and not having called upon the vendors to make good any shortage in the timber, should be held to have elected to restrain the 25 cents per thousand feet, rather than to call for any additional timber. And I think, also, that this option should be held to have extended to the timber which they purchased and failed to get. The said Sumter Pine & Cypress Company are liable then to the plaintiffs at \$2.25 per thousand feet on 5,369,635 feet, amounting to \$12,081.68.

In addition to this sum, the said Sumter Pine & Cypress Company are due the sum of \$450 for the rent of the mill site. Scarborough says they paid up to January 1, 1912, and the lease still had three years to run.

The plaintiffs claim also actual and punitive damages against the Sumter Pine & Cypress Company for tearing up and removing the tramway. It appears, however, that most of the rails used on the tramway were leased from the Atlantic Coast Line Railroad and were not the

property of the Rocky Bluff Lumber Company or H. L. Scarborough or J. L. Scarborough.

It is true that Mr. Scarborough testified that the rails had been torn up and shipped away, or, at least, most of them. But there is no evidence showing that they were not shipped back to the Atlantic Coast Line Railroad, or that the Rocky Bluff Lumber Company or J. L. Scarborough or J. H. Scarborough incurred any liability to the said Atlantic Coast Line Railroad Company on account of the moving of the said rails. Mr. H. L. Scarborough does testify that he purchased three-fourths of a mile of said rails, but as no value is placed upon them by him, and as there is nothing in the evidence by which such value may be fixed, it is impossible for the court to fix what damage, if any, Mr. Scarborough may have sustained by the moving or appropriation of the said rails.

It is true that the witness Scarborough testifies that it will cost at the rate of \$300 per mile to re-lay said tramroad, but I understand that this only includes the cost of the labor and cross-ties, and does not include the value of the rails. The contracts specifically state that the timber sold is all the timber owned by the Rocky Bluff Lumber Company and H. L. Scarborough and J. H. Scarborough. The value of this timber has been fixed, with the tramroad laid down as it originally was, at \$2.25 per thousand feet. It is shown conclusively by the evidence that the timber was worth more with the tramway, as stated, at the time of the sale, than it would have been worth without such tramway. Any damages therefore, which may have accrued on account of the tearing up of the tramways, are included in the judgment for the value of the said timber.

It is therefore ordered, adjudged, and decreed that the plaintiffs have judgments against the said Sumter Pine & Cypress Company, defendants, in the sum of \$12,531.68.

It is further adjudged and decreed, against all the defendants, that the mortgage sued upon be foreclosed, and all of the property and property rights and leases mentioned and described in said mortgage be sold by the master for Sumter county on sales day in October next, or some subsequent convenient sales day thereafter, in front of the courthouse door at Sumter during the legal hours for public sale to the highest bidder or bidders for cash, and after due and legal advertisement.

It is further adjudged and decreed that any sum or sums of money received for any of the said properties sold since the commencement of this action shall be turned over to the plaintiffs and credited by them upon the amount hereinabove found due by the defendant Sumter Pine & Cypress Company. Out of the proceeds of the sale of the said properties, rights, etc., the master shall first pay the costs and expenses of this action and any taxes which may be due, and then apply the remainder in the settlement of the amount hereinabove found due to the plaintiffs, and, if there be any residue, that then he pay over the same to whomsoever may be entitled thereto.

It is further adjudged that any of the parties hereto may have leave to apply at the foot of this decree for any order which may be necessary to correct any error in computation herein, or to carry into effect the provisions hereof.

L. D. Jennings and A. S. Harby, both of Sumter, for appellant.

Lee & Moise and Purdy & Bland, all of Sumter, for respondents.

WATTS, J. This is an appeal from a decree made in the above case from his honor Judge Rice on August 4, 1915. For an understanding of the case, the decree of his honor should be reported. After entry of judgment, appellant appeals, and by 16 exceptions imputes error and seeks reversal.

[1] Exceptions 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 15, and 16 are overruled. It is the duty of the appellant to satisfy this court that the finding of fact by the circuit court is against the preponderance of the testimony. This appellant has failed to do, and we find no errors of law committed by his honor, as complained of.

Exception 12 must be sustained.

Both the preliminary contract and final conveyance contained the provision that H. L. Scarborough should rent the mill site to the Sumter Company for a period of six years, at a rental of \$150 per annum.

[2, 3] There is no allegation in the complaint that the Sumter Company failed to pay the rent or breached that portion of its contract. They paid the rent up to the time they shut down and abandoned the contract. That was sufficient to terminate the contract, and giving 30 days' notice was unnecessary. The appellant was not put upon notice by the complaint that rent was asked, for the items of damages were for uncut timber, for punitive damages for tearing up of a tramroad, and no mention made of rent. While it is true that this court has decided that the prayer of the complaint is no part of it, yet the complaint itself must allege facts sufficient to allow judgment in conformity to its allegation, and neither allegation of complaint or evidence in the case sustains his honor's findings in this particular, and the decree of his honor to this extent must be modified, and in all other particulars affirmed.

Modified:

GARY, C. J., and HYDRICK, FRASER, and GAGE, JJ., concur.

(113 S. C. 205)

WESSINGER v. DUNCAN. (No. 10369.)

(Supreme Court of South Carolina. Jan. 27, 1920.)

1. ARREST  $\S$ 1—IMPROPER ARREST AND BAIL DOES NOT DEFEAT CAUSE OF ACTION TO RECOVER MONEY.

Arrest and bail is merely a matter ancillary to the action, and the question of conformity to the statutes for arrest and bail are proper

in a motion to discharge the arrest, but non-conformity to the statutes does not defeat a cause of action set up in a complaint to recover money and a note, and is not ground for sustaining a demurrer to the complaint.

2. PLEADING  $\S$ 138—PAYMENTS TO PLAINTIFF SUING FOR MONEY DEFENSE AND NOT COUNTERCLAIM.

In an action against an attorney to recover money placed in his hands, where defendant put in a bill against the plaintiff, which tended to show that at plaintiff's request he had paid out all of the funds, including fees, to the defendant, except a certain amount which he tendered in court, the matters set up by defendant were simply matters of defense, and not a counterclaim, as no separate judgment could have been rendered thereon.

3. APPEAL AND ERROR  $\S$ 1039(11)—ALLOWING REPLY TO ANSWER UNDER ERRONEOUS BELIEF THAT ANSWER CONTAINED COUNTERCLAIM HARMLESS.

Since it was within the discretion of the trial court to allow a reply to an answer, there was no reversible error in allowing a reply to an answer under the erroneous belief that the answer contained a counterclaim.

4. ATTORNEY AND CLIENT  $\S$ 128—CONTRACT BETWEEN ATTORNEY AND CLIENT QUESTION FOR JURY.

In an action against an attorney to recover money left in his hands, whether a receipt tendered in evidence by the plaintiff was a receipt referred to in a power of attorney, and whether it was a part of the contract, held for the jury.

5. TRIAL  $\S$ 105(1)—TESTIMONY NOT OBJECTED TO MUST BE CONSIDERED BY JURY.

Testimony introduced without objection must be considered by the jury.

6. APPEAL AND ERROR  $\S$ 994(2)—QUESTIONS OF FACT NOT REVIEWABLE.

The appellate court cannot pass upon the facts, not even when a witness makes a contradictory statement; it being for the jury to say which statement they believe.

7. ATTORNEY AND CLIENT  $\S$ 128—WITHDRAWAL OF EVIDENCE FROM JURY IN ACTION FOR ACCOUNTING ERROR.

In an action against an attorney to recover money left in his hands, court erred in withdrawing from the consideration of the jury evidence of defendant that he had a contract for the collection of certain disputed claims, and that plaintiff wrongfully settled with the debtors without his consent, and that defendant was withholding part of the money left with him as compensation for his services.

Appeal from Richland County Court.

Action by J. W. Wessinger against J. T. Duncan. Judgment for plaintiff, and defendant appeals. Reversed, and new trial ordered.

John T. Duncan, of Columbia, for appellant.

John Hughes Cooper, of Columbia, for respondent.

FRASER, J. The plaintiff brings this action against the defendant, formerly his attorney, to recover the sum of \$800 in cash (less \$150 paid out by the defendant, at the plaintiff's request) and a note for \$270, which the plaintiff alleges that he had left with the defendant for safe-keeping. The plaintiff alleged fraud in the detention of his property, and the defendant was arrested under proceedings in arrest and bail.

The defendant demurred to the complaint, on the ground that the complaint did not state a cause of action in arrest and bail under the statutes of this state. The demurrer was overruled, and the defendant interposed an answer as follows:

"The defendant herein answering:

"(1) Denies each and every allegation in said complaint contained.

"(2) Defendant alleges that a reckless disregard of facts is shown in the allegations of the complaint, and that sinister reasons of counsel and other interested parties entered in the bringing of this action in arrest and bail against defendant.

"(3) Defendant alleges that for such time in the month of May and up to the middle of June while he represented plaintiff he served plaintiff faithfully and well, and both prior to and after plaintiff insisted upon making, and did make, to defendant power of attorney to act for and represent plaintiff said plaintiff approved of every act of this defendant in the expenditure of said money and every other act of defendant in the bringing and defending actions brought by and against plaintiff, who was then engaged in the sale of automobiles.

"Wherefore, defendant demands that an accounting be had, that judgment be given defendant in accordance with the facts, and that plaintiff be required to pay the costs and damages herein to defendant, and for such other relief as is just."

[1] I. The demurrer was properly overruled, as the complaint stated a cause of action. Arrest and bail is merely a matter ancillary to the action. The question of conformity to the statutes for arrest and bail are proper in a motion to discharge the arrest, but non-conformity to this statute does not defeat the cause of action to recover the money and note.

There are 30 exceptions, but they have not been separately considered by appellant in his argument, and will not be so treated here.

The verdict was for the plaintiff, and the defendant appealed.

[2, 3] II. At the trial of the case before the county court for Richland county, the question arose as to whether the defendant had pleaded a counterclaim or not. The county judge held at first, that the defendant had not pleaded a counterclaim. He subsequently reversed this ruling and allowed the plaintiff to reply. Exception is taken to this ruling. The defendant put in a bill against the plaintiff, which tended to show

that at plaintiff's request he had paid out all of the funds, including fees to the defendant, except \$10 which he tendered in court. The judge was right in the first instance. The matters of defense were pleaded strictly as a defense and not as a counterclaim. No separate judgment could have been rendered on the answer; it did not state facts to sustain a separate judgment. There was no reversible error in the second ruling as he had the right in his discretion to allow the reply.

III. On the day the money and note were turned over to the defendant, the defendant gave to the plaintiff the following receipt:

"May 28, 1918. Received of Joseph W. Wessinger, cash, check, and note \$1,070.00 dollars to keep safe as atty. to return at call \$1,070.00. [Signed] John T. Duncan."

The power of attorney is as follows:

"South Carolina, Richland County.

"Whereas, I did employ John T. Duncan to act for me and in my behalf as attorney in making a collection of certain property then in the hands of Frank Cosgrove which he was unjustly withholding and refusing to deliver to me and whereas my attorney, the said John T. Duncan, did succeed in collecting from him four hundred and fifty dollars, a check for three hundred and fifty dollars and a note for two hundred and seventy dollars, all of which I then turned over to my attorney, John T. Duncan, taking his receipt for same. I do now authorize him to use said funds as he may see proper and to account to me for said use in the outlay of same in the payment of all expenses hereto attached and in the handling, adjusting, settlement or litigation that may be necessary or that may be thrust upon me in the settlement of all my matters with the Cosgrove Automobile Co.

"I do further employ the said John T. Duncan to represent me in all of said matters now in hand or growing out of my dealings with said Cosgrove Automobile Co. and I now give to him the right to do any and all things for me and in my behalf and to sign my name as my attorney in any and all transactions for me.

"Witness my hand and seal this May 30, 1918. Jos. W. Wessinger. [L. S.]

"Witness: E. A. Crater."

[4] The defendant claimed that the power of attorney was the only evidence of the contract between the parties, and that all previous agreements were merged in the power of attorney. The judge charged the jury that whether the receipt and power of attorney were merged or not, and whether the receipt in evidence was the receipt referred to in the power of attorney, were questions of fact for them. In that charge the judge was right. The power of attorney referred to a receipt, and it was for the jury to say whether the receipt in evidence, not identified by the power of attorney, was the receipt referred to. Contracts are sometimes to be gathered from many papers, and in this case the question as to whether the contract

consisted of one or two papers was a question for the jury.

IV. The appellant claims that he was entitled to a verdict on the whole case. This cannot be sustained, as the testimony was conflicting. The appellant appeared for the plaintiff in several cases, but the plaintiff testified:

"Q. Do you owe Mr. Duncan? A. Not as I know of.

"Q. State whether or not you employed Mr. Duncan to do anything for you. A. To make the contract when I subrented to Crater Sales Motor Company; employed him to do nothing else.

"Q. Have you employed him since? A. No, sir; not before either.

"Q. Did you give Mr. Duncan a power of attorney? A. For a day or two to make settlement with Cosgrove. I gave him power of attorney to make that special settlement—found it was not done—not my intention for him to act on any other than on that day."

[5, 6] The testimony was not objected to, and, being in without objection, must be considered by the jury. This court cannot pass upon the facts, not even when a witness makes contradictory statements. It is for the jury to say which statement they believe.

[7] V. Appellant claims that he had, with the plaintiff, a contract for the collection of certain disputed claims. There was a conflict of statement as to whether these claims had been collected. The appellant claims that he did collect them, in that allowances were made for the claims in the settlement made. The presiding judge charged the jury as follows:

"The Court: In other words, he testifying, and I understood Mr. Wessinger to say, that there was a \$700 claim which he told Mr. Duncan he could collect, and if he did collect it, he would give him half of it. That is not in here, because, as I understand, that has never been collected. Put that aside, because they are not asking for that \$700 in their complaint. They are asking for the balance of that thousand and seventy dollars, for the \$1070, less \$150.

"Mr. Duncan: You entirely misunderstood the \$700 collection. That says—let me see the power of attorney; have you got it there?

"The Court: I won't ask any questions. I think I am right on that."

It was error to exclude the matter from the consideration of the jury.

There are other questions that apply solely to the trial from which this appeal is taken, and include such matters as the tone of voice, etc., which the record does not show, and cannot show.

The judgment is reversed, and a new trial ordered.

WATTS and GAGE, JJ., concur.  
GARY, C. J., did not sit.

HYDRICK, J. I concur in the opinion of Mr. Justice FRASER, except as to the dis-

position of points III and V. As to III: The testimony was susceptible of but one inference as to what receipt was referred to in the power of attorney. There is no evidence that defendant ever gave plaintiff any other receipt than that dated May 28, 1918; and that receipt is also sufficiently identified in the power of attorney as being the one therein referred to, because that instrument refers explicitly to the collection from Cosgrove of \$450, a check for \$350, and a note for \$270, "all of which I then turned over to my attorney, John T. Duncan, taking his receipt for same." The evidence is undisputed that there was only one collection from Cosgrove, and that it consisted of the very items mentioned in the power of attorney, and the receipt mentions "cash, check and note," amounting to \$1,070. The evidence being susceptible of but one inference, and that being that the receipt referred to in the power of attorney was the one dated May 28th, the court erred in refusing to so instruct the jury, as requested by defendant, and that the rights of the parties were to be determined under the power of attorney.

As to V: The testimony was susceptible of but one inference as to the collection by defendant of plaintiff's claim against the Cosgroves for \$700, which defendant had undertaken to collect for a contingent fee of one-half the amount collected, and that inference is that neither the claim, nor any part of it, had ever been collected by defendant. Nevertheless, defendant charged half of that amount—\$350—in his account against plaintiff, as an item for which he should have credit, on the ground that plaintiff had defeated his collection of it by making a settlement with the Cosgroves of all matters in dispute between them, without his knowledge or consent, after having employed him to collect it on the agreement that he should have half the amount collected.

Clearly, plaintiff had the right to settle with the Cosgroves and end the litigation between them, but, in doing so without the consent of defendant, he incurred liability to defendant, not necessarily for half the amount of the claim, as erroneously contended by defendant, but for reasonable compensation to defendant for the services which he had rendered in and about the investigation and prosecution of that claim. I agree, therefore, that the court erred in excluding that claim entirely from the consideration of the jury. They should have been allowed to find what defendant had done, at the request of plaintiff, in and about the investigation and prosecution of that claim, and what his services were reasonably worth, and for that amount he should have had credit. There was some evidence that that claim was fictitious and without foundation in fact or in law. If so, of course, defendant would not be entitled to anything on account of it.

(113 S. C. 240,

WREN et al. v. McCAY et al. (No. 10817.)

(Supreme Court of South Carolina. Jan. 26, 1920.)

**WILLS §—497(1) — DEVISE TO WHICHEVER CHILD SUPPORTS IDIOT SON HELD TO GO TO PARTICULAR SON'S ESTATE.**

Under a will devising certain plantations and interest for the support of testator's idiot son for his life, with remainder over "to whichever of my children shall take kind care of my said son . . . and provide for him until his decease," where another son of testator, assisted by the widow, took care of the idiot son for 13 years, or until his death, and then turned over the charge to his wife and daughter, who took care of the idiot son for 9 more years, until he became dangerous and was committed to a hospital, where he died in a few weeks, the estate of the son who took care of the idiot is entitled to the entire remainder.

Appeal from Common Pleas Circuit Court of Berkeley County; W. H. Townsend, Judge.

Action by Ella G. Wren and others against Margaret R. McCay and others. From judgment for plaintiffs, defendants appeal. Reversed.

L. D. Jennings and A. S. Harby, both of Sumter, for appellants.

E. J. Dennis, of Moncks Corner, and Wolfe & Berry, of Orangeburg, for respondents.

**FRASER, J.** This is an action for partition and accounting. The defendants-appellants set up title in themselves, and that question alone is before the court on this appeal, because, if the appellants have title, there need be no accounting.

The question (only one need be considered) raised is purely a question of law, and arises out of the following provision of the will of C. G. McCay:

"I give, devise and bequeath my plantations in Saint James Santee, known as the Manigault Tract and the Poplar Grove Tract, and the interest on the sum of two thousand dollars (which amount I hereby direct my executors, or such of them as shall qualify, to raise out of my estate and to securely invest), for the support and maintenance of my son Lawrence, for and during the term of his natural life; and from and after his decease, I give and devise the said tracts of land and the said capital sum of two thousand dollars, in whatever invested, to whichever of my children shall take kind care of my said son Lawrence, and provide for him until his decease."

We find this statement of facts in respondent's argument:

"C. G. McCay, the father, died in 1879. His wife, Frances C., died in 1892.

"The two executors of the will, the two sons, Thomas A. and Augustus William, died in 1905 and 1904, respectively.

"Lawrence, the imbecile son, died in 1914.

From the death of his father in 1879 Lawrence continued to reside with his mother, Frances C., in the old home until she died in 1892; and, of course, she necessarily attended his personal wants during that period. From the death of his father in 1879 until the death of the mother in 1892, Thomas A. took charge of and attended to the business affairs of Lawrence. When the mother died in 1892 Thomas A. took Lawrence to his house, and cared for him and his property until said Thomas A. died, in 1905.

"When said Thomas A. died in 1905, said Lawrence continued to live in the same house with Mrs. Margaret R. McCay and Mrs. Annie E. Andrews, the widow and daughter, respectively, of said Thomas A., who cared for him and took charge of his property interests until the 21st day of December, 1913, when they had him committed to the asylum as a pauper or beneficiary patient, where said Lawrence died in about six weeks, namely, on January 21, 1914.

"No child of the testator cared for Lawrence, save Thomas A., who died in 1905, 9 years prior to the death of Lawrence.

"Upon the death of Lawrence, the defendants, Margaret R. McCay and Annie E. Andrews, wife and daughter, respectively, of Thomas A. McCay, took possession of the property of Lawrence McCay, claiming it as owners thereof under the will of the testator, C. G. McCay.

"This suit now seeks the partition of this property among and between the four children of the testator, C. G. McCay, or their descendants, under the residuary clause of his will."

The record further contains statements that—

"Lawrence McCay had been an imbecile since birth, that he was a mute, and that he could understand a little, but had to be helped in every way, and could not dress himself alone, and that in recent years he had become dangerous, and would chase women and children."

Lawrence was admitted to the state hospital as a pauper, and it was not contradicted that Mrs. Andrews had written to the authorities that she was willing to pay his expenses. Lawrence died about four weeks after he reached the hospital.

Thomas A. McCay left a will in which he provided:

"I direct my executors, or such of them as may qualify upon this will and testament, to raise out of my personal property a fund of \$3,100.00 which they are hereby instructed to invest and hold in trust for the use of my brother Lawrence during his natural life, and, at his death, to be disposed of in accordance with the provisions of the will of my father, the late C. G. McCay, as to Lawrence's share in his estate."

The widow and daughter of Thomas A. McCay claimed that Thomas A. McCay had performed the conditions of this will of his father, and that they are entitled as his heirs at law to property devised and bequeathed for the support of Lawrence.

The trial judge held that Thomas had not

performed the conditions, in that the will of his father required, as a condition precedent to the investing of the remainder, the personal care of one of the testator's children, and that the care of the daughter-in-law and grandchild do not fulfill the condition. He held that the condition was not fulfilled, since Thomas died before Lawrence. He realized that the case was a hard one, and, while he ordered an accounting, allowed to the estate of Thomas reasonable compensation for the trouble and care bestowed upon Lawrence. It is indeed a hard case if Thomas, who cared for, and it is stated, and not denied, kindly cared for, assisted by his mother during her life, and kindly cared for him in his own home for 13 years, and then at his death turned over his trust to his wife and daughter, who carried the burden for some 9 years more, shall be deprived of the pecuniary compensation so justly offered by his father. It is also a hard case if those brothers and sisters and their families, who in all these years had never raised their hands to help their unfortunate brother, shall now come in and get the property. The temptation is that in doing a "great right" we might feel excusable in doing a "little wrong," but we must not forget that hard cases too often make bad precedent, and thereby great confusion creeps into the law. The law in this case is very clear, and we have no authority to change it. In *Whitesides v. Whitesides*, 28 S. C. 331, 5 S. E. 818, we read:

"It will be observed that this is not the case of a devise to some specified person upon condition in which the question whether the condition is precedent or subsequent is oftentimes difficult to determine; but it is a case of a devise to an unascertained or uncertain person, where the uncertainty can only be removed by a compliance with the condition prescribed. So that here the condition is necessarily precedent. No one of the sons of Thomas Whitesides can claim under this devise until he has complied with the prescribed condition, for in that way alone has the testator designated which one of the sons was to take."

The law is clear and inexorable. If Thomas did not "take kind care of my son Lawrence and provide for him until his death," then neither Thomas nor his estate is entitled to the remainder.

If the duty of taking care of Lawrence had been committed by the will to Thomas alone, then there might be much force in the position that he could not delegate the duties to any one, but the devise is to a class. A strict construction of the word "children," of course, means the immediate offspring of the testator. That construction here would destroy, and was likely to destroy, the whole object of the provision for this most unfortunate son. Can it be supposed that the testator intended to send Lawrence adrift in

case of the death of that child who first assumed the duty? The devise was not to Thomas, but to "whichever of my children." The purpose manifestly was to provide that the case of this idiotic and unlovable son should be committed to a member of the family, and not to strangers. Thomas turned over his burden to his wife and daughter, who had learned by long and hard experience to take kindly care of the unfortunate. There is no question but that the kindly care was bestowed by them, even when they committed him to the hospital for the insane. It is true that the widow and daughter took an active part in committing him to safe custody, but there was kindly care even then, and his honor so finds.

Besides this, Thomas provided for kindly care after his own death by setting aside \$3,100 of his own money for the maintenance and support of Lawrence, and with kindly care provided that that sum should, at the death of Lawrence, be added to the fund provided for Lawrence, under his father's will, and go to him who gave kindly care to Lawrence. Thomas gave kindly care to Lawrence while he lived, and gave kindly care to Lawrence until he (Lawrence) died. Thomas was a child of C. G. McCay, and gave kindly care to Lawrence until he died, thus literally performed the condition precedent, and the estate of Thomas is entitled to the entire fund provided by C. G. and Thomas McCay. It is claimed that kindly care requires personal service, i. e., that Thomas must dress and wait on Lawrence with his own hands. The will does not say so. The case of *Cabeen v. Gordon*, 1 Hill Eq. p. 56, is relied upon as authority. This case does not sustain the position. The testator gave certain slaves to his daughter, Betsy, "but if my daughter Mary shall take care of said Betsy during her life, then at her death I give said slaves to the said Mary." The court goes on to say, "For one cannot be said to be taken care of, who is waited on with great care, but who is neither fed nor clothed; nor can one be taken care of; who is unable to feed herself, or put on her clothes, by placing before her food and raiment." Mary did not care for Betsy, and was not entitled to the remainder. It is manifest that the personal care provided for was care personal to Betsy, but supplied by Mary. Parents take kindly care of their injured child when they take it to a good hospital and commit it to the ministrations of skilled physicians and competent trained nurses, even though neither of them touch, or are allowed to touch, the child while it is in a critical condition. The mother may long to do the service herself. Sometimes she is most kind when she restrains her natural impulse for the good of the child. It is undisputed that Lawrence received kindly care to the day of his death, and that this kindly

care was provided by Thomas McCoy, and his estate is entitled to the entire remainder. The judgment is reversed.

GARY, C. J., and HYDRICK, WATTS, and GAGE, JJ., concur.

(113 S. C. 251)

THOMPSON et al. v. ATLANTIC COAST LINE R. CO. et al.

KELLERS et al. v. SAME.

(No. 10843.)

(Supreme Court of South Carolina. Jan. 26, 1920.)

1. DAMAGES ¶158(3)—EVIDENCE OF PREMATURE BIRTH ADMISSIBLE IN PERSONAL INJURY ACTION THOUGH NOT SPECIFICALLY FLEADED.

In passenger's action against railroad for injuries in derailment, wherein was alleged that plaintiff "was seriously and permanently injured, suffered a fearful and terrible mental and bodily shock," testimony that injury to plaintiff resulted in the loss of an unborn child was admissible, though not specifically pleaded; such testimony tending to prove the extent of plaintiff's injuries and to show that the permanent injuries caused by the premature birth was the proximate result of the injuries sustained in the accident.

2. CARRIERS ¶316(1), 320(1) — CARRIER WHOSE PASSENGER IS INJURED PRESUMED TO BE NEGLIGENT.

When a passenger is injured by an instrumentality of the common carrier, there is a presumption of negligence; the amount of testimony necessary to overcome such presumption being a question of fact for the jury.

3. EVIDENCE ¶570—JURY NOT BOUND TO ACCEPT OPINION OF EXPERT.

The jury is not bound to take the opinion of an expert witness.

4. CARRIERS ¶320(30)—OPINION OF EXPERT AS TO CAUSE OF ACCIDENT NOT SUFFICIENT TO OVERCOME PRESUMPTION OF NEGLIGENCE.

In action against railroad for injuries to passenger in derailment, court cannot say, as a matter of law, that the mere opinion of an expert witness that the cause of the accident was a broken bolt, which could not have been detected by the most expert inspection, is sufficient to overcome the presumption of negligence.

5. CARRIERS ¶320(22) — WHETHER DERAILMENT WAS RESULT OF CARRIER'S NEGLIGENCE FOR JURY.

In passenger's action against railroad for injuries sustained in derailment from defect in car, question of railroad's negligence held for jury.

6. APPEAL AND ERROR ¶1003, 1004(4)—SUPREME COURT WILL NOT PASS ON EVIDENCE OR DISTURB VERDICT IF MORE THAN ONE INFERENCE CAN BE DRAWN FROM TESTIMONY.

Where more than one inference can be drawn from the evidence, the Supreme Court has

no jurisdiction to pass on the manifest weight of the testimony, nor to disturb the verdict, though it may be greater than court may think proper.

7. RELEASE ¶58(6)—ISSUE AS TO FRAUDULENT PROCUREMENT OF RELEASE PROPERLY SUBMITTED.

In action for injuries to passenger sustained in derailment, wherein railroad claimed to have been released from liability, issue of whether the releases had been freely and voluntarily given, or had been procured by fraud, coercion, or misrepresentation, held properly submitted under the evidence.

8. RELEASE ¶59—INSTRUCTION IN PASSENGER'S ACTION FOR INJURIES NOT MISLEADING.

In action against railroad for injuries to passenger in derailment, wherein railroad claimed that passenger had released it from liability, instruction held not to mislead jury to think that mere inadequacy of consideration was ground for setting aside of release, in view of charge as a whole instructing that passenger could not recover if release was freely and voluntarily given.

9. CARRIERS ¶318(12)—RAILROAD SUED WITH PULLMAN COMPANY COULD NOT COMPLAIN OF DIRECTION OF VERDICT FOR LATTER.

In passenger's action for injuries in derailment against railroad and the Pullman Company, where the railroad's own witnesses testified that it was the duty of the railroad to inspect and repair the running gear of the Pullman cars while in use, and where there is no evidence that the Pullman Company was responsible for the roadbed, railroad could not complain of direction of verdict for Pullman Company.

Appeal from Common Pleas Circuit Court of Charleston County; J. W. De Vore, Judge.

Actions by Gertrude B. Thompson and husband, and by Edyth Kellers and husband, against the Atlantic Coast Line Railroad Company and others. Judgments for plaintiffs, and named defendant appeals. Affirmed.

Rutledge & Hyde, of Charleston, for appellant.

Logan & Grace, of Charleston, for respondents.

FRASER, J. The appellant, in its argument, thus states its case:

"It appears that the action was for damages due to personal injury, nervous shock, etc., alleged to have been sustained by the plaintiffs while passengers on a train of the defendant, consisting, among other things, of the Pullman car upon which the plaintiffs were riding.

"Both plaintiffs claiming to have been injured in the same accident and the allegations of negligence being the same in both cases and the defenses the same, the cases were tried together. A verdict of \$10,000 was awarded to plaintiff Mrs. Thompson, and a verdict of \$100 was awarded the plaintiff Mrs. Kellers.

"The allegations of negligence in each case were as follows:

"(a) In failing and omitting to take care to prevent derailment.

"(b) In not adopting the proper safeguards to protect said train and car so that said accident would not have happened.

"(c) In causing and allowing said train and car to be derailed.

"The allegation of injury in the case of Mrs. Thompson was as follows:

"That she was thrown from the place occupied by her, and that she had her infant child in her arms, and that she was thrown with such force and violence against said car that she was rendered unconscious, and her head badly bruised and her side and back fearfully wrenched, jerked, and strained, and was seriously and permanently injured, suffered a fearful and terrible mental and bodily shock, and she was rendered almost a complete nervous wreck by reason of her injuries, and the frightful and awful experiences resulting from her injuries and shock; that plaintiff had only recently come out of a hospital in the city of Washington, where she had been treated for illness, and in consequence was utterly unable to withstand the agonizing and fearful shock to her mental and bodily system by reason of the jolt, jerk, and jar caused by the derailment of said train."

"The allegations of injury in the case of Mrs. Kellers were:

"That her right arm was fearfully bruised, jerked, and strained, her back badly wrenched, and her nervous and bodily system frightfully shocked and injured, she was seriously and permanently injured and (that she) was rendered an almost complete nervous wreck by reason of her injuries, and the frightful and awful experiences resulting from her injuries and shock, and will be otherwise injured."

#### "Argument.

"Coming directly to the consideration of the first exception which complains of the ruling of the court in permitting a question to be asked Dr. A. E. Baker, physician of the plaintiff, with reference to a serious physical condition from which the plaintiff had suffered, not set out in the complaint, and entirely different from any allegation of injury therein complained."

[1] I. The testimony of Dr. Baker referred to the "mental and bodily" injury of Mrs. Thompson, which was the result of the injury. It included the loss of an unborn child, which was not the subject of the action. The testimony tended to prove the extent of the plaintiff's injuries and was competent. The testimony tended to show that the injuries caused the premature birth, and the premature birth was cause of the permanent injuries, i. e., the wreck was the proximate cause of the plaintiff's injuries. The testimony was competent, and this exception is overruled.

II. The appellant thus states the second question:

"The second exception assigns error in overruling the motion of the defendant railroad company having nonsuit made upon the ground

that there was a total failure of evidence to support the allegation of negligence and specifications thereof alleged in the complaint."

[2] When a passenger is injured by an instrumentality of the common carrier, there is a presumption of negligence. How much testimony is necessary to overcome this presumption is a question of fact for the jury. *McLeod v. Railroad Co.*, 93 S. C. 71, 78 S. E. 19, 705.

Mrs. Thompson, one of the plaintiffs, said, "What is the matter with this train; it rocked and pitched all night?" Did it rock and pitch all night? Mrs. Thompson was in the drawing room of a Pullman. Would a man of ordinary prudence, who was exercising due care, know that something was wrong when the Pullman rocked and pitched all night? If the jury thought so, then there was evidence from which the jury could infer negligence, independent of the presumption. The appellant says it did everything that it could have done, in that it made inspection after inspection and found only one thing wrong, to wit, two new brake shoes were needed for the "Judsonia" (the car in which the plaintiff was injured). These were supplied. The witness did not know how long a brake shoe would last. So it seems that the brake shoes that needed replacing had passed several inspections, unless they had worn to the danger point after leaving the initial terminal. There was no evidence to show that this defect developed after the car passed the other inspection. The appellant places much reliance on the testimony of an expert who states that he examined the wreck and in his judgment the cause of the accident was a broken bolt, and that the broken bolt was so placed that the most careful and expert inspection would not have revealed the defect; that the defect was a latent defect for which the carrier was not liable.

[3] The jury is not bound to take the opinion of an expert witness.

[4, 5] This court cannot say as a matter of law that the mere opinion of an expert witness is sufficient to overcome the presumption of negligence. This witness did not see the car until after the accident. Can even an expert tell, by looking at a wreck, what bolts were broken before the accident and what bolts were broken by the accident? That was a question for the jury, and this exception is overruled.

What has been said applies to the third exception, and the third exception is overruled.

[6] III. The fourth exception complains that the verdict is against the manifest weight of the testimony. More than one inference can be drawn from the testimony, and this court has no jurisdiction to pass upon the manifest weight of the testimony, nor to disturb the verdict, because it may



be greater than the court may think proper.

The fifth exception is withdrawn.

IV. The sixth exception is:

"I charge you that, if you conclude from the evidence in this case that the consideration paid for these releases was so out of proportion to the injuries received as to shock the conscience of a reasonable person, under those circumstances it would release them and would not hold them bound by it, but that depends on the extent of the injuries that was caused by the Atlantic Coast Line Railroad Company; if the injuries were slight and reasonably in keeping with the amount paid for the release and they were willing to settle for that amount, why they would be bound by it."

"The error being that this constituted a direction that the release was invalid, if the amount paid was not reasonably in keeping with the injuries received.

"Whereas, inadequacy of compensation is no ground for setting aside a release obtained without fraud, coercion, or misrepresentation."

His honor charged as follows:

"If these releases were signed and the parties who signed them knew what they were doing, and did it freely and voluntarily, based on the belief that they were only slightly injured, and did it in good faith, why then they could not recover. But if they were induced to sign these releases by fraud, coercion, or misrepresentation, not knowing or understanding what they were doing, and were persuaded to sign these releases, they would not be bound because fraud vitiates."

Thus his honor charged that, not mere inadequacy of consideration, nor after developed facts, would destroy the release, but that fraud was necessary, and he charged that both before and after the charge complained of.

There was testimony in the case from which the jury might have inferred that the ladies were not in a condition to know what they were doing. A mother with her children and aunt are fastened in the drawing room of a Pullman car. The car is turned over on its side; the door will not open; there is a cry made that they may burn up if the car takes fire before they can get out; they find it necessary to break open a window, through which they are taken to safety; the negro porter, by whose heroism the sick baby is taken out, collapses from his own injuries; the mother, the plaintiff, is wounded on the head and shows a mark as big as a "lemon"—and all the other circumstances connected with the accident were before the jury.

[7, 8] The issue was properly submitted, and the charge was not misleading, taken as a whole.

This exception is overruled.

V. His Honor directed a verdict in favor of the Pullman Company, and this is the basis of the last exception.

[9] The appellant cannot complain as its own witnesses testified that it was the duty of the railroad company to inspect and repair the running gear of the Pullman cars while in use. There was no suggestion that the Pullman Company was responsible for the roadbed. This exception is overruled.

The judgment is affirmed.

GARY, C. J., and HYDRICK, WATTS, and GAGE, JJ., concur.

(112 S. C. 247)

CITY COUNCIL OF CHARLESTON v. TERRY FISH CO. (No. 10291.)

(Supreme Court of South Carolina. Nov. 26, 1919.)

1. LANDLORD AND TENANT §63(2)—TENANT ESTOPPED TO DENY TITLE OF LANDLORD.

A tenant in possession is estopped to deny the title of his landlord when the landlord proceeds to eject him.

2. LANDLORD AND TENANT §18(3)—CITY AND NOT DOCK COMMISSION LANDLORD OF PROPERTY LEASED TO DEFENDANT.

In an action by a city council to eject a fish company from premises used by the defendant as a vendor of fish, evidence held to show the defendant was the tenant of the city, and not of the dock commission; contract being between mayor of the city and defendant.

Appeal from Common Pleas Circuit Court of Charleston County; S. W. G. Shipp, Judge.

Proceedings by the City Council of Charleston to eject the Terry Fish Company from premises let to it. Judgment for plaintiff, and defendant appeals. Affirmed.

The 11 exceptions, made into four grounds, referred to in the opinion, are as follows:

First. That the notice to quit served on the Terry Fish Company was not a legal notice, as it should have run in the name of the commissioners of the market or the dock commission, but certainly not in the name of the city council of Charleston.

Second. That the testimony showed that the Terry Fish Company should not have been ejected from the premises occupied by it.

Third. That the court should have held that the question of title was involved, and that therefore the civil and criminal court had no jurisdiction.

Fourth. That the court should have held that the Terry Fish Company had a right to offer in evidence the deed and indenture of Charles Cotesworth Pinckney and others to the city council of Charleston, dated March 27, 1788, as this would have shown:

(a) That the city council of Charleston is neither the owner nor the landlord of the property at the foot of Market street, occupied by Terry Fish Company.

(b) That the city council of Charleston held

the premises occupied by Terry Fish Company only as a trustee for a public market, and that by operation of law and breach of the trust the title to the property was no longer in the city of Charleston.

(c) The Terry Fish Company is in possession of the premises now occupied by it as a part of the public market of the city of Charleston and lawfully in possession under the terms of the trust deed, and therefore has an equitable title to said premises, and cannot be dispossessed by the city council of Charleston as trustee in breach of its trust.

Logan & Grace, of Charleston, for appellant.

M. Rutledge Rivers, of Charleston, for respondent.

GAGE, J. Proceeding by the city of Charleston under section 3509 of the Code of Laws to eject the Terry Fish Company from premises aforesaid let to it by the city. The proceeding was instituted before a magistrate, who on June 10, 1918, notified the defendant to show cause before the civil and criminal court of Charleston, and that court granted the remedy. On appeal to the circuit court the judgment of the trial court was affirmed. Now the fish company appeals here from the judgment of the circuit court.

The subject-matter in issue is the foot of Market street, hitherto for long years used by fishermen as a place to land their catch; and for years lately occupied by the defendant as a vendor of fish.

The appellant has consolidated the 11 exceptions made into four grounds. Let so much be reported at folios 14, 15, 16, 17, and 18 of the appellant's brief, and in lieu of the exceptions. These four grounds we now consider in what is the consecutive order of them.

[1] The jurisdiction of the court of trial is challenged, and that because the proceeding involves title to land. And that affirmation, that title to land is involved, rests on another contention, to wit, that an examination of an ancient deed from Pinckney to the city would disclose the fact that the city's title is of such a character that the city has not the legal right she now asserts. The trial court ruled that in a proceeding by a landlord to eject his tenant the tenant could not question the landlord's title. The appellant is not understood to question the rule of law that generally a tenant in possession is estopped to deny the title of his then landlord, when the landlord shall proceed to eject the tenant. The appellant's present contention is that a tenant so situated may prove, in order to defeat ejectment, that his landlord's title has expired or been terminated by operation of law. It is true the rule of law stated above is not absolute under all circumstances. The appellant has

cited a recent case to that effect from the federal Supreme Court (*Johnson v. Riddle*, 240 U. S. 480, 36 Sup. Ct. 393, 60 L. Ed. 752), and an old case of our own court is to the same effect (*Givens v. Mullinax*, 4 Rich. 590, 55 Am. Dec. 706), and to like effect is *Tant v. Guess*, 37 S. C. 504, 16 S. E. 472. But the Pinckney deed is not in the "case," and is therefore not before us for construction; and all we know about it is what transpired when Mr. Bryan (then attorney for Terry and now deceased) was cross-examining one Dingle, who styled himself "Secretary of the Dock Commission." This is the record of that circumstance:

"Q. Do you happen to know the property of the market, from Meeting street the whole way, what it is known in the city; do you know where it comes from? A. I cannot tell where it comes from.

"By Mr. Rivers: I object to that because this is a question of landlord and tenant. The question is, Is the city council of Charleston the landlord and the Terry Fish Company the tenant? That is the only question on this branch of the case. I submit it is absolutely incompetent, anything in relation to the title of this property, who it came from and where it comes from.

"By Mr. Bryan: My point is: First, this property as I expect to prove, is a trust, and the beneficiary is in possession under the terms of the trust. The city holds it in trust, and cannot turn defendant out. I make another proposition, the act of the trustee in this case is a breach of trust, and has no title under the trust deed to turn defendant out.

"By the Court: Under these pleadings the only question, under section 3509 of the Code, is the right to possession of this property as between the landlord and the tenant, if such a relation is proved between the parties in these proceedings, and therefore all other testimony along any other lines will be stricken out; that is the position of the court."

"By Mr. Bryan: Excepts to the ruling; the object of the testimony offered is to prove: (1) That the property in question is held as trustee for the use of dealers in fish; (2) that Terry Fish Company is such a dealer in possession under the trust; (3) that the city has committed a breach of trust, and title is not any longer in the city, and by operation of law the title is divested, and under both of these grounds the doctrine that the tenant is estopped to deny the title of the landlord does not apply."

And the present attorney for Terry says in his brief that—

"The deed would have shown that the property occupied by the Terry Fish Company was deeded to the City Council of Charleston to use for the purpose of a public market, and that the city council, in claiming to take this property out of the hands of the board of market commissioners who have charge of the public market of the city of Charleston, and putting it into the hands of the dock commission, and in endeavoring to eject the Terry Fish Company, was

acting in violation of the terms of the trust deed."

The same counsel says also:

"That while counsel for the city made an objection that the proper notice had not been given to him that the deed would be produced, yet the real reason why the deed was excluded was upon the ground that this was a proceeding between landlord and tenant, and that the tenant could not dispute the title of its landlord."

Granting that the trust deed has been correctly recited by the appellant's counsel, the terms of it so recited do not negative the right which the city now asserts, for there is no testimony tending to show that the city intends to divert the wharf from the purposes of a public market. And as the deed is not before us, we are limited in the construction of it to what counsel for the defendant has said about it. There is therefore no circumstance to exempt the instant cause from the operation of the general rule of law before stated, if Terry was tenant of the city.

[2] We revert now in sequence to the first ground, that the notice to quit ought to have run in the name of the commissioners of the market or the dock commission, and not in the name of the city. The contention of the appellant is that the dock commission, a creation of statute law, and not the city, was landlord. But Mr. Bryan contended at the trial:

"That the dock commission is not the landlord, or the representative of the landlord, in this matter." And Mr. Terry testified: "I stand under this contract with Mayor Rhett; he being the landlord and I being the tenant. I claimed the wharf needed repairs and charged it to the rent account. I have been there as tenant, first of the Consolidated Company and afterwards as tenant of the city council of Charleston, a supposed case of tenancy. I paid rent."

It is therefore perfectly manifest that the city is landlord and Terry is tenant under it.

Finally it is contended by the appellant that Terry was not formally notified by the city three months before January 1, 1918 (the time set for the tenant to quit), that the premises should be vacated on that day. About that matter the appellant's counsel says:

"There is, of course, no doubt that Terry had been notified that possession of the property occupied by him was desired, but the point we make is that, if the city council was the landlord, then Terry never received any three months' notice from such landlord that it was desired to terminate the tenancy. And this was necessary before he could be ejected."

Counsel for the city admitted at the bar that the tenant was entitled to have three

months' notice to quit. The testimony is plain to the effect that on July 2, 1917, Dingle, who was both secretary of the dock commission and city engineer, sent the defendant a letter of notification "that the lease of the city property, east end of Market street, shall terminate January 1, 1918. And on June 27, 1917, Mr. Barbot, who was clerk of the city council, sent the Terry Fish Company a letter, advising it "that the lease of the city property at the foot of Market street shall terminate January 1, 1918." And on July 10, 1917, in a regular meeting of the city council, the action of the dock commission first above stated was approved by the council. And on September 5, 1917, the Terry Fish Company acknowledged in a letter to the chairman of the market commissioners that it had received "a notice from the ways and means committee that we are to vacate our present place of business on January 1, 1918.

The judgment below is affirmed.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

(113 S. C. 177)

STATE v. BREUER. (No. 10367.)

(Supreme Court of South Carolina. Jan. 27, 1920.)

1. CRIMINAL LAW §27—PENALTY DOES NOT DISTINGUISH FELONY FROM MISDEMEANOR.

The penalty for an offense by itself does not always fix the character of the offense as between felony and misdemeanor.

2. BIGAMY §1—CRIMINAL LAW §982 — SENTENCE FOR BIGAMY CANNOT BE SUSPENDED, IT BEING A "FELONY."

Bigamy is a "felony," sentence for which, therefore, by provision of Act Feb. 1912 (27 St. at Large, p. 773), cannot be suspended by the court, it having been a felony at common law, and having been expressly declared such by the act of 1712 (2 St. at Large, p. 508), and such character therefore inhering in it till it is changed by express words or by necessary implication of a later statute; the mere failure of the codifiers, from 1872 down, to carry forward in their works the prior legislative declaration, not being enough to reduce the offense to a misdemeanor.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Felony.]

Appeal from General Sessions Circuit Court of Charleston County; R. W. Memminger, Judge.

A. L. Breuer was prosecuted for bigamy. From so much of the judgment, on a conviction, as suspended sentence, the State appeals. Reversed.

T. P. Stoney, Sol., and Paul M. McMillan, both of Charleston, for the State.

B. H. Mathews, of Charleston, for respondent.

GAGE, J. Upon a verdict of bigamy the court pronounced this judgment:

"Let the defendant, A. L. Breuer, be imprisoned at such labor as he can perform in the county jail at Charleston county, for a period of six (6) months and pay a fine of five hundred (\$500.00) dollars. That the above sentence be suspended during good behavior upon the payment of two hundred (\$200.00) dollars."

[1, 2] The only issue made by the state's appeal is that the court had no power to add the "suspension" to the judgment. The statute expressly provides that the power and authority to suspend shall not extend to cases of felony. 27 St. at Large, 773. So the primary issue to be decided is the character of the offense of bigamy; is it felony, or is it misdemeanor?

It would be fruitless to follow up at length the origin and meaning of the word "felony"; it is sufficient to say that the full ancient meaning of the word no longer attaches to it. By the common law the penalty for felony was death, and the confiscation of the estate of the felon. Bishop, § 615. In time the character of felony became modified, so that now the chief difference betwixt felony and misdemeanor consists in procedure. See Ency. Brit. vol. 10, p. 244.

"The question whether a particular offense is felony or misdemeanor can be answered only by reference to the history of the offense, and not by any logical test." Same authority.

A statute may define felony; in some jurisdictions so much is true, but there exists no such statute in this state, so "we look into the books upon common-law crimes, and see what was felony and what was not under the older laws of England." 1 Bish. § 616. An offense may be misdemeanor by express words of a statute, yet with penalties attached which are more often attached to felonies. And statutes have expressly made other offenses to be felony which before such were misdemeanors only. Those offenses are of course felonies which are by statute expressly declared to be such.

The penalty for an offense by itself does not therefore always fix the character of the offense to be felony or misdemeanor. By the statutes of 1712 of this state bigamy was expressly declared to be a felony (2 St. at Large, 508); and it was so adjudged by the courts. State v. Barefoot, 2 Rich. 220. The failure of the codifiers, from 1872 down, to carry forward into those works the prior legislative declaration, does not reduce the offense from felony to misdemeanor. See State v. Rowe, 8 Rich. 17.

When bigamy was expressly declared by statute to be felony, that character inheres in it until the same is changed by express words or by necessary implication of a later statute. The offense was a felony at the common law (4 Blackstone, 464), and for that reason its character inheres in it until the Legislature declares the contrary.

So much of the judgment as undertakes to suspend the sentence is reversed.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

(113 S. C. 212)

ROBISON v. BARTON. (No. 10344.)

(Supreme Court of South Carolina. Jan. 28, 1920.)

1. LANDLORD AND TENANT  $\S$  114(3)—MERE HOLDING OVER AFTER TERMINATION OF LEASE INSUFFICIENT TO CONSTITUTE TENANCY FROM YEAR TO YEAR.

The mere fact that a tenant may continue in possession after the termination of a year's lease is not in itself sufficient to constitute a tenancy from year to year, since there must be consent or acquiescence on the part of the landlord, or the circumstances must be such as to be susceptible of a reasonable inference that the parties intend a tenancy from year to year.

2. LANDLORD AND TENANT  $\S$  116(2) — REASONABLE NOTICE ONLY NECESSARY TO TERMINATE TENANCY FROM YEAR TO YEAR.

In order to terminate a tenancy from year to year the law only requires reasonable notice.

Appeal from Common Pleas Circuit Court of Richland County; W. H. Townsend, Judge.

Action by Lena Robison against G. M. Barton. Judgment for defendant, and plaintiff appeals. Reversed.

The order of the circuit judge and the plaintiff's bill of exceptions, referred to in the opinion, are as follows:

This is an appeal in a special proceeding under Civil Code 1912, § 3509, to eject the defendant from a residence No. 1203 Woodrow street, in Melrose Heights, a suburb of Columbia, on the ground that he is a tenant of the plaintiff, holding over after expiration of his lease. The uncontradicted evidence shows that defendant is the tenant, holding said house under plaintiff as landlord; that he entered upon said tenancy under a written lease for one year, ending October 17 or 21, 1917, at an annual rental of \$240, payable \$20 per month. He held over after the expiration of this term and continued to pay the rent monthly. On August 1, 1918, plaintiff, by her agent, notified defendant to vacate the leased premises on or before September 17, 1918, and he refused, but continues to pay the rent in monthly install-

ments. On April 14, 1919, plaintiff again notified defendant to quit, and on the 21st or 22d of May, 1919, commenced this proceeding under the statute above cited. The defendant contends that he is entitled as tenant from year to year to hold until the end of this calendar year.

I find from the evidence that after the expiration of the year specified in the written contract, under which he entered as tenant, defendant held over as tenant from year to year (*Dorrill v. Stephens*, 4 McCord, 59; *State ex rel. Sawyer v. Fort*, 24 S. C. 515, 521; *Wilson v. Rodeman*, 30 S. C. 210, 214, 8 S. E. 855; *Laurens Tel. Co. v. Enterprise Bank*, 90 S. C. 50, 57, 72 S. E. 878), and the notices given in August, 1918, to vacate in September, 1918, and in April, 1919, were neither sufficient to terminate his tenancy. To terminate defendant's tenancy the notice should have been given three months before the end of the calendar year (*Godard v. S. O. R. R. Co.*, 2 Rich. Law, 346, 350; *Floyd v. Floyd*, 4 Rich. Law, 23; *Wilson v. Rodeman*, 30 S. C. 210, 214, 8 S. E. 855), and should have specified the end of the calendar year as the time for the termination of the tenancy (*Arbenz v. Exley, Watkins & Co.*, 57 W. Va. 580, 50 S. E. 813, 4 Ann. Cas. 625, 627, and note on page 628). The notice to quit in September, 1918, or in May, 1919, on an intermediate day was insufficient. *Grace v. Michaud*, 50 Minn. 139, 52 N. W. 390; *Right v. Darby*, 1 T. R. 159; *Sanford v. Harvey*, 11 Cush. (Mass.) 93.

It is therefore ordered, adjudged, and decreed that judgment of the magistrate's court be, and hereby is, reversed, and the proceedings dismissed.

#### Exceptions.

1. That his honor erred in finding that the tenancy under the written contract ended October 17 or 21, 1917, because there is no evidence to support the same, and the uncontradicted testimony shows that the contract of lease ended on September 21, 1917.

2. That his honor erred in finding from the evidence "that after the expiration of the year specified in the written contract under which he entered as tenant, defendant held over as tenant from year to year," because:

(a) The defendant had not remained on said premises for one year after the expiration of the written contract at the time he received notice from the plaintiff, through her agent, to terminate the tenancy.

(b) Because at the time the defendant received notice to terminate his tenancy in August, 1918, he was not a tenant from year to year, and had not acquired the rights of a yearly tenant.

3. That his honor erred in finding and ruling: "And the notices given in August, 1918, to vacate in September, 1918, and in April, 1919, were neither sufficient to terminate his tenancy. To terminate defendant's tenancy, the notice should have been given three months before the end of the calendar year \* \* \* and should have specified the end of the calendar year as the time for the termination of the agency"—because:

(a) A year had not expired from September 21, 1917, the end of the original lease, at the time notice to terminate tenancy was given,

(b) The defendant not having acquired a yearly tenancy, the notice given in August, 1918, was sufficient and prevented defendant from acquiring the rights of a yearly tenant, and therefore notice in April, 1919, was also sufficient.

(c) It was not necessary to give notice three months before the end of the calendar year, or to specify the end of the calendar year as the time for the termination of the tenancy, because the yearly tenancy did not commence with the calendar year.

4. That his honor erred in finding, adjudging, and decreeing that the judgment of the magistrate's court be reversed, and the proceedings dismissed, because, under all the evidence and the facts in the case, and under the law, the tenancy of defendant had expired and plaintiff was entitled to possession of her premises.

D. W. Robinson, of Columbia, for appellant.

James H. Hammond, of Columbia, for respondent.

GARY, C. J. The facts herein are stated in the order of his honor the circuit judge, which will be reported, together with the plaintiff's exceptions.

The following is a summary of the contract between the plaintiff and the defendant, out of which the controversy arose:

"This is a contract between G. M. Barton, seller, and Lena Robison, purchaser, dated August 21, 1918, for the purchase of the house and lot on Woodrow street, Melrose Heights, at the price of \$2,250, of which \$25 was paid the date of the contract, balance to be paid 30 days from date on execution of good title.

"The contract further provides: It is understood and agreed that the owner is to have one year lease on place at \$20 per month, making \$240; \$200 to be deducted from selling price, which is \$2,250, leaving \$2,050 to be paid as above, two last months' rent of year's lease to be paid at the end of each month."

The defendant executed a deed of the house and lot to the plaintiff on the 21st of September, 1918.

[1] Unquestionably the lease was only for a year. The mere fact that a tenant may continue in possession after the termination of his lease is not, in itself, sufficient to constitute a tenancy from year to year.

There must be consent or acquiescence on the part of the landlord, or the circumstances must be such as to be susceptible of a reasonable inference, that the parties intended a tenancy from year to year. *Matthews v. Hipp*, 66 S. C. 162, 44 S. E. 577.

The testimony in the case does not make the same impression upon us as it did upon his honor the circuit judge. It appears to us that the only reasonable inference from the testimony is that the plaintiff did not, by implication or otherwise, consent or acquiesce in a tenancy from year to year.

Unless there was a tenancy from year to year, the plaintiff was not bound to wait until the end of the calendar year before eject-

ing the defendant under proper proceedings. *Floyd v. Floyd*, 4 Rich. 23.

[2] The ruling of his honor the circuit judge that, in order to terminate a tenancy from year to year, it was necessary to give three months' notice, before the end of the calendar year, was reversible error. The law only requires reasonable notice. *Jones v. Herald Co.*, 44 S. C. 526, 22 S. E. 731.

Reversed.

HYDRICK, WATTS, FRASER, and GAGE, JJ., concur.

(113 S. C. 204)

COKER v. DUNCAN. (No. 10330.)

(Supreme Court of South Carolina. Jan. 26, 1920.)

APPEAL AND ERROR §773(2) — FAILURE TO COMPLY WITH COURT RULE BY FILING POINTS AND AUTHORITIES JUSTIFIES DISMISSAL.

Where appellant has failed to file points and authorities as required by court rules, but states in the record that he "submitted without argument," the appeal must be dismissed.

Appeal from Richland County Court; M. S. Whalen, Judge.

Action by W. M. Coker against J. T. Duncan. Judgment for plaintiff, and defendant appeals. Appeal dismissed.

John T. Duncan, of Columbia, for appellant.

Paul A. Cooper, of Columbia, for respondent.

WATTS, J. The appellant having failed to file points and authorities, as required by the rules of the court, but states in the record that "submitted without argument," the appeal must be dismissed; but, even without this, under the recent case of *Lena Robison v. G. M. Barton*, 102 S. E. 16, opinion of Chief Justice, and authorities cited by him therein, on the merits, the appeal would be dismissed.

Appeal dismissed.

HYDRICK, FRASER, and GAGE, JJ., concur.

The CHIEF JUSTICE, disqualified, did not sit.

(113 S. C. 171)

GRANITEVILLE MFG. CO. v. RENEW. (No. 10322.)

(Supreme Court of South Carolina. Jan. 26, 1920.)

1. LANDLORD AND TENANT §297(2) — PROCEEDING BY COMPANY TO EJECT TENANT EMPLOYE ON THREE DAYS' NOTICE VALID.

A manufacturing company properly proceeded, under Civ. Code 1912, § 3509, on 3 days' notice, to eject from its house its em-

ploye and tenant, occupying under contract to pay 70 cents a week rent and to surrender possession on the day when he ceased to work for the company, section 3508, providing for 10 days' notice, not applying as governing the ejectment of tenants at will, domestic servants, and common laborers at the time of its enactment in 1866, while the employe was a tenant holding over after he quit work.

2. LANDLORD AND TENANT §309 — QUESTION OF OCCUPANCY AS TENANT OR AS INCIDENTAL TO EMPLOYMENT ONE OF FACT.

In proceedings by an employer to eject an employe tenant from its house, the question being whether Civ. Code 1912, § 3508, or section 3509, applies, in every case it is a matter of fact whether the occupier is in the house as a tenant, or merely as incidental to his work for the master, and the determination of such question depends on all the circumstances attendant on the transaction.

3. LANDLORD AND TENANT §296(2) — EMPLOYE WHOSE TENANCY IS INCIDENTAL TO EMPLOYMENT SUBJECT TO EJECTMENT ON TERMINATION OF EMPLOYMENT.

If a manufacturing company's employe was not a tenant of its house, but was only an incidental occupant, he was liable to immediate ejectment by the manufacturing company when he ceased to work for it; Civ. Code 1912, § 3508, giving the right to 10 days' notice, having express reference to tenants at will, domestic servants, and common laborers.

4. APPEAL AND ERROR §1082(2) — ISSUE NOT MADE IN INTERMEDIATE COURT IS NOT BEFORE SUPREME COURT.

An issue, not made in the five exceptions before the circuit court on appeal from a magistrate and a jury, is not properly before the Supreme Court.

5. JUSTICES OF THE PEACE §107(1) — SUPPLYING ABSENT JURORS WITHOUT CONTINUANCE.

In proceedings before a magistrate and a jury, under Civ. Code 1912, § 3509, to eject from a dwelling house, where, when two of the six jurors were reported non est, and the constable proceeded to supply two others pursuant to statute, the magistrate properly overruled motion for continuance until the next day, on the ground there should not be further procedure in the matter.

6. JUSTICES OF THE PEACE §111 — CHARACTER OF OCCUPANCY IN PROCEEDINGS TO EJECT TENANT QUESTION FOR JURY.

In proceedings before a magistrate and a jury, under Civ. Code 1912, § 3509, to eject from a dwelling house, the issue of the character of the occupant's holding, whether as tenant or not, having been one of fact, the magistrate had no right to declare to the jury the character of the occupancy.

Appeal from Common Pleas Circuit Court of Aiken County; Edward McIver, Judge.

Proceeding to eject from a dwelling house by the Graniteville Manufacturing Company against Harvey Renew. From judgment for plaintiff, defendant appeals. Affirmed.

(102 S.E.)

John F. Williams, of Aiken, for appellant.  
Hendersons, of Aiken, for respondent.

GAGE, J. Proceeding before a magistrate and jury under section 3509 of the Code of Laws to eject a person from a dwelling house. The jury found that the plaintiff was entitled to have the defendant ejected from the house and premises in dispute; the circuit court concluded that a warrant of ejectment ought to issue; the defendant has appealed from that judgment.

The controversy arises out of these circumstances: Renew was a worker in the cotton mills at Graniteville. These workers, according to the custom common in the mills of this state, occupy, while they work in the mill, houses supplied to them by the mill company, and they generally pay therefor a stated rent. The defendant was discharged from the service of the mill, and was paid his wages, less the rent due. The mill company notified him to quit the house he occupied within three days, and he declined to do so.

The appellant has argued three questions: (1) That all the testimony shows that Renew was in, not as tenant, but as a servant; that his occupancy of the house and lot was but incidental to that service, and that therefore his right rests under section 3508 of the Code of Laws, which allows him 10 days' notice, which he had not, in the place of 3 days' notice, which he had; (2) that the jury box was not rightly prepared; (3) that the magistrate did not declare the law to the jury.

A practical difference betwixt the plaintiff's contention that Renew was a tenant holding over (section 3509) and Renew's contention that he was a servant occupying (section 3508) lies in the matter of 3 or 10 days' notice to quit. For no matter in what capacity Renew occupied the premises, they are not his, and he is bound to give them up, sooner or later, on demand of the owner. So at last the question is one of procedure, not so much what one's right is as how one shall procure his right.

[1] We are of the opinion that the proceeding was properly brought under section 3509. It is manifest from the history of the times and the words of the statute that section 3508, first enacted in 1866, was made to govern the ejectment of tenants at will, domestic servants, and common laborers of the class then occupying those relationships. The instant is not such a case. Renew was not (1) a tenant at will of the mill company; he was under contract to occupy the house so long as he labored in the mill; nor (2) was he under contract with the mill company as a domestic servant or common laborer. Section 3509, first enacted in 1873, is of wider application than the act of 1866. It expressly includes in its terms "all cases": (1) Where tenants hold over after the expira-

tion of the contract for rent; and (2) all cases where the tenant (before expiration of the contract) shall be in arrears of rent. In the instant case Renew was manifestly a tenant. The return to the notice so recites in totidem verbis. He occupied a house and lot of the mill company under a contract, and the contract was that he would pay 70 cents per week rent, and that he would surrender possession, not in one week or four, but on the day when he ceased to work in the mill. The contract expired when he quit work, and he was thereafter in as one holding over after the expiration of a contract for rent.

[2] In every case it is a matter of fact whether the occupier is in a house (1) as a tenant or (2) merely as incidental to his work for a master; and the determination of it, as of most issues of fact, depends, not upon one circumstance, but upon all the circumstances attendant upon the transaction. 16 R. C. L. 579. The circuit court has found that Renew's relationship was that of tenant; and we concur in that view. But at most the only practical difference between the occupancies referred to rests in the remedy of the owner. In the case of a technical tenant, the landlord must proceed to eject under the terms of the statute. In the case of an incidental occupancy, the master may proceed to eject under the terms of the statute. In the case of an incidental occupancy, the master may proceed summarily, without notice, and use such force as may be necessary to put the occupant out. *Lane v. Electric Co.*, 181 Mich. 26, 147 N. W. 546; *Ann. Cas.* 1916C, 1108; 16 R. C. L. page 582, par. 57.

[3] If, therefore, Renew was not a tenant at all, and that is the contention of his counsel, but was only an incidental occupier of the house, then he was liable to immediate ejectment when he ceased to work; the statute relied upon by Renew has express reference to tenants.

[4] The appellant has argued another matter. He says the tenancy (if it was a tenancy) was from week to week, and for the ending of such the occupier was entitled to a week's notice to quit. But the "return to the magistrate's rule alleged that Renew was tenant "from year to year." And the issue now above made was not made in the five exceptions before the circuit court. It is therefore not properly before us.

The other two questions stated at the out-start must go against the appellant.

[5] The jury was selected pursuant to section 1395 of the Code of Laws. As to the selection of four of the six jurors no exception seems to have been made; but when two of the six were reported non est, and the constable proceeded to supply two others pursuant to the statute, the objection was made that there ought not to have been a further

procedure thereabout, but a continuance until the next day. The magistrate refused the motion; and there was no error in that.

[8] The magistrate left it to the jury to find as a fact whether the occupant held as a tenant or the contrary. The issue was one of fact; the magistrate had no right to declare to the jury the character of the occupancy.

The judgment of the circuit court is affirmed.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

(113 S. C. 223)

KAMINER et al. v. KAIGLER et al.  
(No. 10363.)

(Supreme Court of South Carolina. Jan. 27, 1920.)

**1. WORK AND LABOR §7(3)—RELATIONSHIP OF PARENT AND DAUGHTER-IN-LAW DOES NOT RAISE PRESUMPTION OF NO COMPENSATION INTENDED FOR SERVICES.**

Where an aged woman, of small means and with little help, took care of her daughter-in-law, a minor, who had been practically abandoned by her husband, the woman's relationship to her son's wife was not such by itself as to rebut the general implication that the service which was rendered the son's wife was to be compensated.

**2. WORK AND LABOR §5(2)—SERVICES INTENDED AS CHARITY MAY NOT BE CONVERTED INTO A CHARGE.**

If a mother undertook service to her son's wife, with no expectation of compensation, but as a gratuity, her intended charity may not afterwards be converted into a charge.

**3. WORK AND LABOR §28(3)—IMPLIED PROMISE OF COMPENSATION MAY NOT BE ESTABLISHED BY LOOSE AND INCONCLUSIVE EVIDENCE.**

An implied promise of a wife to compensate her husband's mother for her support and services rendered may not be established by loose and inconclusive testimony.

**4. GUARDIAN AND WARD §58—HUSBAND AS GUARDIAN OF WIFE MAY NOT DISBURSE FUNDS WITHOUT LEAVE OF COURT.**

A trustee husband may not take the whole of a small fund into his hands, and pay it out for the maintenance of his ward wife, without leave of a court.

Appeal from Common Pleas Circuit Court of Calhoun County; I. W. Bowman, Judge.

Suit by J. A. Kaminer and others against L. E. Kaigler and others. Decree for plaintiffs, reducing the amount of their claims, and they appeal. Decree reversed, and cause remanded, with directions.

W. A. Isgett, of St. Matthews, for appellants.

J. G. Stabler, of St. Matthews, for respondents.

GAGE, J. The issue of law involves the efficacy of payments made by a guardian for his ward. The circuit court allowed the payments, and the representatives of the ward have appealed.

The circumstances out of which the controversy was born are these: A young woman named Isolette Kaminer, while yet a minor, married in July, 1912, a young man named L. E. Kaigler. She died in August, 1914, not having reached her majority. In January, 1914, Isolette fell heir to \$696, and her husband immediately qualified as her guardian, with his mother and brother as his sureties, and received the said sum of money. He gave no account of his trusteeship, was a worthless fellow from all accounts, and is now gone to parts unknown.

Isolette's father and sister and Isolette's aunt have demanded of the sureties on the husband's bond an accounting for the said sum of money. The court allowed the plaintiffs' demand, reduced, however, by \$510, constituted of these items:

Maintenance of Isolette by Mrs. Kaigler, 18 months .....	\$320 00
Maintenance of Isolette by Mrs. Kaminer, 6 months .....	80 00
Personal service, Mrs. Kaigler to Isolette.....	30 00
For sum paid by Mrs. Kaigler for Isolette.....	20 00
Funeral expenses of Isolette.....	60 00
	<hr/>
	\$510 00

Judgment was awarded for the balance of \$186.39, and five years' interest upon that sum.

The two exceptions (1) challenge the effectiveness of the aforesaid payment to acquit the liability of the bondsmen; and (2) deny that there was proven any express contract, as it is contended was necessary, by Isolette or her guardian to make the payments.

[1] The rule laid down in *Ex parte Aycok*, 34 S. C. 257, 13 S. E. 450, is this:

"Where there is a legal or moral obligation on the part of one to render service to another, no such promise [to pay for the service] can be implied from the mere rendition and acceptance of such service."

There was no legal obligation on Mrs. Kaigler to maintain her adult son and his wife, one or both. The legal obligation was on the son to maintain his wife. The interesting inquiry is: Was there resting on Mrs. Kaigler such a moral obligation to maintain Isolette as to raise the presumption that she did so gratuitously?

"The standard of moral duty is to be found in the books of law rather than in those of moral science." Bishop on Contracts, § 94.



In some sense there is a moral obligation on all men to render assistance to a stranger even, and that without hope of recompense; the Good Samaritan was moved to act by the force of that obligation. But moral obligation, when put into action, assumed the character of an implied contract on the part of him who receives the benefit, "whenever such assumed promise is necessary as a foundation on which to enforce so much of natural justice as comes within judicial cognizance." Same authority.

Reference, therefore, must be had in every such case to all the circumstances of it, to find out if the natural justice of the cause brings it within our cognizance. In the instant case the testimony is very meager in essential matter; but we infer from the case and the argument that Mrs. Kaigler was well up in years, a woman of small means and little help; that her son, the husband, was a worthless fellow, who practically abandoned his wife and thrust her upon his mother to maintain. If so much be true, and if Isolette had means to pay for her support, and if all the circumstances show that so much was anticipated by the parties, then Mrs. Kaigler ought to be compensated.

Judge O'Neill expressed the opinion that a plaintiff, who maintained his wife's mother, did not bear to her so close a relationship as of itself to negative the legal implication of the liability of the woman's husband to the plaintiff for her maintenance. Trammel v. Salmon, 2 Bailey, 310. So here Mrs. Kaigler's relationship to her son's wife was not such by itself as to rebut the general implication of law that the service which Mrs. Kaigler rendered was to be compensated. As suggested by the learned judge, the case may be altered by other attendant circumstances. See, also, 40 Cyc. 2321.

[2] Of course, if Mrs. Kaigler undertook the service to Isolette with no expectation of compensation and as a gratuity it is well established that what was originally intended for a charity may not afterwards be converted into a charge. That question must also be determined by the testimony elicited on the new trial.

[3] But, granting that testimony may show a case where Mrs. Kaigler ought to be compensated, yet the record which is before us, and upon which the circuit court acted, does not make such a case. As said by Dunkin, Chancellor, "the testimony is loose and inconclusive." Prince v. Logan, Speer's Eq. 34.

[4] It is axiomatic that a trustee husband may not take the whole of a small fund into his hands, and pay it out for the maintenance of his ward wife, without any sort of leave of a court to do so. It is nevertheless true that in exceptional cases a court may condone such conduct, if in the first instance it would, on application to it, have permitted

the expenditure. The testimony before us, however, does not make such a case. See Holmes v. Logan, 3 Strob. Eq. 38; Prince v. Logan, Speer's Eq. 33; McDowell v. Caldwell, 2 McCord's Eq. 55, 16 Am. Dec. 635; Wright v. Wright, 2 McCord, Eq. 199; Houséal v. Gibbes, Bailey, Eq. 486, 23 Am. Dec. 186.

The decree below is reversed, and the cause is remanded for trial pursuant to the rules we have indicated; and in that trial let all the items of disbursement be inquired into.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

(149 Ga. 707)

BENTLEY v. BENTLEY. (No. 1469.)

(Supreme Court of Georgia. Jan. 16, 1920.)

(Syllabus by the Court.)

1. DIVORCE ~~§~~71—INFANTS ~~§~~78(7)—RIGHT OF INFANT WIFE TO MAINTAIN ACTION FOR DIVORCE AND ALIMONY; APPOINTMENT OF GUARDIAN AD LITEM FOR MINOR HUSBAND UNNECESSARY.

An infant wife, of sufficient age to enter into a marriage contract under the statute of this state, may maintain an action to dissolve the marriage relation for any of the causes authorized by the laws of this state. She may also, pending such suit, maintain an action for alimony. It necessarily follows that such a case may proceed against the husband while he is still a minor, without the appointment of a guardian ad litem.

2. AWARD OF TEMPORARY ALIMONY AND COUNSEL FEES.

The trial judge did not abuse his discretion in awarding the wife temporary alimony and attorneys' fees.

Gilbert and Atkinson, JJ., dissenting.

Error from Superior Court, Coffee County; J. I. Summerall, Judge.

Action by Bessie Bentley against C. C. Bentley, by next friend, for divorce and alimony. An order requiring payment of temporary alimony and attorney's fees was passed, and the motion of the minor defendant to suspend the hearing and appointing a guardian ad litem denied, and he brings error. Affirmed.

Mrs. Bentley brought suit for divorce and alimony. Service was made on the defendant personally. The parties consented to the fixing of a time for a hearing. When it came on, a motion made by the defendant to continue was overruled; and, while the bill of exceptions contains an assignment of error based on this action, it is expressly abandoned in the brief. No pleadings were filed by the defendant, but the evidence on the

hearing developed the fact that he was only 19 years old. His counsel thereupon moved the court to suspend the hearing and to appoint a guardian ad litem to represent the interests of the minor defendant. This motion was overruled, and an order was passed, requiring the payment of temporary alimony and attorney's fees. Error is assigned upon the refusal of the court to suspend the hearing and appoint a guardian ad litem, and upon the order allowing alimony and attorney's fees, on the ground that the defendant was not properly before the court, and that it was impossible for him to be properly before the court without the appointment and qualification of a guardian ad litem and service of the suit upon him, as provided by Civil Code, § 5565.

McDonald & Willingham, of Douglas, for plaintiff in error.

Dickerson & Kelley, of Douglas, for defendant in error.

HILL, J. (after stating the facts as above). [1] 1. In this state "to be able to contract marriage, a person must be of sound mind; if a male, at least seventeen years of age, and if a female, at least fourteen years," and laboring under none of the disabilities pointed out in the Civil Code 1910, § 2931. See, also, sections 3008, 4236. In *Besore v. Besore*, 49 Ga. 378, it was held that an infant married woman may maintain an action for divorce; and the decision was based upon the ground that if the wife was of sufficient age under the statute to enter into a marriage contract, there was no good reason why she could not maintain an action in the courts to dissolve the marriage relation. It was said in the opinion that marriage contracts and settlements made by infants, who are of lawful age to marry, are as binding as if made by adults, citing section 2692 of the Code then in force. It was further said that if such marriage contracts of infant females were binding upon them, they would be as competent to maintain an action to dissolve the marriage contract for any of the causes authorized by law as an adult married woman would be. See, in this connection, Civil Code 1910, § 5524; *Hinkle v. Lovelace*, 204 Mo. 208, 102 S. W. 1015, 11 L. R. A. (N. S.) 730, 120 Am. St. Rep. 698, 706, 11 Ann. Cas. 794. If this is so with respect to a minor plaintiff who brings an action to dissolve the marriage contract, it would seem that a minor defendant could be sued and defend such suit for divorce or alimony without the necessity for a guardian ad litem being appointed under the Civil Code 1910, § 5565. If this were not so, the will of the guardian ad litem might be substituted for the will of the party defending a divorce or alimony suit. The defendant in such a suit is the only person who knows, or has the option of decid-

ing, whether or not he desires to contest the divorce suit or to pay alimony and support his wife; and this should not be left to a guardian ad litem to decide, as it would be contrary to public policy to permit a third party to decide whether a divorce or alimony suit should be brought or defended. Section 5565 of the Civil Code merely prescribes how a guardian ad litem shall be served when there is a necessity for the appointment of one. *Furr v. Burns*, 124 Ga. 742, 53 S. E. 201, where it is said:

"Section 4987 of the Civil Code merely declares the mode of service on minors, not when it is necessary."

In addition to the above reasons, it appears in the present case that the defendant was personally served with a copy of the proceedings brought against him, and that in answer to the process served upon him he employed counsel, who was present at the trial and moved for a continuance of the case, but such motion and the showing made in connection therewith did not come up to the requirements of the law in such cases, and was consequently overruled, and the exception to such ruling was expressly abandoned in the brief of the plaintiff in error. Counsel then moved that a guardian ad litem be appointed for the defendant, which motion was overruled; and, after a hearing on the merits of the application for temporary alimony, the court awarded temporary alimony and attorneys' fees. Under such circumstances we think that the judgment should not be reversed because a guardian ad litem was not appointed for the defendant. It would be illogical, at least, to say that a minor plaintiff can bring a suit for divorce and alimony in her own name, without the appointment of a next friend for that purpose, and yet hold that in order for the defendant in such case, who is also a minor 19 years old, to defend such suit, a guardian ad litem should be appointed to represent him at the trial and file his answer, etc., whether he assents to it or not.

From what has been said, and on the authorities cited, we hold that the court did not err in overruling the motion to suspend the hearing of the case until a guardian ad litem could be appointed to represent the minor defendant in the hearing; nor did the trial judge abuse his discretion in requiring the defendant to pay his wife the sum of \$30 per month as temporary alimony, together with the sum of \$50 as counsel fees.

Judgment affirmed.

All the Justices concur, except ATKINSON and GILBERT, JJ., dissenting.

GILBERT, J. (dissenting). The liability of a husband, although a minor, for the payment of alimony is not questioned. Minority cannot in itself affect in any way such liability, if the husband has attained the age

of 17 years, at which time he may lawfully contract marriage. The sole question is as to the proper manner of proceeding against him, and therefore, when the court acquires jurisdiction of his person, enabling it to render a valid judgment. Until he is legally in court as a party to a proceeding, the court has no authority to render a personal money judgment against him. Civil Code, § 5585, provides the mode of service of "writs, petitions, citations, and other legal proceedings in the courts of this state on minors." In addition to personal service, the statute directs that—

"When the returns of such service are made to the proper court, and order taken to appoint said minor a guardian ad litem, and such guardian ad litem agrees to serve, all of which must be shown in the proceedings of the court, then said minor shall be considered a party to said proceedings." "Where there is a statutory or testamentary guardian or trustee representing the interest of the minor to be affected by a legal proceeding, service as usual on said guardian or trustee shall be sufficient to bind said minor's interest in their control to be affected by said proceedings."

The statute, as it appears in the section just quoted, was enacted by the General Assembly in 1876, and amended in 1879. Prior to this legislation, service on the guardian ad litem was sufficient service on the minor. *Morehead v. Allen*, 127 Ga. 510, 56 S. E. 745. It will be observed that this statute is broad and comprehensive in its terms, and permits of no exception. *Maryland Casualty Co. v. Lanham*, 124 Ga. 859, 53 S. E. 395; *Douglas v. Johnson*, 130 Ga. 472, 60 S. E. 1041(2); *Peavy v. Dure*, 131 Ga. 115, 62 S. E. 47; *Miller v. Luckey*, 132 Ga. 581, 64 S. E. 658, the case last cited being a suit for necessities, where the infant had engaged in business by permission of his parent; *Schouler's Domestic Relations* (5th Ed.) § 451 et seq.; *Nelson on Divorce & Separation*, § 728; *Field's Law of Infants*, 153, § 162 et seq. The decisions in *Worthy v. Worthy*, 36 Ga. 45, 91 Am. Dec. 758, and *Besore v. Besore*, 49 Ga. 379, are not in conflict with the view just stated, because in those cases the minor litigants were plaintiffs, and for the additional reason that the cases were decided prior to the passage of the act of 1876 (section 5585), supra. The distinction between the rights of plaintiff and defendant infants is shown in the early case of *Coalson v. Tooke*, 18 Ga. 742, 744. The plaintiff in that case, an infant, sought to avoid the force and effect of the judgment, on account of her minority. The court said:

"Whether founded upon solid grounds or not, the distinction seems to be well established in the books that, while infant plaintiffs will be bound by decrees and judgments, infant defendants will not, unless the same are manifestly for their benefit, or unless a day is given them

in court, after coming of age, to look into the proceedings."

In the case of *Groce v. Field*, 13 Ga. 31, it was said:

"The record discloses the fact that one of the defendants, Solomon Groce, was an infant when the decree was rendered against him. That an infant can be sued in equity there is no doubt—upon the idea that he is in the hands then of his paramount guardian. Chancery, it is presumed, will do no harm to its peculiar beneficiary. The course seems to be to serve the infant even when there is a regularly appointed guardian. The infant cannot defend, nor can his guardian, but the court will appoint a guardian ad litem to defend for him. \* \* \* In this case the infant appears to have been served, but no guardian ad litem to have been appointed. Notwithstanding the court proceeded to decree against him. He was not before the court—he was without his day, and the decree was erroneous."

In *Nicholson v. Wilborn*, 13 Ga. 467, 473, which was a suit to recover the amount of an account contracted before marriage by the wife, an infant, the defendant moved on the trial to dismiss the case, because the wife was an infant. The court overruled the motion and permitted plaintiffs to take an order appointing a guardian ad litem for Mrs. Nicholson. The defendant excepted to this ruling. This court said that "it is laid down that, when an infant feme covert is sued jointly with her husband, she must appear by guardian," after which it was ruled that the court did not err in making the appointment of a guardian ad litem and allowing the case to proceed. In the case of *Welch v. Agar*, 84 Ga. 583, 11 S. E. 149, 20 Am. St. Rep. 380, the suit was against Mrs. Hoge, an infant married woman. Her husband was appointed guardian ad litem for her, but declined to accept the appointment. *Bleckley, C. J.*, said:

"The court should not have proceeded in spite of his declination, for the precise opposite is the spirit of our law. It contemplates an express acceptance, in order to make an infant a party with perfect regularity."

The foregoing authorities are sufficient to demonstrate that a valid judgment in personam could not have been rendered against a minor without the appointment of a guardian ad litem, prior to the passage of the act of 1876, now found in the Civil Code, § 5585. If a doubt of this could have been entertained, the Code section removes the doubt by legislative enactment, which requires a specific mode of service. The Code section cannot in any way affect the rights of plaintiffs, though minors, to proceed in their own names. Indeed, where a proceeding is against a minor for whom a guardian ad litem is appointed, the proceeding is in the name of the minor, and the duty of the guardian ad litem is to manage and protect

the interests of the minor. It should be observed, for a proper understanding of the principles involved, that the character of the judgment sought to be sustained is different from a decree of divorce. In alimony the judgment is in personam. It may be enforced by fieri facias. Civil Code 1910, § 2978; *Coulter v. Lumpkin*, 94 Ga. 225, 21 S. E. 461; *Raines v. Raines*, 138 Ga. 790, 76 S. E. 51. Divorce has been characterized as being a proceeding in rem. Upon that theory a decree based on constructive service is sustained. It is universally conceded that a valid judgment in personam cannot be obtained on constructive service. Such a judgment is in personam, and is a lien upon all of the property of the defendant. A contract of marriage is different from all other contracts. This difference has long been recognized by the courts in England and in this country. Among the differences it is sufficient to point out that such contracts may be lawfully made by minors of certain ages, and that the parties who contract marriage cannot, at their will, dissolve it. In so far as that contract is concerned, an infant plaintiff has been permitted to institute a suit in her own name, without prochein ami, to set aside and dissolve a marriage contract. The writer has been unable to find any authority for the theory that a court may render a valid judgment in personam against a minor defendant without the appointment of a guardian ad litem, more especially where the statute law of the state, as embodied in Civil Code, § 5565, is plain and unambiguous, without providing any exception thereto that a guardian ad litem must be appointed for the infant defendant. This rule may seem illogical, in view of the fact that infants may contract marriage, and it may prove inconvenient to litigants; but none of these things should weigh in a declaration of what the law on the subject actually is. Applying the principles above announced, the refusal of the court to appoint a guardian ad litem, and the rendition of a judgment for alimony against the minor, should be set aside.

Justice ATKINSON authorizes the statement that he concurs in this dissent.

(149 Ga. 716)

STATE BOARD OF MEDICAL EXAMINERS et al. v. LEWIS. (No. 1524.)

(Supreme Court of Georgia. Jan. 16, 1920.)

(Syllabus by the Court.)

1. CONSTITUTIONAL LAW §43(1) — PHYSICIANS AND SURGEONS §2—ACT AUTHORIZING REVOCATION OF LICENSE WITHOUT NOTICE AND HEARING IS INVALID.

Section 14 of the act approved August 18, 1913 (Acts 1913, p. 101), entitled "An act to

abolish the present state board of medical examiners and to establish a composite board of medical examiners for the state of Georgia; to define its duties and powers," etc., is unconstitutional and void in so far as it provides for the trial and conviction of a licensed physician of certain specified offenses, and the consequent revocation of his license; as the section, in so far as it provides for such trial and the penalty upon conviction, is violative of the due process clause of the federal and state Constitutions, inasmuch as no provision is made in that section, or elsewhere in the act, for due notice and hearing of the accused.

2. CONSTITUTIONAL LAW §43(1)—PHYSICIAN WHOSE LICENSE IS REVOKED MAY ATTACK VALIDITY OF STATUTE AFTER PROCEEDING TO REVIEW SUCH REVOCATION.

Where a licensed physician was tried and convicted under section 14 of the act first referred to, and appealed to a jury in the superior court, where he was again convicted, and then sued out a writ of error to the Court of Appeals of this state, where the conviction was sustained, he could subsequently attack the judgments of conviction in the superior court and before the board of medical examiners, and, upon proper petition to a court of equity, prevent the enforcement of the penalties imposed by the act upon conviction.

Error from Superior Court, Carroll County; F. A. Irwin, Judge.

Suit by M. W. H. Lewis against the State Board of Medical Examiners and others. Decree in favor of plaintiff, and defendants bring error. Affirmed.

M. W. H. Lewis, a practicing physician, was notified to appear before the state board of medical examiners, and to answer certain charges preferred against him by that board. He appeared with his counsel; evidence was introduced pro and con; and the board found the charges against him true, revoked his license, and ordered that his name be removed from the records of the clerk of the superior court of his county. He appealed from the judgment of the board to Carroll superior court, filing an appeal bond. The board then, under the provisions of the statute, filed in the superior court specifications of the charges against Lewis. Lewis answered, the case was tried before a jury, and he was found guilty on the first specification, the only one insisted on by the board. Lewis then excepted to the decision of the superior court; and the Court of Appeals of this state rendered judgment affirming the judgment of the superior court. 23 Ga. App. 647, 99 S. E. 147. Before the judgment was executed and the name of Lewis stricken from the records of Carroll superior court, he filed his equitable petition in that court, alleging that the act of the General Assembly above referred to, under which he was tried and convicted, is unconstitutional for certain reasons, and prayed that execution of the judgment be restrained.

(103 S.E.)

To the petition thus filed the defendants filed a general demurrer and an answer. After hearing evidence and argument, the judge rendered a decree restraining the state board of medical examiners from interfering with the petitioner in the practice of his profession, until the case is finally determined by a jury in Carroll superior court, stating in his order that he held the act creating the state board of medical examiners to be unconstitutional, and all acts done by the board and by the courts thereunder to be null and void; the courts being without jurisdiction. To this decree the defendants excepted.

S. Holderness, of Carrollton, for plaintiffs in error.

Boykin & Boykin and Buford Boykin, all of Carrollton, for defendant in error.

BECK, P. J. [1] By an act approved August 18, 1913 (Acts 1913, p. 101), entitled "An act to abolish the present state board of medical examiners and to establish a composite board of medical examiners for the state of Georgia; to define its duties and powers," etc., the General Assembly created the state board of medical examiners, and conferred upon them enumerated powers and duties. Section 14 of the act declares that the board may refuse to grant a license to practice medicine in this state, or may cause a licensee's name to be removed from the records in the office of the clerk of the court, on several stated grounds; and that the board may, upon satisfactory proof made that any licensee has been guilty of any of the offenses defined in the grounds enumerated, suspend said licensee from the practice of medicine and call in his license upon a majority vote of the board—

"provided, however, that said suspended physician shall have a right to appeal to a jury in the superior court of the county of his residence, and it shall be the duty of said board to prefer in writing the charge or charges against said physician, which shall be tried by a jury regularly empaneled and sworn. Said physician, the defendant in said proceedings, shall be entitled to an appeal to the Supreme Court. In the event of conviction by the jury of any of the charges preferred, the license of said physician shall be revoked."

This proviso is followed by other provisions relative to the restoration of the physician whose license has been revoked or called in. The petition in this case attacks the provisions of this section, upon stated constitutional grounds; among others, that it is violative of the due process clauses of our state and federal Constitutions, in that no provision is made in this particular section of the act, or elsewhere, for notice to him of the action to be taken by the board, as a result of which the physician's license might be revoked or called in, and that no provision for a hearing is made either in this section or

in any other part of the act. In view of the ruling made in a recent case, *Mott v. State Board of Optometry*, 148 Ga. 55, 95 S. E. 867, the objection made to this section of the act is good. From that case it appears that Mott filed his petition for mandamus and other relief against the state board of examiners in optometry, and in his petition attacked section 7 of the act approved August 7, 1916 (Acts 1916, p. 83), entitled "An act to establish a board of examiners in optometry \* \* \* to define its duties and powers," etc. In section 7 it was provided that the board of examiners could refuse to issue the certificate of registration provided in this act to any person who shall have been guilty of unprofessional and dishonest conduct—

"provided an appeal may be taken from the action of the board to the superior court of the county in which the certificate was refused or revoked by the board."

The attack upon this section of the act of 1916 was substantially the same as that made upon section 14 of the act of 1913 in the present case. In the course of the opinion it was said:

"Neither the portion of the act quoted above nor any other portion applicable to Mott makes any provision whatever for notice or hearing before condemnation, which is contrary to the rights guaranteed by both the State and Federal constitutions. Civil Code, §§ 6359, 6700. 'The fundamental idea in due process of law is that of "notice" and "hearing." It means that the citizen must be afforded notice and hearing before he is condemned. There must be a hearing first, and judgment can be rendered only after trial.' *Arthur v. State*, 146 Ga. 828 (92 S. E. 637). The benefit of notice and a hearing before judgment is not a matter of grace, but is one of right. *Shippen Lumber Co. v. Elliott*, 134 Ga. 699, 702 (68 S. E. 509); *Security, etc., Co. v. Lexington*, 208 U. S. 333 (27 Sup. Ct. 87, 51 L. Ed. 204). Without notice and opportunity to be heard, there is no jurisdiction to pass judgment. The act contains the following: 'Said board shall prescribe such rules, regulations, and by-laws for its own proceedings and government as will carry into effect the provisions of this act.' And it is insisted that this provision will 'save the said act from being unconstitutional and void.' The provision is not sufficient to comply with the constitutional requirements. Even if it be conceded that a constitutional act can be passed which requires the board to provide due notice and hearing before judgment, this provision does not in terms make it mandatory upon the board to give due notice and hearing before judgment in the class of cases which includes the petitioner. The petitioner having complied fully with the requirements of the statute, the issue was, in contemplation of law, closed as to him. The action of the board as complained of was in effect the raising of a new issue by them, of which the petitioner had no notice until after judgment. The provision in the act for an appeal to the superior court after the board has rendered judgment of condemnation is not a compliance with the mandate of the Constitution.

It is not conceivable that the constitutional guaranty is satisfied when a hearing is provided only after judgment in such a case. To deprive one of the right to practice his profession is to subject him to humiliation, mortification, and injury, which the Constitution will not permit except in conformity with the law of the land and on evidence sufficient to authorize such a finding by an impartial tribunal. To say that one may be adjudged guilty of 'grossly unprofessional and dishonest conduct,' for the reasons stated by the board in this case, is to demonstrate the arbitrary power which the act undertakes to lodge in the state board of optometry."

Neither in that section of the act of 1913 which we have under review nor in any other portion of the act is provision made for notice to the accused and a hearing; and, though in this particular case the accused might have appeared and submitted evidence, that did not cure the defect in the act itself. If such a hearing was granted him, it was by grace, and not by virtue of the requirements of the law. Nor did the right of appeal to a jury in the superior court cure the defect in the law, as was expressly decided in the Mott Case. An extended discussion of the question is unnecessary.

[2] The statute under which the defendant was tried by the state board of medical examiners being invalid and void on the constitutional grounds pointed out, the proceedings before that board, which resulted in finding the defendant guilty of certain specified offenses, were nugatory, and the finding was without effect and void; and the appeal and trial before a jury under the provisions of the section in the statute set forth above could not have the effect of giving validity to the proceedings and findings before the board, nor could the finding of the jury in the superior court upon the appeal be treated otherwise than as void, as the statute under which the trial was had was itself invalid. Nor could the fact that the case was carried to the Court of Appeals of this state, where the judgment of the court below was affirmed, give validity to the proceedings, or bar the defendant from asserting, as he is seeking to assert here, that all proceedings had against him were nugatory. It is cogently argued by counsel for the plaintiffs in error that, if the act of the Legislature attacked as unconstitutional could be so held for any of the reasons set out in the plaintiff's petition, as to him the act is good and binding, because he appealed his case from the state board of medical examiners to the superior court of Carroll county, and then carried his case to the Court of Appeals of Georgia; and that he thereby waived the constitutionality of the law, and this waiver was binding. The argument is not without force. But this court has held that—

"One indicted and tried under an unconstitutional statute may, even after final conviction,

obtain his discharge from custody on a writ of habeas corpus." *Moore v. Wheeler*, 109 Ga. 62, 35 S. E. 116.

It appears from the report of the case just cited that the grand jury of Paulding county returned an indictment against Moore, charging him with the offense of selling spirituous and intoxicating liquors, and that he entered a plea of guilty and was sentenced, but subsequently sued out a writ of habeas corpus, whereby he sought to be discharged from the custody, and in his application for the writ he alleged that the indictment was void because based upon an act alleged to be unconstitutional. In the case of *Embry v. State*, 109 Ga. 61, 35 S. E. 116, the law upon which the indictment was founded had been held unconstitutional; and this court held that a verdict of guilty was therefore unauthorized. In the *Moore Case*, supra, the court said:

"It seems to be now well settled that, when one is indicted and tried under an unconstitutional statute, he may, even after final conviction and sentence, obtain his discharge from custody on a writ of habeas corpus [citing numerous decisions in other jurisdictions]. 'An unconstitutional enactment is never a law; and if there can be a case in which a conviction is illegal and without jurisdiction, it seems that such a case is presented when it appears either that there is no law making criminal the alleged crime, or authorizing its prosecution in the court wherein the sentence has been imposed.'"

In the case of *Griffin v. Eaves*, 114 Ga. 65, 39 S. E. 913, the ruling made in the *Moore Case* was upheld. The court said:

"Counsel for plaintiff in error, in support of his contention that the defendant in error cannot be discharged from custody under habeas corpus, relies upon *Daniels v. Towers*, 79 Ga. 785 [7 S. E. 120], wherein it is held: 'After a judgment of conviction for felony has been affirmed by the Supreme Court on writ of error brought by the convict, the legality of his conviction cannot be drawn in question by a writ of habeas corpus sued out by him, or by any other person in his behalf, save for want of jurisdiction appearing on the face of the record as brought from the court below to the Supreme Court. Such affirmance implies that he was tried by a court of competent jurisdiction legally constituted, and nothing to the contrary can be shown otherwise than by inspection of the record.' We do not think that decision is in conflict with the ruling made in *Moore v. Wheeler*, supra, or contravenes anything we have said in the present case. While it is an elementary principle that errors and irregularities, not jurisdictional, cannot be examined or inquired into on habeas corpus, that on questions of law and fact within the court's jurisdiction its decision is conclusive, and however erroneous its judgment may be, it cannot be reviewed collaterally on such writ; yet, as we have seen, it is firmly established that, where one is convicted and sentenced under an indictment founded upon an unconstitutional or repealed statute,

the court had no jurisdiction to render the particular judgment, and a discharge may be granted on habeas corpus, where the invalidity of the statute appears from the face of the indictment. The court in *Daniels v. Towers*, supra, recognized the rule that the legality of a conviction could be drawn in question by habeas corpus when the want of jurisdiction in the court appeared on the face of the proceedings."

See, also, *Collins v. Hall*, 92 Ga. 411, 17 S. E. 622.

It is further urged in this case that even if the principles which we have restated above, supporting them by quotations from decisions rendered by this court, are sound in criminal cases, the doctrine cannot be applied to civil cases; and it is insisted that the proceedings against the defendant in error, which resulted in his conviction and the revocation of his license, are civil proceedings. We cannot assent to this proposition in its entirety. The result, it is true, did not subject the defendant to imprisonment in the chain gang or the penitentiary, and resulted merely in the revocation of his physician's license and the striking of his name from the record kept in the office of the clerk of the superior court. But this itself was a penalty, and the proceedings are in the nature of criminal proceedings. The proceedings were certainly quasi criminal in character. In the section of the statute which authorizes the proceedings it is provided that—

"Said suspended physician shall have a right to appeal to a jury in the superior court of the county of his residence, and it shall be the duty of said board to prefer in writing the charge or charges against said physician, which shall be tried by a jury regularly empaneled and sworn. Said physician, the defendant in said proceedings, shall be entitled to an appeal to the Supreme Court. In the event of conviction by the jury of any of the charges preferred, the license of said physician shall be revoked."

The language of this provision, making it the duty of the board to "prefer charges against the physician," and providing for the revocation of his license "in the event of conviction" by the jury, distinctly imports a trial in a criminal case; and the doctrine stated in the cases from which we have quoted is plainly applicable to the case under consideration, without giving either to the decisions from which the quotations are taken or to the statute under which the defendant in error was tried a strained construction.

It follows from what we have said that the petitioner was entitled to injunctive relief against the threatened action of the state board of medical examiners, which, if carried out, would result in revoking and canceling his license and thereby depriving him of the right to pursue his profession; and it requires no argument to demonstrate that the injury which would thus be inflicted

would be irreparable in its character. The court below did not err in granting the injunctive relief complained of.

It is unnecessary to consider other objections raised to the statute in question, which are based upon constitutional grounds.

Judgment affirmed.

All the Justices concur, except ATKINSON, J., disqualified.

(149 Ga. 727)

DOWLING v. DOYLE. (No. 1467.)

(Supreme Court of Georgia. Jan. 17, 1920.)

(Syllabus by the Court.)

1. SPECIFIC PERFORMANCE ⇨108—INJUNCTION MAY ISSUE TO RESTRAIN EVICTION OF PLAINTIFF'S HUSBAND AS TENANT HOLDING OVER.

Where a suit by a married woman for specific performance of a contract to convey land is pending, and the defendant in that suit sues out a warrant to evict the plaintiff's husband (with whom the plaintiff resides) as a tenant holding over, injunction will issue, at the instance of the plaintiff in the suit for specific performance, to restrain the execution of the warrant, if it appear that the suit for specific performance is prosecuted in good faith and is well founded.

2. SPECIFIC PERFORMANCE ⇨28(2)—TRUSTS ⇨92½—TRUST MAY BE BASED ON CERTAIN ORAL AGREEMENT TO BID IN LAND AT SHERIFF'S SALE FOR DEFENDANT'S BENEFIT TO ALLOW APPLICATION OF REMEDY.

A plaintiff in execution who, at the instance of the defendant in execution in possession of land under a deed, bids off the land at a sheriff's sale, under a parol agreement with the defendant that he will buy in the land and take the sheriff's conveyance to himself for the benefit of the defendant and allow the defendant to redeem the land upon the payment of the judgment (the value of the land exceeding the amount of the judgment), and who, while the bidding is in progress, discourages bidding by others by stating that he is bidding in behalf of the defendant, holds as trustee for the latter such title as he derives from the sheriff, and, on being paid or tendered in due time the amount of the judgment with interest, may be compelled by decree to convey the premises to the defendant in execution by release or quitclaim deed.

(a) Whether the contract be such as is provable by parol or is required by the statute of frauds to be in writing, it must be certain and unequivocal in all its essential terms either within itself or by reference to some other agreement or matter, or it cannot be specifically enforced. The certainty required must extend to all the particulars essential to the enforcement of the contract.

(b) Under the facts in this record, the contract which the plaintiff sought to have specifically performed was certain and definite in all the particulars essential to its enforcement. The refusal of the interlocutory injunction

prayed, upon the ground that the contract, "not being in writing, is too indefinite to be enforceable," was error.

Error from Superior Court, Colquitt County; W. E. Thomas, Judge.

Suit by M. E. Dowling against M. N. Doyle for specific performance and for an injunction. A temporary injunction was dissolved, and petitioner brings error. Reversed.

J. L. Dowling was the owner of a certain tract of land in the city of Moultrie, purchased by him at a cost of \$650. He contracted with E. S. Nace to construct a dwelling thereon. He paid \$500 on the contract price, and placed other improvements upon the property at a cost to him of \$800. On the completion of the building he borrowed from an insurance company the sum of \$1,500, securing the loan by a deed to the premises. The \$1,500 so borrowed was also paid to the contractor. He still owed the contractor approximately \$800, and to secure this balance he executed a second lien upon the premises. In November, 1916, J. L. Dowling conveyed the premises to his wife, Mrs. M. E. Dowling. The conveyance was made subject to the liens aforesaid. J. L. Dowling failed to pay Mr. Nace or the insurance company. In December, 1916, Nace paid to the insurance company the money due it, and caused a transfer of its lien to be made to him. He thereupon instituted separate suits against J. L. Dowling, and recovered separate judgments against him, with special liens upon the land. In May, 1917, the *fi. fas.* issued from these judgments were levied upon the property. Before the sale of it on the first Tuesday in June, 1917, Nace and Mrs. Dowling, the latter acting through her husband, entered into an agreement by the terms of which Nace was to buy in the property at the sheriff's sale at the lowest possible figure (thereby saving commissions on the sale), for the benefit of Mrs. Dowling, and she was to redeem the property by paying the amount of the *fi. fas.* She was to continue to occupy the property as a home, and to pay Nace a monthly rental of \$30, which rental was to be accepted by Nace in lieu of interest and all taxes and insurance paid by him on the property to the date of its redemption by Mrs. Dowling, and so long as she (Dowling) paid the monthly rental promptly, she was to have the right to occupy the house and the right to redeem the property upon the terms stated. As a result of the agreement, Nace bought the property for \$500.

Mrs. Dowling, with her husband, occupied the dwelling and paid the stipulated monthly rental according to the agreement. Mr. Nace entered into the agreement in good faith, and at all times recognized its validity. In October, 1918, Mr. Dowling entered the military service, but before doing so Mr. Nace agreed

to protect the interest of Mrs. Dowling and to allow her to pay the money on the return of her husband. Mr. Nace died in November, 1918, and the agreement at the time of his death was in full force and effect. Thereafter his property, consisting largely of real estate, was, by consent of his administrator, partitioned in kind by his heirs at law; there being no debts and no necessity for the sale of the realty. Mrs. May Nace Doyle, one of the heirs at law of E. S. Nace, received in the division the house and lot in question. Before the partition of the realty, Mrs. Doyle was fully advised of the contract between Nace and Mrs. Dowling. She recognized and ratified the agreement, and accepted from Mrs. Dowling the monthly rental as stipulated until Mrs. Dowling had procured the full amount due upon the two *fi. fas.* against J. L. Dowling, her husband, and had tendered the same to her. The tender was unqualified and unconditional. Nevertheless Mrs. Doyle refused to accept the money and repudiated the agreement. Whereupon Mrs. Dowling filed her petition against Mrs. Doyle, for specific performance of the contract, therein continuing the tender. Subsequently, Mrs. Doyle filed an affidavit before a notary public and *ex officio* justice of the peace, in which she alleged that J. L. Dowling was her tenant and that he was holding over and beyond his term. Upon this affidavit a warrant was issued to evict J. L. Dowling from the premises.

Thereupon Mrs. Dowling filed the present equitable petition, alleging in substance the facts above set forth, and praying that the eviction warrant be enjoined. The defendant demurred and answered. In her answer she admitted the making of the contract substantially as set forth in the petition, and notice thereof before the division of the realty, except in the following particulars: The property was to be redeemed within six months after the sale of it by the sheriff; and upon failure to redeem, the *fi. fas.* against J. L. Dowling were to be canceled of record, and neither J. L. Dowling nor his wife was to have any further interest in the property or any further right under the contract. She further alleged that in August, 1917, more than a year after the sheriff's sale, Mr. Dowling advised Mr. Nace that he could not, and would not redeem the property, and demanded a cancellation of the *fi. fas.* Mr. Nace thereupon ordered the cancellation of the *fi. fas.*, and they were canceled before Nace's death. The defendant further pleaded that Mrs. Dowling had attempted to purchase the property from the defendant since the death of Mr. Nace, and had otherwise recognized the defendant's absolute title thereto. The evidence on behalf of the plaintiff and the defendant at the interlocutory hearing tended to sustain the allegations of the parties respectively. The judge who heard the cause rendered the following judgment:



"Upon consideration of this case which has been duly submitted, it appearing to the court that the contract relied upon by the plaintiff, not being in writing, is too indefinite to be enforceable, the restraining order heretofore granted is hereby dissolved."

Mrs. Dowling excepted.

Erle B. Askew, of Moultrie, and J. R. Potte, of Albany, for plaintiff in error.

Parker & Gibson, of Moultrie, for defendant in error.

GEORGE, J. (after stating the facts as above). [1] As a general rule, injunction will not issue to restrain a landlord who has sued out a dispossessionary warrant against a tenant alleged to be holding over beyond his term, upon the ground that the tenant has a good defense to the warrant which he is unable to avail himself of by filing a counter affidavit, because, by reason of his poverty, he cannot give the bond which the statute requires in connection with such affidavit. *Hall v. Holmes*, 42 Ga. 179; *Huff v. Markham*, 70 Ga. 284; *Brown v. Watson*, 115 Ga. 592, 41 S. E. 998. The general rule does not apply in this case. Mrs. Dowling was in the actual possession of the land. She claimed title thereto. Her suit for specific performance was pending at the time the defendant in that suit instituted eviction proceedings against Mr. Dowling. The warrant to evict, if executed, will have the effect to dispossess Mrs. Dowling, the plaintiff in the specific performance suit. In such circumstances injunction should issue if it appears that the suit for specific performance is in good faith and is apparently based on good grounds. *Pace v. Neely*, 113 Ga. 901, 39 S. E. 420.

Before considering the merits of the suit for the specific performance of the contract, two preliminary matters require notice. The agent and attorney representing Mrs. Dowling was permitted to testify to transactions with the deceased Nace. Counsel for the defendant in error contends that this evidence was illegally received and considered, and cites the case of *Kramer v. Spradlin*, 148 Ga. 805, 98 S. E. 487. In that case it was held that a legatee was an "assignee" of the testator, within the meaning of the Civil Code, § 5358. Mr. Nace made no will. There was an administration upon his estate. There being no debts, the administrator consented to a division of the realty by the heirs. The administrator was not a party to the suit. It appears that the evidence was admitted without objection. No question, therefore, is presented for decision here. See, however, *Oliver v. Powell*, 114 Ga. 592, 40 S. E. 826.

[2] It is urged that the evidence, being illegal, should not be considered, although not objected to in the court below. This court has heretofore suggested that evidence illegally admitted without objection may be considered by the court if the evidence has probative value. If the evidence has no

probative value, as for instance if it is purely hearsay, the court should not consider it, although admitted without objection, for the obvious reason that it proves nothing. The second matter to which attention is directed is the order of the court. Had the judge put his refusal of the interlocutory injunction on the facts which were controverted, or had he denied the injunction generally, the case would fall within the general rule that the discretion of the judge in granting or refusing interlocutory relief upon disputed issues of fact will not be controlled, unless manifestly abused. However, the judgment itself clearly discloses that the judge did not exercise a discretion. The judge found that the contract, "not being in writing, is too indefinite to be enforceable." Unless this conclusion—in final analysis a legal conclusion—is justified, the judgment refusing an interlocutory injunction should be reversed. *Head v. Bridges*, 72 Ga. 30 (2); *Spires v. Wright*, 147 Ga. 633, 95 S. E. 232 (2). The contract was in parol. The making of the contract and the terms thereof, except in the particulars noted in the statement of facts, were admitted by the defendant. The evidence clearly discloses that Mrs. Dowling was the owner of an equity of considerable value in the house and lot levied upon, and that she had arranged to have the property bid in by a third party for her benefit at the sheriff's sale. At this juncture Mr. Nace entered with Mrs. Dowling into the parol contract which she seeks to have specifically enforced. At the sale third parties submitted bids. They were advised of the agreement by Mr. Nace, and, being so advised, withdrew their bids. The validity of the contract, though in parol, is scarcely open to question.

In *Collins v. Williamson*, 94 Ga. 635, 21 S. E. 140, it was held:

"One who, at the instance of a vendee of land who was in possession under a bond for titles with none of the purchase money paid, bid off the land at a sheriff's sale, under a parol agreement with the vendee, the defendant in execution, that he would buy in the land, advance the money, and take the sheriff's conveyance to himself for the benefit of such vendee, and who, while the bidding was in progress, discouraged bidding by another by stating that he was bidding in behalf of the vendee, holds as trustee for the latter such title as he derived from the sheriff, and on being paid or tendered in due time the amount of his bid and all other money advanced by him in consequence of his purchase, with interest thereon, may be compelled by decree to convey the premises to said vendee by release or quitclaim deed."

See, also, *Chastain v. Smith*, 30 Ga. 96; *Rives v. Laurence*, 41 Ga. 283; *Gordon v. Spellman*, 145 Ga. 682, 89 S. E. 749, Ann. Cas. 852.

According to the undisputed evidence in this case, the property was worth approximately \$4,500. The amount of the judgments, principal and interest, was approxi-

mately \$2,800. Mr. Nace bought the property for only \$500. Mrs. Dowling's position is therefore somewhat similar to that of a purchaser under a parol contract, in actual possession, with a considerable portion of the purchase money paid. But for the agreement the property might have been purchased at the sheriff's sale by Mrs. Dowling, or some one for her, and her equity therein preserved. Had not bidders been deterred, the property presumably would have brought its full value, and Mrs. Dowling would have received the proceeds after the payment of the *fi. fas.* It would therefore be inequitable to hold that Mrs. Dowling is not entitled to specific performance of the contract, upon the ground that the contract was not in writing. But, as we have already seen, the defendant admits the contract, and the only controversy is with respect to the time in which Mrs. Dowling had the right to redeem the property. We recognize the rule that, whether the contract be such as is provable by parol or is required by the statute of frauds to be in writing, it must be certain and unequivocal in all its essential terms, either within itself or by reference to some other agreement or matter, or it cannot be specifically enforced. 2 Story's Eq. Jur. § 1053; *Miller v. Cotten*, 5 Ga. 341 (4); *Pomeroy on Contracts*, § 159 et seq. It is generally said that the amount of certainty required in the specific performance of a contract is greater than that in an action for damages at law. "For, to sustain the latter proceeding, the proposition required is the negative one, that the defendant has not performed the contract—a conclusion which may be often arrived at without any exact consideration of the terms of the contract; whilst in proceedings for specific performance it must appear, not only that the contract has not been performed, but what is the contract which is to be performed." Fry on Spec. Perf. § 380.

It has been pointed out that it would perhaps be more accurate to say that the difference between the two classes of cases is not in the amount or degree of the certainty required, but in the extent of the certainty. It is, however, established that the certainty required must extend to all the particulars essential to the enforcement of the contract. It is essential that the contract be certain and definite as to the promise or engagement, as to the parties to whom the conveyance is to be made, as to the description of the subject-matter, as to the consideration of the contract, and as to the time and mode of performance. According to the undisputed evidence, the contract between Mrs. Dowling and Mr. Nace was certain and definite as to the agreement to convey, as to the consideration to be paid by Mrs. Dowling, as to the party to whom the consideration should be

paid, to whom the conveyance should be made, and as to the description of the property to be conveyed. Nor do we think there is such uncertainty as to the time of performance as to defeat the right of the plaintiff to the relief sought. In all cases like the present "the certainty required must be a reasonable one, having regard to the subject-matter of the contract, and the circumstances under which and with regard to which it was entered into." Fry Spec. Perf. § 380, and cases cited in note.

According to the evidence for the plaintiff, no specific time was at first fixed in which she should pay the *fi. fas.* and redeem the property, but she should have the right to occupy the house and the right to redeem so long as she continued to pay the agreed monthly rental. When Mr. Dowling decided to enter the military service, it was agreed that Mrs. Dowling should have until the discharge of her husband from the military service and until his return in which to pay the judgments. Moreover, the evidence for the plaintiff tended to show that Mr. Nace at all times recognized the validity of the contract, and that the defendant likewise recognized its validity and never repudiated it until actual tender made. According to the evidence for the defendant, Mrs. Dowling had the right under the contract to redeem the property within six months from the date of the sheriff's sale, and at no time thereafter. While there is a clear conflict in the evidence, there is no uncertainty as to the time in the evidence offered by either party. If Mr. Nace agreed to allow Mrs. Dowling to redeem the property at any time while she remained in possession by the payment of the stipulated monthly rental, which was to cover interest, taxes, and insurance, and, while the agreement was still of force, consented to an extension of time until the happening of a definite event (the discharge of Mr. Dowling from the military service and his return home), the contract is not wanting in certainty as to the time of performance. If time were of the essence of the contract (but in this case, according to the plaintiff's evidence, the failure to redeem was taken care of by a fixed monthly payment to cover interest), it would be within the power of the parties to waive that condition. The case for the plaintiff is even stronger. She alleges (and her evidence tended to support the allegation) that she tendered unconditionally the full amount of the *fi. fas.* before the defendant attempted to repudiate the contract. From the foregoing it follows that the judgment refusing an interlocutory injunction upon the grounds stated by the judge must be reversed.

Judgment reversed.

All the Justices concur.

(24 Ga. App. 623)

**MOULTRIE GROCERY CO. v. CHARLESTON MILLING CO. (No. 10866.)**(Court of Appeals of Georgia, Division No. 2.  
Dec. 16, 1919. Rehearing Denied  
Feb. 7, 1920.)*(Syllabus by the Court.)***1. SALES §—22(4)—CONTRACT NOT MADE BY TELEGRAMS WHERE SELLER'S OFFER WAS NOT ACCEPTED UNCONDITIONALLY.**

A broker located at Albany, Ga., made an offer by telegram on July 18, 1916, to the Charleston Milling Company, a corporation situated at Charleston, Mo., to sell to the Moultrie Grocery Company "2,000 barrels of flour, basis Eclipse Brand, plain, sacked, delivered Moultrie," at \$5.85 per barrel, and in reply to his offer received the following telegram from the Charleston Milling Company: "Decline Moultrie. Will book School Days \$6.40; Eclipse, plain, \$6.10; self-rising, \$6.30; Queen South, self-rising, \$5.20; put your force behind Eclipse. Have understanding all contracts prorated monthly and give specifications first car immediately; needing prompt shipping order; market still advancing." In response to this telegram the broker on July 19, 1916, wired "Book Moultrie per your message Eclipse \$6.10; Daisy self-rising \$6.10; Queen of South \$5.20." On July 22, 1916, the milling company notified the broker by wire that "Moultrie booking declined account price Daisy self-rising; quotations all made subject to confirmation as advised, especially on such a radically advancing market. Don't work Jacksonville, Snyder Bros. our representatives." It appears from this correspondence, as well as from the undisputed evidence adduced on the trial, that not only was there a substitution by the broker in his telegram of acceptance of "Daisy self-rising, \$6.10," for "School Days \$6.40," as contained in the telegram making the offer, but that the latter brand of flour was not a self-rising flour, whereas the one substituted in lieu thereof was a self-rising flour. *Held*, that while a contract may be made by telegram, the telegrams which were the basis of this suit did not constitute a complete contract between the Moultrie Grocery Company and the Charleston Milling Company, since the broker's offer was not accepted by the seller unequivocally, unconditionally, and without variance. There was no mutual assent of the parties to the same thing in the same sense. *Robinson v. Weller*, 81 Ga. 704, 8 S. E. 447; *Stix v. Rouleston*, 83 Ga. 748, 15 S. E. 826; *Harris v. Lumber Co.*, 97 Ga. 465, 25 S. E. 519; *Larned v. Wentworth*, 114 Ga. 209, 39 S. E. 855; *Harper v. Ginn's Mutual Insurance Co.*, 6 Ga. App. 139, 142, 64 S. E. 567; *Phinixy v. Bush*, 129 Ga. 479, 59 S. E. 259; *Pennsylvania Fire Ins. Co. v. Sorrells*, 23 Ga. App. 398, 98 S. E. 358. The trial judge therefore did not err in granting a nonsuit.

**2. ASSIGNED ERROR NOT CONSIDERED.**

Under the above ruling it is unnecessary to pass upon the fifth ground of error set out in the bill of exceptions, in which it is alleged that the defendant in the court below waited an unreasonable length of time to repudiate or refuse to accept the order made by the plain-

tiff in the court below for the sale and purchase of the flour.

Error from Superior Court, Colquitt County; W. E. Thomas, Judge.

Action by the Moultrie Grocery Company against the Charleston Milling Company. Judgment of nonsuit, and plaintiff brings error. Affirmed.

W. F. Way, of Moultrie, for plaintiff in error.

James Humphreys and Dowling & Askew, all of Moultrie, for defendant in error.

SMITH, J. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(24 Ga. App. 698)

**SLEDGE v. STATE. (No. 11029.)**(Court of Appeals of Georgia, Division No. 1.  
Jan. 27, 1920.)*(Syllabus by the Court.)***1. CRIMINAL LAW §—522(3)—CONFESSION ADMISSIBLE AS FREE AND VOLUNTARY.**

The amendment to the motion for a new trial contains only one ground, which is as follows: "Because the following evidence was illegally admitted to the jury by the court over the objection of the defendant, to wit, S. A. Smith, sheriff, and W. R. Fuller, testified that after defendant ran, Jackson had shot several times, and while defendant was handcuffed and was bloody and bleeding from a blow on his head struck by Smith, the sheriff, he was asked by Smith, the sheriff, whose liquor it was, and he, Sledge, said it was his. Movant objected to the admission of said evidence at the time same was offered, and did then and there urge the following objection thereto: that said testimony was illegal, and showed on its face that said alleged confession was made after Jackson had shot several times, after defendant had been struck on the head by the sheriff, while he was handcuffed and was bloody and bleeding on account of said blow, and after he had been caught by Smith and Jackson, and brought back where he and Sivell were. Under said circumstances, said alleged confession could not have been freely and voluntarily made, without the slightest hope of benefit or remotest fear of injury." On the trial of the case, S. A. Smith, the sheriff, swore that he, "W. R. Fuller, and Mr. Jackson, a revenue man from Newnan, Ga., went to where Will Sledge lives, and saw Will Sledge and a negro by the name of Sivell sitting out near the well, on a log of wood. Witness, Fuller, and Jackson drove around the house towards where Sledge and Sivell were, and when Sledge saw a car coming he jumped up and commenced to run, and when he did Jackson shot several times. Doesn't know whether he shot at Sledge or shot into the ground. Witness and Jackson ran after Sledge and caught him, and was

fixing to put handcuffs on him when Sledge jerked back. Witness struck him over the head with the handcuffs. That was what caused the blood on him when he was brought back to where he and Sivell were. There was a gallon jug of whisky and a drinking glass near where they were sitting. After Sledge was caught and had been struck with handcuffs, and after Jackson had shot several times, I asked him whose liquor it was, and he said it was his. No promises or threats were made. His confession was voluntary. We then searched his smokehouse and found several empty bottles and jugs that smelled like they had had whisky in them. This was in Troup county, Ga." The evidence of W. R. Fuller was substantially the same as that of the sheriff. In reference to the alleged confession, Fuller testified: "No promises were made (defendant) and no threats were made. The confession was made freely and voluntarily." Under the ruling in *Smith v. State*, 139 Ga. 230, 76 S. E. 1016 (1), the court did not err in admitting the evidence of which complaint is made.

## 2. SUFFICIENCY OF EVIDENCE.

There was ample evidence to support the verdict, and no error of law appears.

Error from City Court of La Grange; Duke Davis, Judge.

Will Sledge was convicted of an offense, his motion for new trial was denied, and he brings error. Affirmed.

Henry Reeves, of La Grange, for plaintiff in error.

L. L. Meadors, Sol., of La Grange, for the State.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(24 Ga. App. 695)

GRAHAM v. MARYLAND MUT. LIFE INS. CO. (No. 10973.)

(Court of Appeals of Georgia, Division No. 1. Jan. 27, 1920.)

(Syllabus by the Court.)

1. INSURANCE §188(1)—PROVISION IN LIFE POLICY THAT IT SHOULD NOT BE OF FORCE UNTIL FIRST PREMIUM ACTUALLY PAID WOULD NOT DEFEAT SUIT ON PAST-DUE NOTES GIVEN FOR FIRST ANNUAL PREMIUM.

Where the insurer sues the insured upon unpaid past-due promissory notes given for the first annual premium on a policy of life insurance, which was delivered to and accepted by the insured, a recovery for the full amount of the notes, with interest and attorney's fees, cannot be defeated on the ground of a failure of consideration, total or partial, in that the policy provided that it should not become of force until the first premium had actually been paid, and that a failure to pay any premium

note when due would void the policy. 25 Cyc. 756, note 46; *Id.* 758, notes 62 and 63; *Id.* 759, note 69; *Id.* 760(4), note 79.

## 2. EVIDENCE NOT SUPPORTING PLEA THAT PREMIUM NOTE WAS PROCURED BY FRAUD.

The defendant's plea of fraud in the procurement of the notes sued upon was not supported by any evidence.

## 3. DIRECTED VERDICT.

Under the above rulings the court did not err in directing a verdict for the plaintiff for the full amount sued for.

Error from Superior Court, De Kalb County; Chas. W. Smith, Judge.

Action by the Maryland Mutual Life Insurance Company against E. A. Graham. Judgment for plaintiff on a directed verdict, and defendant brings error. Affirmed.

Ralph McClelland, of Atlanta, for plaintiff in error.

L. J. Steele, of Decatur, for defendant in error.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(24 Ga. App. 707)

SOUTHEASTERN FAIR ASS'N v. WONG JUNG. (No. 10969.)

(Court of Appeals of Georgia, Division No. 1. Jan. 28, 1920.)

(Syllabus by the Court.)

MASTER AND SERVANT §329—PETITION FOR CAUSING DEATH BY UNLAWFUL ASSAULT ON FAIR ASSOCIATION'S CONCESSIONAIRE INSUFFICIENT.

The court erred in overruling the general demurrer to the petition.

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by Wong Jung against the Southeastern Fair Association. General demurrer to amended petition overruled, and defendant brings error. Reversed.

Mayson & Johnson and W. D. Ellis, Jr., all of Atlanta, for plaintiff in error.

B. H. & Harvey Hill and Fred E. Harrison, all of Atlanta, for defendant in error.

BROYLES, C. J. This was a suit for damages based upon the alleged willful homicide of the plaintiff's husband by an employé of the defendant. The petition as amended showed that the defendant, the Southeastern Fair Association, was a corporation operating for pecuniary gain a fair in Fulton county, and that it let out for hire various concessions upon its grounds, such as restau-

(102 S.E.)

rants, cafés, and soft drink stands; that it had rented for a large sum a concession to the plaintiff's husband (a Chinaman), and had located it at a certain place on the fair grounds; that one McDonald was employed by the defendant as its manager of concessions; and that as such manager, and as servant and agent of the defendant, acting for and in behalf of it, he ordered the plaintiff's husband to change the location of his concession, and, upon the latter's refusal to do so, McDonald struck him on the head with an iron instrument thereby killing him. The petition further alleged that this assault was without provocation or justification, and was wanton, willful, and unlawful, but was within the scope of McDonald's employment as manager of concessions, and was committed for the purpose of forcing the concessionaire to move his concession, and was for the purpose of accomplishing in an unlawful manner the business of the corporation which had been intrusted to him.

Section 3603 of the Civil Code of 1910 is as follows:

"The principal is not liable for the willful trespass of his agent, unless done by his command or assented to by him."

Section 4413 reads as follows:

"Every person shall be liable for torts committed by his wife, and for torts committed by his child, or servant, by his command or in the prosecution and within the scope of his business, whether the same be by negligence or voluntary."

These two Code sections should be construed together, so as to harmonize them and allow both to remain of force, in the cases to which they are applicable. *Western & Atlantic Railroad v. Turner*, 72 Ga. 292 (2a), 53 Am. Rep. 842.

The petition in the instant case shows that the agent or servant of the defendant committed an unprovoked, wanton, willful, and unlawful assault upon the plaintiff's husband, which caused his death, but it fails to show that it was done by the defendant's command or that it was assented to by the defendant, or that it was in the prosecution or within the scope of the master's business. The general allegations in the petition to the effect that the assault was in the prosecution, and within the range of the master's business and within the scope of McDonald's employment, are mere conclusions of the pleader, and are not sustained by any fact or facts set forth in the petition. When the petition is construed as a whole, and most strongly against the plaintiff, it shows that the assault by McDonald was not committed for the purpose of accomplishing his master's business by having the Chinaman's concession relocated, but merely that it was made to punish the Chinaman for the "back talk" which the petition shows he made when Mc-

Donald notified him that his concession must be relocated. In making this willful and unnecessary assault, it appears that McDonald temporarily forgot his master's business, stepped aside therefrom, and made it a personal matter with the Chinaman, and inflicted the beating to relieve his own anger and ruffled feelings. If McDonald had attempted physically to remove the concession to another location on the fair grounds (conceding that he had implied authority to do so), and the Chinaman by physical force had attempted to prevent the removal, and McDonald had then assaulted him for the purpose of making him desist from his interference, then, even though McDonald used more force than was necessary, it would be properly held that the assault, although criminal, in that more force than necessary was used, was nevertheless within the range of his employment, and was committed for the purpose of accomplishing the business of his master which had been intrusted to him. See, in this connection, *Southern Ry. Co. v. James*, 118 Ga. 840, 45 S. E. 303, 63 L. R. A. 257. It is, however, difficult to see how such a willful, unprovoked, unnecessary, and disconnected assault as the one now under consideration could ever be held to be within the scope of the servant's employment, unless it was directed by the master or assented to by him; it not appearing that the servant had authority, express or implied, to use any degree of physical force whatever to carry out his master's business.

This ruling is not in conflict with the decision in *Southern Ry. Co. v. James*, supra, cited and relied upon as controlling in this case by the learned counsel for the defendant in error. In that case the servant was a night watchman employed by the railroad company for the special purpose of arresting all trespassers upon the company's property. He arrested James as a trespasser, and was taking him to jail, when James broke away and fled. The watchman shot and wounded him, and James sued the railroad company for damages. While the Supreme Court in that case discussed generally the question of a master's liability for his servant's tort, the real point decided was that the railway company was liable for the criminal shooting of the trespasser by its servant, for the reason that he had been employed by the company for the special purpose of arresting and imprisoning trespassers, and, in this connection, had been given orders by the company which implied the use of force and violence to others, and which left it to his discretion to decide when the occasion required force, and the kind and extent of force to be used. That case is clearly distinguishable from the instant one. See, in this connection, 28 Cyc. 1539, 1540, 1541, 1542, and authorities there cited.

In the absence of anything in the petition

showing that a duty rested upon the defendant to protect its concessionaires from violence, or that it was within the defendant's authority, or within the range of its business, to force a concessionaire to relocate his concession after he had paid for the privilege of operating it at the place where it had been located by the proper agents of the defendant, or that McDonald had any authority, by virtue of his employment as manager of concessions, or otherwise, to order a concessionaire to relocate his concession, and especially to use actual physical force to compel him to do so, it does not appear that the willful, unprovoked, and murderous assault committed by McDonald was within the range and scope of the defendant's business, or McDonald's employment. If it were, then a real estate agent employed by the owner of a house to collect rent therefor who willfully killed the tenant for his mere refusal to pay the rent would be acting within the scope of his employment, and the property owner would be liable in damages for this willful and unauthorized act of his agent; or if a merchant sent a professional bill collector to collect an account past due, and the collector willfully and wantonly killed the debtor upon his mere refusal to pay the account, then the merchant would be liable civilly for this act of his agent. Such rank injustice cannot be the law. The defendant's agent, McDonald, is clearly liable, both civilly and criminally, for his tort, but, under the facts of the case as shown by the amended petition, the defendant is not responsible therefor, either legally or morally.

It follows that the court erred in overruling the defendant's general demurrer to the amended petition.

Judgment reversed.

LUKE and BLOODWORTH, JJ., concur.

(24 Ga. App. 689)

HIGHTOWER v. DAVIS. (No. 10950.)

(Court of Appeals of Georgia, Division No. 1.  
Jan. 27, 1920.)

(Syllabus by the Court.)

1. CERTIORARI  $\S$  70(4) — UNSANCTIONED PETITION FOR CERTIORARI CANNOT BE SENT UP AS PART OF RECORD.

An unsanctioned petition for certiorari cannot be specified or sent up as part of the record. It should be incorporated in the bill of exceptions or be verified as a part thereof by the trial judge. *Hall v. State*, 2 Ga. App. 437, 58 S. E. 558, and citations; *McGovern v. Trammell*, 14 Ga. App. 754, 82 S. E. 318.

(a) An unsanctioned petition not incorporated in the bill of exceptions but specified and sent up as a part of the record is not sufficiently identified by the mere attaching to the bill of

exceptions, and following the judge's certificate, of the paper which purports to be the original petition, or a copy thereof, with the order refusing sanction. *Sullivan v. Surrency*, 15 Ga. App. 301, 303, 82 S. E. 926; *Hollingsworth v. College Park*, 17 Ga. App. 372, 86 S. E. 945.

2. DISMISSAL OF WRIT OF ERROR.

Under the above ruling, the writ of error must be dismissed.

Error from Superior Court, Fayette County; W. E. H. Searcy, Jr., Judge.

Action between J. G. Hightower and J. E. Davis. Judgment for the latter, certiorari denied, and the former brings error. Dismissed.

W. B. Hollingsworth, of Fayetteville, for plaintiff in error.

J. W. Oulpepper, of Fayetteville, for defendant in error.

BROYLES, C. J. Writ of error dismissed.

LUKE and BLOODWORTH, JJ., concur.

(24 Ga. App. 671)

JONES v. STAPLER. (No. 10636.)

(Court of Appeals of Georgia, Division No. 1.  
Jan. 7, 1920. Rehearing Denied  
Jan. 27, 1920.)

(Syllabus by the Court.)

1. NEW TRIAL  $\S$  78(1) — TRIAL JUDGE HAS DISCRETION TO GRANT NEW TRIAL AFTER SECOND VERDICT FOR SAME PARTY.

Twice has this case been tried by a jury. The verdict on the second trial was for just double the amount found by the jury on the first trial, and was for the full amount sued for. The order granting the new trial after the second verdict was in general terms. In *Richie v. Louisville & Nashville Railroad Co.*, 23 Ga. App. 741, 99 S. E. 309, this court held: "It appears to be conclusively settled that, notwithstanding the return of a second verdict in favor of the same party, the trial judge may still exercise his discretion in granting or refusing a new trial, though that discretion may not then be as ample as on the hearing of the motion for a first new trial (*Morgan v. Lamb*, 16 Ga. App. 484, 85 S. E. 792, and cases there cited), and under the particular facts of the instant case the second grant of a new trial was not an abuse of the discretion vested in the trial judge." As in that case we held that "under the particular facts of the instant case the second grant of a new trial was not an abuse of the discretion vested in the trial judge," so we hold in this case.

2. ERRORS NOT NECESSARY TO CONSIDER.

As a new trial is to be had in this case, the errors, if errors they are, complained of in the special grounds of the motion for new trial, are such as will not likely recur on an-

other trial, and it is not necessary to pass upon them.

Error from City Court of Macon; Du Pont Gerry, Judge.

Action by I. E. Jones against Mrs. M. M. Stapler. Verdict and judgment for plaintiff, and from the second grant of a new trial defendant brings error. Affirmed.

Julian F. Urquhart, Hall & Grice, and Chas. J. Bloch, all of Macon, for plaintiff in error.

Jno. R. L. Smith, Grady O. Harris, and Peter F. Brock, all of Macon, and Reagan & Reagan, of McDonough, for defendant in error.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(24 Ga. App. 695)

WARD v. WARD. (No. 10979.)

(Court of Appeals of Georgia, Division No. 1.  
Jan. 27, 1920.)

*(Syllabus by the Court.)*

**1. MARRIAGE §40(10)—PRESUMPTION OF VALIDITY NEGATED ONLY BY DISPROVING REASONABLE POSSIBILITIES.**

Whoever attacks the validity of a marriage has the burden of proving its invalidity by clear, distinct, and positive proof. The presumption as to the validity of a marriage can only be negated by disproving every reasonable possibility. *Murchison v. Green*, 128 Ga. 339, 342, 57 S. E. 709, 11 L. R. A. (N. S.) 702; 26 Cyc. 877(2).

**2. MARRIAGE §40(8, 11) — ONE ATTACKING VALIDITY OF SECOND MARRIAGE HAS BURDEN OF SHOWING THAT NO DIVORCE HAD BEEN GRANTED FROM PREVIOUS HUSBAND OR WIFE.**

Where a second marriage by a person is established, and it is shown that he or she had previously married another person, who was living at the time of the second marriage, the presumption is that the first marriage had been dissolved by a decree of divorce, and the burden is upon the person attacking the validity of the second marriage to show that a divorce had not been granted. 26 Cyc. 880(4), note 37, and authorities there cited.

**3. APPEAL AND ERROR §1052(8)—ADMISSION OF EVIDENCE WAS HARMLESS WHERE WITHOUT IT THE SAME JUDGMENT WOULD HAVE BEEN DEMANDED.**

Under the above rulings, and the facts of the instant case, the court did not err in direct-

ing a verdict for the caveatrix; and the error in allowing, over the objections of the other party, oral testimony to the effect that the caveatrix had secured a divorce from her first husband, was harmless, and does not require a new trial. If this illegal evidence had been eliminated, a finding in favor of the validity of the second marriage of the caveatrix would still have been demanded.

Error from Superior Court, Floyd County; Moses Wright, Judge.

Caveat by Mrs. J. F. Ward against E. W. Ward. Judgment for caveatrix, and defendant brings error. Affirmed.

M. B. Eubanks, of Rome, for plaintiff in error.

Maddox & Doyal, of Rome, for defendant in error.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(24 Ga. App. 696)

WARD v. WARD. (No. 10980.)

(Court of Appeals of Georgia, Division No. 1.  
Jan. 27, 1920.)

*(Syllabus by the Court.)*

**1. REVIEW ON APPEAL.**

This case is controlled by the decision in *Ward v. Ward* (No. 10979) 102 S. E. 35, this day rendered.

**2. APPEAL AND ERROR §1078(1) — ASSIGNMENTS NOT REFERRED TO IN BRIEF ARE TREATED AS ABANDONED.**

There are some assignments of error in this case which were not raised in case No. 10979; but, as they are not referred to in the brief of counsel for the plaintiff in error, they are treated as abandoned.

Error from Superior Court, Floyd County; Moses Wright, Judge.

Proceeding between E. W. Ward and Mrs. J. F. Ward. Judgment for the latter, and the former brings error. Affirmed.

M. B. Eubanks, of Rome, for plaintiff in error.

Maddox & Doyal, of Rome, for defendant in error.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(24 Ga. App. 530)

**ATLANTIC PAPER & PULP CORPORATION v. BOWEN. (No. 10623.)**(Court of Appeals of Georgia, Division No. 1.  
Dec. 10, 1919. Rehearing Denied  
Jan. 27, 1920.)*(Syllabus by the Court.)***MASTER AND SERVANT — 107 (3)—PLEADING  
— 248 (12)—NEGLIGENCE IN ERECTING DEFECTIVE  
ROOF SUPPORTS ACTIONABLE;  
AMENDMENT NOT SETTING OUT NEW CAUSE  
OF ACTION.**

On the former appearance of this case before this court, it was held that "this case in principle is controlled by *Byrd v. Thompson*, 146 Ga. 800, 91 S. E. 100, and cases cited. The court erred in overruling the general demurrer to the petition." See 23 Ga. App. 250, 97 S. E. 863, where the allegations in the original petition are set out. After the above decision and before the judgment of this court was made the judgment of the superior court, plaintiff amended his petition, and, among other things, alleged that the defendant company had three vice principals, Wilbur, Stokes, and Overstreet, each of whom was an alter ego of the corporation; that they were in charge of the construction of the shed that collapsed and caused the injury to the plaintiff; that in behalf of the defendant company they had and exercised the power and authority of laying out, directing, supervising, and controlling the work of the employes on this job, of determining how the work should be done, and seeing that it was done; that the defects which caused the collapse of the building "were not due to the negligence of fellow servants of petitioner," but "were defects of material and of construction furnished and erected under the supervision of the vice principals of the defendant company, namely, Wilbur, Stokes, and Overstreet"; that, "just prior to the time petitioner and other employes were ordered upon the roof, the defendant company had made no inspection of the roof girder H, or of the supports of the section of the building which collapsed"; that "petitioner did not know that such inspection had not been made, and did not know of the defects described, but relied, as he had a right to rely, upon the due performance of the duty of the defendant to its employes, and supposed that his employer would not send him upon a structure weak, defective, and dangerous"; that "the defendant company knew of the defects and weakness of the roof girder H. It knew of the defects and weakness of the support B. It knew of the condition of the ground underneath, and that the same was likely to settle. The defendant company knew that the end of the roof was likely to collapse; it knew that no inspection had been made; \* \* \* that petitioner had never worked about the end of the building or about the girder which collapsed. He did not know of the defects in the construction and erection of the roof girder, its support, or the ground underneath. He knew none of the defects complained of, \* \* \* could not ascertain the same in the exercise of ordinary care, was in the exercise of ordinary care, and is free from fault. To petitioner the dangers

and defects in the south end of the building were latent and concealed dangers, unknown to him, and not discoverable in the exercise of ordinary care. They were dangers known to the defendant company. \* \* \* The defendant company did not perform its duty to petitioner by warning him of the dangers by which he would be threatened." There is also an allegation that "roof girder H, the flooring joists on top thereof, and the sheathing nailed on top of the roof flooring joists, were permanent structures. They had been completed." It is also alleged that "the weight of the roof timbers, the sheathing, and the men doing the work, was about 20,000 pounds." The allegations of negligence in the petition, as amended are, in part, as follows: "In failing to determine and ascertain the amount of weight of the various timbers, building material, and workmen to be carried by the roof; in erecting and constructing under the supervision of its vice principals a defective girder insufficient to carry the weight of the roof and the materials and workmen to be supported thereby; in placing a certain support upon a defectively filled place in the ground, which the defendant company knew to be defective and would settle; in failing properly to inspect the said roof structure prior to sending workmen and material thereupon; in failing to warn petitioner of the defective construction of the section that had been thus defectively constructed by its vice principals. Because the defendant company did not, as the building progressed in its erection, make the same safe, secure, and stable in its permanent and completed portions, \* \* \* and in placing upon said section a greater quantity of building material than the same could carry, the defendant company having placed on said roof approximately 20,000 pounds of men and material, when the same was so defectively constructed that it would not carry the same."

The amendment to the petition clearly takes the case out of the ruling in the case of *Byrd v. Thompson*, supra, as it alleges that the injury to the plaintiff was not due to the negligence of fellow servants; that the servant had no knowledge of the defects complained of, but that the master had knowledge thereof and failed to disclose the defects to the plaintiff; and there is also an allegation that "roof girder H, the flooring joists on top thereof, and the sheathing nailed on top of the roof flooring joists, were permanent structures. They had been completed."

The issue to be determined here arises on a demurrer to the petition, and all matters in the petition well pleaded must be accepted as true. It is therefore held:

(1) The amendment to the petition did not set out a new and distinct cause of action. See *City of Columbus v. Anglin*, 120 Ga. 785 (5, 6), 789 (3, 4, 5), 796 (6), 48 S. E. 318.

(2) The petition as amended set out a cause of action, and the demurrers thereto were properly overruled.

Error from Superior Court, Chatham County; P. W. Meldrim, Judge.

Action by John Bowen against the Atlantic Paper & Pulp Corporation. Demurrers to petition overruled, and defendant brings error. Affirmed.



(102 S.E.)

Travis & Travis and Hitch & Denmark, all of Savannah, for plaintiff in error.

Oliver & Oliver, of Savannah, for defendant in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(24 Ga. App. 572)

ATLANTIC PAPER & PULP CORPORATION v. JOHNSON. (No. 10624.)

(Court of Appeals of Georgia, Division No. 1.  
Dec. 10, 1919. Rehearing Denied  
Jan. 27, 1920.)

(Syllabus by the Court.)

#### REVIEW ON APPEAL.

This is a companion case to that of Atlantic Paper & Pulp Corporation v. Bowen, 102 S. E. 36, and is controlled by the opinion rendered in that case.

Error from Superior Court, Chatham County; P. W. Meldrim, Judge.

Action by B. R. Johnson against the Atlantic Paper & Pulp Corporation. Judgment for plaintiff, and defendant brings error. Affirmed.

See, also, 97 S. E. 868.

Travis & Travis and Hitch & Denmark, all of Savannah, for plaintiff in error.

Oliver & Oliver, of Savannah, for defendant in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(24 Ga. App. 572)

ATLANTIC PAPER & PULP CORPORATION v. OWENS. (No. 10625.)

(Court of Appeals of Georgia, Division No. 1.  
Dec. 10, 1919. Rehearing Denied  
Jan. 27, 1920.)

(Syllabus by the Court.)

#### REVIEW ON APPEAL.

This is a companion case to that of Atlantic Paper & Pulp Corporation v. Bowen, 102 S. E. 36, and is controlled by the opinion rendered in that case.

Error from Superior Court, Chatham County; P. W. Meldrim, Judge.

Action by F. J. Owens against the Atlantic Paper & Pulp Corporation. General demurrer to petition overruled, and defendant brings error. Affirmed.

See, also, 97 S. E. 867, 869.

Travis & Travis and Hitch & Denmark, all of Savannah, for plaintiff in error.

Oliver & Oliver, of Savannah, for defendant in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(24 Ga. App. 621)

McFARLAND v. McFARLAND. (No. 10774.)

(Court of Appeals of Georgia, Division No. 2.  
Dec. 16, 1919. Rehearing Denied  
Feb. 7, 1920.)

(Syllabus by the Court.)

**LIMITATION OF ACTIONS §130(7)—DISMISSAL FOR WANT OF JURISDICTION PREVENTED RUNNING OF STATUTE AGAINST SUBSEQUENT SUIT IN COUNTY OF DEFENDANT'S RESIDENCE.**

Where a person was sued in a county other than that of his legal residence or domicile, and the sheriff's entry of service stated that the defendant was served by leaving a copy "at his place of residence," and the defendant appeared and filed a plea to the jurisdiction, alleging that he was a resident of another county, naming the county, traversing the entry of service making the sheriff a party to the traverse, and upon the trial of the traverse and the issue made on the plea to the jurisdiction two separate verdicts were rendered, the first sustaining the traverse to the return of the sheriff and the other sustaining the plea to the jurisdiction, upon which verdicts the court entered a judgment reciting the verdicts and dismissing the case for want of jurisdiction, *held*, that this suit was such a suit as prevented the statute of limitations from running as against a subsequent suit brought for the same cause of action within six months in the county of the defendant's true residence.

Error from Superior Court, Brooks County; W. E. Thomas, Judge.

Action by T. F. McFarland, as executor of J. M. McFarland, deceased, against J. A. McFarland. Judgment for plaintiff, and defendant brings error. Affirmed.

W. M. Henry, of La Fayette, and Jno. E. Morris, Jr., of Quitman, for plaintiff in error.

R. M. W. Glenn, of Chattanooga, Tenn., and Branch & Snow, of Quitman, for defendant in error.

SMITH, J. On July 30, 1917, T. J. McFarland, as executor of J. M. McFarland, brought suit in the superior court of Brooks county against J. A. McFarland, seeking to recover upon two promissory notes. One note was dated January 27, 1892, and the other dated March 12, 1892, each being for a specified amount of money as principal, both

bearing interest from date at the rate of 8 per cent. per annum, and both due one day after date. The petition in one paragraph alleged that the former suit had been brought upon said notes in the superior court of Walker county, Ga., and was filed January 7, 1912, and nonsuited and discontinued on February 19, 1917. The petition further alleged that all the costs of the former suit had been paid and that this last suit was brought within six months from the date of the dismissal. The petition did not attach a transcript of the record from the superior court of Walker county. To this latter suit the defendant filed two pleas, one a plea of payment and the other a plea of the statute of limitations, and upon the trial of the case the plaintiff introduced in evidence a certified transcript of the proceedings in the superior court of Walker county. After the evidence was all in, the court charged the jury on all the issues involved in the case, except the issue as to the statute of limitations. Defendant's counsel called his attention to this omission, and he declined to charge on this subject, giving as his reason that the statute of limitations was not involved in the case. This ruling was not error, as, under the testimony introduced by the plaintiff, the suit in the superior court of Walker county was such a suit as prevented the statute of limitations from running, and the bringing of the subsequent suit within six months thereafter and after payment of costs was allowable under the law. See *Mitchell County v. Dixon*, 20 Ga. App. 21, 92 S. E. 405; *Atlanta, K. & N. Ry. Co. v. Wilson*, 119 Ga. 782, 47 S. E. 366.

There was evidence to support the verdict. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(24 Ga. App. 715)

CAISON v. GROOVER. (No. 10814.)

(Court of Appeals of Georgia, Division No. 1. Jan. 29, 1920.)

(*Syllabus by the Court.*)

REPLEVIN §8(1)—TITLE IN PLAINTIFF, OR RIGHT OF POSSESSION WITHHELD, MUST BE SHOWN.

Mrs. Caison qualified as natural guardian of her son, Ivy Caison, a minor. Ivy purchased an automobile, and gave his notes therefor, which were indorsed by his mother. He sold the car, and his mother, as his guardian, brought trover to recover it. On the trial the mother swore: "I bought the automobile for Ivy, and let him have it, and he generally drove it; but he did not have any right to sell it or dispose of it in any way. When we bought the car, Ivy gave his notes for it, and I indorsed them,

and have had them to pay. Of course, it was Ivy's car. As to whether it is my car or Ivy's, I will say that Ivy gave his notes for it, and I have had them to pay; but I have always considered it Ivy's car." So far as the evidence shows, the plaintiff had never had title, possession, or right of possession of the automobile. "To maintain an action of trover, the plaintiff must show title in himself, or the right of possession wrongfully withheld from him by the defendant." *Dudley v. Isler*, 21 Ga. App. 615, 94 S. E. 827 (3), and cases cited. The jury properly found a verdict for the defendant, and the court did not err in refusing to set the verdict aside on a motion for a new trial, based on the general grounds only.

Error from City Court of Hinesville; W. O. Hodges, Judge.

Action by Fannie Caison, as guardian, against Charlie Groover. Verdict and judgment for defendant, motion for new trial denied, and plaintiff brings error. Affirmed.

C. L. Cowart, of Glennville, for plaintiff in error.

Ben A. Way, of Hinesville, for defendant in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(24 Ga. App. 681)

ROME RY. & LIGHT CO. v. THOMAS.  
(No. 10840.)

(Court of Appeals of Georgia, Division No. 1. Jan. 27, 1920.)

(*Syllabus by the Court.*)

1. TRIAL §25(12)—PLEA HELD NOT SUCH A PLEA OF JUSTIFICATION AS TO ENTITLE DEFENDANT TO OPEN AND CLOSE.

In a suit against a railroad company, a plea which admits that the plaintiff was injured by the running of the cars, but denies negligence and asserts ordinary diligence upon its part, and alleges that the negligence of the plaintiff caused the injury, is not such a plea of justification as will entitle the defendant to the opening and conclusion in the case. See *Georgia Railroad v. Williams*, 74 Ga. 723 (2); *Brunswick Railway Co. v. Wiggins*, 113 Ga. 842-848, 39 S. E. 551, 61 L. R. A. 513. It was not error in this case to deny to the defendant the right to open and conclude the argument.

2. NEW TRIAL §140(2)—TRIAL COURT HAS DISCRETION TO DENY MOTION ON COUNTER AFFIDAVITS RELATING TO NEWLY DISCOVERED EVIDENCE FOR WANT OF DILIGENCE.

This court cannot say, as matter of law, that in this case it was not to grant the motion for a new trial on the ground of newly discovered evidence. Upon the counter showing as to diligence we cannot say that it was error for the court to hold that there was a lack

of the diligence required by law to discover the facts or witnesses alleged to be newly discovered. It is true that much diligence was used, but upon the counter showing the court was within the discretion authorized by law in determining that the defendant had sufficient information to put it on inquiry as to the possibility of securing the evidence. See *Atlanta Rapid Transit Co. v. Young*, 117 Ga. 349, 43 S. E. 861; *Jinks v. State*, 117 Ga. 714, 44 S. E. 814 (1). As to one of the grounds of newly discovered evidence, see answer of Supreme Court to certified question in *Central of Ga. Ry. Co. v. Moore*, 101 S. E. 668.

### 3. CHARGE OF COURT.

When considered in view of the note of the trial judge in the judgment overruling the motion for a new trial, and when the charge as a whole is considered, there is no reversible error in any of the assignments of error upon the excerpts from the charge of the court. The case was fully and fairly submitted to the jury, upon the issues raised by the pleadings and evidence.

### 4. OVERRULING OF MOTION FOR NEW TRIAL.

The evidence authorized the verdict, which has the approval of the trial judge, and for no reason assigned was it error to overrule the motion for a new trial. See *Central of Georgia Railway Co. v. Larsen*, 19 Ga. App. 423, 91 S. E. 517.

Error from City Court of Floyd County; W. J. Nunnally, Judge.

Action by C. L. Thomas against the Rome Railway & Light Company. Judgment for plaintiff, motion for new trial denied, and defendant brings error. Affirmed.

L. H. Covington and Dean & Dean, all of Rome, for plaintiff in error.

Maddox & Doyal, of Rome, for defendant in error.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(19 Ga. App. 632)

### OLELAND v. BENNETT. (No. 10641.)

(Court of Appeals of Georgia, Division No. 1. Jan. 27, 1920.)

(Syllabus by the Court.)

#### 1. APPEAL AND ERROR ⇐336(1)—DISMISSAL OF WRIT OF ERROR FOR FAILURE TO MAKE SHERIFF AND HIS DEPUTY PARTIES TO BILL OF EXCEPTIONS.

A motion to dismiss the bill of exceptions in this case was made on two grounds: (1) "Because there is no proper and sufficient assignment of error made"; (2) "because the Woodmen of the World, W. J. Branch, and D. J. Branch were not made parties to the bill of exceptions, nor was same served on them." The bill of exceptions contains a suffi-

cient assignment of error, and the first ground of the motion to dismiss is overruled. The second ground is sustained. The Woodmen of the World is not a necessary party to the bill of exceptions. W. J. Branch, the sheriff, and D. J. Branch, his deputy, are necessary parties. *Producers' Naval Stores Co. v. Brewton*, 19 Ga. App. 19, 90 S. E. 735; *Byrd & Co. v. Interstate Chemical Co.*, 19 Ga. App. 412, 91 S. E. 578, and cases cited. While the sheriff and his deputy acknowledged service of the bill of exceptions, they did not "agree that said case may be heard," as provided by section 6160, subd. 3, of the Civil Code of 1910 (*Marietta Paper Mfg. Co. v. Faw*, 64 Ga. 450; *Craig v. Webb*, 70 Ga. 188 [2]; *Sears v. Jeffords*, 119 Ga. 821, 823, 47 S. E. 186; *Bullard v. Wynn*, 134 Ga. 636, 68 S. E. 439 [1]; *Carter v. Davidson*, 138 Ga. 317, 75 S. E. 155 [1]); nor were they made parties by amendment as provided by section 5 of the act of 1911 (Ga. Laws 1911, p. 149); *Park's Civ. Code*, § 6164(b). See, also, *Parrish v. Adams*, 22 Ga. App. 170, 95 S. E. 749 (1); *Coleman v. Board of Education*, 136 Ga. 844, 72 S. E. 159 (3).

Error from City Court of Baxley; H. J. Lawrence, Judge.

Action between M. J. Cleland and R. M. Bennett. Judgment for the latter, and the former brings error. Writ of error dismissed.

Padgett & Watson, of Baxley, for plaintiff in error.

C. H. Parker and W. W. Bennett, both of Baxley, for defendant in error.

BLOODWORTH, J. Writ of error dismissed.

BROYLES, C. J., and LUKE, J., concur.

(24 Ga. App. 677)

### SCOGGINS v. STATE. (No. 11146.)

(Court of Appeals of Georgia, Division No. 1. Jan. 7, 1920. On Motion for Rehearing, Jan. 28, 1920.)

(Syllabus by the Court.)

#### 1. COURTS ⇐217—CONSTITUTION DETERMINES WHICH REVIEWING COURT HAS JURISDICTION.

The Constitution of this state, and not the certificate of the trial judge to the bill of exceptions, determines which reviewing court has jurisdiction of a case.

#### 2. COURTS ⇐217—GEORGIA COURT OF APPEALS HAS JURISDICTION TO REVIEW SUPERIOR COURT JUDGMENT DENYING CHANGE OF VENUE IN MURDER CASE.

Since the adoption of the amendment of 1916 to section 2 of article 6 of the Constitution (see Laws 1916, p. 19) of this state, the Court of Appeals, and not the Supreme Court, has jurisdiction to review a judgment of a superior court overruling a mo-

tion to change the venue in a case where the defendant was charged with murder, and where no constitutional question was raised in the lower court.

**3. CRIMINAL LAW §1020½—COURT OF APPEALS HAVING JURISDICTION WILL RETAIN CASE WITHOUT TRANSFERRING IT TO SUPREME COURT FOR RETRANSFER.**

Where the trial judge in his certificate to the bill of exceptions directs that a case of which this court, and not the Supreme Court, has jurisdiction, be sent to the Supreme Court, but where the clerk of the trial court transmits it to this court, this court, will retain possession of it and enter it upon its docket without the unnecessary circumvolution of first transferring it to the Supreme Court for the sole purpose of having that court by a formal order transfer it back to this court.

**4. CRIMINAL LAW §1095—MOTION TO DISMISS BILL OF EXCEPTIONS FOR TECHNICAL DEFECTS DENIED.**

The motion to dismiss the bill of exceptions is denied.

**5. CRIMINAL LAW §1150—DENIAL OF CHANGE OF VENUE PROPER.**

The court did not err in denying the motion to change the venue.

On Motion for Rehearing.

*(Additional Syllabus by Editorial Staff.)*

**6. CRIMINAL LAW §1030(2)—CONSTITUTIONAL QUESTION MUST BE RAISED IN LOWER COURT.**

A constitutional question to be considered by the Court of Appeals must be made during the trial of the case in the lower court, and it is too late to first raise such a question in the Court of Appeals.

Error from Superior Court, Bibb County; E. D. Graham, Judge.

Raymond Scoggins was indicted for murder, his motion for a change of venue was denied, and he took a bill of exceptions to the Supreme Court, which the clerk of the trial court transmitted to the Court of Appeals, wherein plaintiff in error moved to transfer the case to the Supreme Court. Judgment affirmed.

John R. Cooper and W. O. Cooper, Jr., both of Macon, for plaintiff in error.

Chas. H. Garrett, Sol. Gen., of Macon, for the State.

**BROYLES, C. J.** This was a motion to change the venue of a case where the defendant was charged with murder. The motion was denied, and the defendant sued out a bill of exceptions to the Supreme Court. The judge, in his certificate thereto, directed that the case be sent to that court, but the clerk of the trial court transmitted it to this court, and the plaintiff in error now moves that the case be transferred to the Supreme

Court. No constitutional question was raised in the trial court.

[1-3] 1-3. The law, and not the certificate of the trial judge to the bill of exceptions, determines at which term a case shall be heard. *De Loach v. Trammell*, 72 Ga. 198; *Gordon v. Gordon*, 109 Ga. 264, 34 S. E. 324 (2). Since the adoption of the act of 1893 (Ga. L. 1893, p. 52) now embodied in section 6147 of the Civil Code of 1910, the only mandatory provision of section 6145 of the Civil Code of 1910 is that the trial judge shall certify the bill of exceptions to be true; the other provisions of the section are directory only. *Bailey v. Guthrie*, 1 Ga. App. 350, 58 S. E. 103. Applying the principle of these rulings to the question now under consideration, it must be held that the Constitution, and not the certificate of the trial judge, determines which one of the two reviewing courts of this state has jurisdiction of the case.

Previous to the constitutional amendment of 1916, the Supreme Court retained jurisdiction of bills of exceptions to judgments overruling motions to change the venue in murder cases, not on the ground that such a proceeding constituted a criminal case or a part thereof, but solely on the ground that it was a case of a civil nature arising in the superior courts (*Wilburn v. State*, 140 Ga. 138, 78 S. E. 819), and the Supreme Court then had jurisdiction of all such cases. Since the constitutional amendment referred to, the jurisdiction of the Supreme Court, as to civil cases arising in the superior courts, has been restricted to certain classes of cases, and a motion to change the venue of a criminal case does not fall within any of those classes; and since that constitutional amendment all bills of exceptions to the overruling of motions to change the venue in murder cases have, when sent to the Supreme Court, been uniformly transferred to this court—the first of such cases being *Marshall v. State*, Supreme Court No. 350, Court of Appeals No. 8867, 20 Ga. App. 416, 93 S. E. 98, transferred to this court May 18, 1917.

Under the practice adopted in both reviewing courts, where a case has been sent by the clerk of the trial court to the reviewing court which has no jurisdiction thereof, it will be transferred by a formal order from that court to the court having jurisdiction; but where the clerk transmits a case to the reviewing court which has jurisdiction, although the judge may have directed that it be transmitted to the other court, the court having jurisdiction of the case will retain it and enter it upon its docket, without obtaining any formal order of transfer from the court to which it was erroneously directed by the judge.

Under the above rulings, the motion of the plaintiff in error to transfer the case to the Supreme Court is denied.

[4] 4. A bill of exceptions which sets forth a general complaint of the refusal to change the venue in a criminal case will not be dismissed on the ground that it does not contain a legally sufficient assignment of error, where this court can, from an examination of both the bill of exceptions and the transcript of the record, ascertain what questions were passed on by the trial judge and what rulings the plaintiff in error seeks to have reviewed. See, in this connection, Civil Code 1910, § 6183; *Anderson v. Newton*, 123 Ga. 512, 51 S. E. 508; *Kirkland v. Atlantic & Birmingham Ry. Co.*, 126 Ga. 246, 55 S. E. 23. Under the above ruling, the motion to dismiss the bill of exceptions is denied.

[5] 5. The evidence introduced upon the hearing of the motion to change the venue was conflicting upon the material issues, and it does not appear that the judge abused his discretion in denying the motion. See, in this connection, *Crawley v. State*, 24 Ga. App. 33, 99 S. E. 705, and cases there cited.

Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

On Motion for Rehearing.

[8] 1. A constitutional question to be considered by this court must be made during the trial of the case in the lower court. It is too late to raise such a question for the first time in this court. *Hendry v. State*, 147 Ga. 260, 93 S. E. 413 (8); *Bolton v. City of Newnan*, 147 Ga. 400, 94 S. E. 236. See, also, in this connection, *Godchaux Co. v. Estopinal*, 251 U. S. 179, 40 Sup. Ct. 116, 64 L. Ed. —.

2. There is no merit in any of the grounds of the motion for a rehearing in this case.

Rehearing denied.

LUKE and BLOODWORTH, JJ., concur.

(24 Ga. App. 704)

WRIGHT v. SALVATION ARMY.  
(No. 10258.)

(Court of Appeals of Georgia, Division No. 1.  
Jan. 28, 1920.)

(Syllabus by the Court.)

EXECUTION — SUFFICIENT DESCRIPTION  
OF REAL ESTATE LEVIED ON.

The judgment rendered was not erroneous for any reason assigned.

Error from City Court of Floyd County;  
W. J. Nunnally, Judge.

Action by the Salvation Army against C. W. Wright. Judgment for plaintiff, and defendant brings error. Affirmed.

M. B. Eubanks, of Rome, for plaintiff in error.

Denny & Wright, of Rome, for defendant in error.

BROYLES, C. J. C. W. Wright sold under a warranty deed certain real property in the city of Rome, Ga., to the Salvation Army. Prior to this sale the city issued an execution against the property for its proportionate cost of street improvements, and subsequent to the sale this execution was levied upon the property, and was paid off by the Salvation Army. Suit was subsequently brought by the Salvation Army against Wright to recover the amount so paid, with interest, and the judge, sitting without the intervention of a jury, rendered a judgment in favor of the plaintiff and against the defendant for the principal sum of \$273 and \$60.05 interest, and the defendant excepted.

The property was described in the execution as belonging to C. W. Wright and as "the property fronting 24 feet at 502 Broad street." Upon the trial the following undisputed facts were shown: The city of Rome had a regular system of numbering streets, and Broad street was one of the streets numbered. 502 Broad street was a definite piece of property in the city of Rome, and there was no other No. 502 Broad street in the city. The property at 502 Broad street extended back about 90 feet and contained a two-story brick building, and immediately in the rear of this property the defendant owned other realty, which was not separated from this property by any fence, inclosure, or other physical evidence of demarcation. All the necessary conditions precedent to the issuance of the *fi. fa.* had been complied with, in accordance with the laws and the charter of the city of Rome. The property was duly advertised for sale, and, in accordance with the advertisement, was sold by the marshal to the city of Rome, although no deed was made by the marshal to the city; the usual custom being not to execute such a deed until the end of the year, when the redemption period had expired. Subsequently the Salvation Army paid off the *fi. fa.* When the *fi. fa.* was issued and demand was made on Wright for payment, he refused to pay it, and verbally so notified the Salvation Army before he executed the warranty deed to it.

In our opinion the description of the property in the *fi. fa.* was not so indefinite as to render the *fi. fa.* void. See, in this connection, *Collier v. Vason*, 12 Ga. 441, 58 Am. Dec. 481; *Oatis v. Brown*, 59 Ga. 711; *Longworthy v. Featherston*, 65 Ga. 165 (1), 166; *Collins v. Boring*, 96 Ga. 360, 23 S. E. 401; *Hawkins v. Johnson*, 131 Ga. 347, 62 S. E. 285 (1).

It appears undisputed that Wright had actual notice of the issuance of the *fi. fa.*, and at least constructive notice of the levy and of the duly advertised sale of the property.

The judgment rendered by the court was authorized by the evidence, and no material error of law appears to have been committed upon the trial. Substantial justice has been done, and for no reason assigned is a new trial required.

Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(24 Ga. App. 679)

**SOUTHERN STATES PHOSPHATES &  
FERTILIZER CO. v. CLARK et al.**  
(No. 9549.)

(Court of Appeals of Georgia, Division No. 1.  
Jan. 27, 1920.)

*(Syllabus by the Court.)*

**1. MORTGAGES  $\S$  442—SERVICE OF RULE NISI IN FORECLOSURE BY SPECIAL BAILLIFF APPOINTED BY SUPERIOR COURT JUDGE WAS ILLEGAL.**

"Service of a rule nisi to foreclose a mortgage on realty, made by a special bailiff appointed by the judge of the superior court under the Civil Code 1910,  $\S$  6310, is not legal, although the service was made by the bailiff during the term of court at and for which he was appointed. The rule nisi must be served by the sheriff or his deputy. The sheriff cannot be affected by the act or omission of such a special bailiff."

(a) It is different, however, if the person serving as bailiff makes the service at the special direction of the sheriff of the county, and makes the return of service as deputy sheriff.

**2. AFFIDAVIT OF ILLEGALITY.**

Upon the agreed statement of facts the court erred in sustaining the affidavit of illegality.

Error from Superior Court, Laurens County; J. L. Kent, Judge.

Proceeding between the Southern States Phosphates & Fertilizer Company and Essie Clark and others. Ruling in favor of the former, and the latter brought error, and the Court of Appeals certified questions. Reversed in conformity to opinion of Supreme Court (101 S. E. 536).

Ira S. Chappell, of Dublin, for plaintiffs in error.

J. S. Adams, of Dublin, for defendant in error.

LUKE, J. This was a proceeding growing out of the foreclosure of a mortgage on realty against Mrs. Essie Clark. The petition with the rule nisi thereon was served personally upon the defendant by a bailiff of the superior court, who was appointed by the judge of that court as is provided by sec-

tion 6310 of the Civil Code of 1910. To the levy of the mortgage *fi. fa.* the defendant interposed an affidavit of illegality, upon the ground that the officer serving the rule nisi was not authorized to make the service and that the service was not legal. The issue was tried upon the following agreed statement of facts:

"The entry of service is in the following words: 'Georgia, Laurens County. I have this day served a copy of the within petition and nisi personally on Mrs. Essie Clark. This January 29, 1914. J. W. Couey, Deputy Sheriff.' The said J. W. Couey was a regular bailiff serving at the January term, 1914, of Laurens superior court, at which said term petition and rule nisi was issued, and took the oath prescribed in Code 1910,  $\S$  4990, and took no other oath. J. J. Flanders, sheriff of Laurens county, placed a copy of the petition, foreclosure, and rule nisi in the hands of the said J. W. Couey, and instructed him to serve the same on the defendant Mrs. Essie Clark. J. W. Couey was not the regular appointed, sworn, and bonded deputy of the said J. J. Flanders, but simply a bailiff serving as such at said term of said court."

The judge of the superior court (by agreement, presiding without the intervention of a jury) upon the agreed statement of facts sustained the affidavit of illegality, upon the ground that the service of the rule nisi was not a legal service. Error was assigned upon this judgment, and the question was certified by this court to the Supreme Court.

[1] In answer to the certified question the Supreme Court says:

"Service of a rule nisi to foreclose a mortgage on realty, made by a special bailiff appointed by the judge of the superior court under Civil Code,  $\S$  6310, is not legal, although the service was made by the bailiff during the term of court at and for which he was appointed. The rule nisi must be served by the sheriff or his deputy. The sheriff cannot be affected by the act or omission of such special bailiff."

"If the person serving as bailiff had made the service at the special direction of the sheriff of the county, and had made his return of service as deputy sheriff, a different question would be presented."

[2] The agreed statement of facts shows that this rule nisi was served at the special instance and at the direction of the sheriff of the county, and that the person serving it made the return of service "as deputy sheriff." Under the answer of the Supreme Court to the certified question it was therefore error for the court to sustain the affidavit of illegality.

Judgment reversed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(24 Ga. App. 700)

**EVANS v. STATE.** (No. 11081.)(Court of Appeals of Georgia, Division No. 1.  
Jan. 27, 1920.)*(Syllabus by the Court.)***1. CRIMINAL LAW §825(2) — CHARGE ON RIGHT TO KILL TO PREVENT COMMISSION OF FELONY, NOT DEFINING THAT TERM, NOT REVERSIBLE ERROR.**

"Where the court gives in charge to the jury the principles of law with respect to the right of a slayer to kill in order to prevent the commission of a felony, the failure to define the term 'felony,' as used in such charge, in the absence of a request to give such definition, is not error requiring a new trial." See *Faison v. State*, 13 Ga. App. 180, 79 S. E. 39 (3), and case cited; *Smith v. State*, 23 Ga. App. 541, 99 S. E. 142 (4).

**2. CRIMINAL LAW §828—DEFENDANT MUST REQUEST MORE SPECIFIC INSTRUCTIONS.**

The charge of the court was full and fair and stated the contentions of the parties clearly, and if the defendant desired more specific instructions upon the issues as raised by his statement he should have made a timely written request therefor. The evidence authorized the verdict, and it was not error, for any reason assigned, to overrule the motion for a new trial.

Error from Superior Court, Gordon County; M. C. Tarver, Judge.

J. H. Evans was prosecuted for an offense, and from the judgment and the denial of his motion for new trial, he brings error. Affirmed.

Starr & Paschall, of Calhoun, and M. B. Eubanks, of Rome, for plaintiff in error.

Joe M. Lang, Sol. Gen., of Calhoun, for the State.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(24 Ga. App. 697)

**WALLS v. STATE.** (No. 10999.)(Court of Appeals of Georgia, Division No. 1.  
Jan. 27, 1920.)*(Syllabus by the Court.)***CRIMINAL LAW §1168(3) — WITNESSES §76(3)—COMPETENCY OF WIFE TO FREELY TESTIFY AGAINST HUSBAND; HARMLESS ERROR.**

Accused was convicted of pointing a gun at his wife. The special grounds of the motion for a new trial are all based upon the fact that his wife was allowed to testify against him. In an explanatory note to his approval to the amendment to the motion for a new trial, the judge shows that he fully instructed the wife as to her rights under section 1037 of the Penal Code of 1910, and that thereafter she "an-

swered all questions propounded freely and voluntarily, and was in no instance ordered by the court to make answer to any question propounded. On cross-examination by counsel for the accused the witness answered that she did not wish to testify against her husband, and did not want to see him prosecuted. Defendant's counsel then moved to exclude the testimony of the witness, on the ground that she did not want to swear against her husband." Under this qualifying note, there is no merit to the amendment to the motion for a new trial. If, however, it was error to admit the evidence of the wife, the uncontradicted evidence of the other witness demanded a verdict of guilty, and, as no error of law was committed, the judgment is affirmed.

Error from City Court of Leesburg; W. G. Martin, Judge.

Zach Walls was convicted of pointing a gun at his wife, his motion for new trial was denied, and he brings error. Affirmed.

Lippitt & Burt, of Albany, for plaintiff in error.

J. B. Hoyl, Sol., of Leesburg, for the State.

BLOODWORTH, J. Affirmed.

BROYLES, C. J., and LUKE, J., concur.

(24 Ga. App. 694)

**HAMILTON v. STATE.** (No. 10962.)(Court of Appeals of Georgia, Division No. 1.  
Jan. 27, 1920.)*(Syllabus by the Court.)***CRIMINAL LAW §1050—JUDGMENT ON DEMURRER TO INDICTMENT INVOLVING CONSTRUCTION OF PENAL STATUTE CONCLUSIVE AGAINST DEFENDANT.**

The indictment in this case contains two counts, the first charging forgery of a bank check, and the second uttering said check. The indictment alleged that the check was "of the following tenor and effect, to wit: 'The First National Bank, Bainbridge, Ga. Oct. 1st, 1918. Pay to the order of Frank Johnson \$20.00, twenty dollars, No. 876. Walker.'" A demurrer was filed to the indictment, in part as follows: "(1) No crime against the laws of Georgia is charged in said indictment. (3) Defendant demurs specially to said indictment, in that said indictment charges that said check was signed 'Walker,' which said signature is not the signature of any person, firm, or corporation, nor is such a signature such that would mislead, defraud, or fool any one, and, such signature not being name or signature of any person, firm, or corporation, same is not subject of being forged." The demurrer was overruled, and no exceptions to this ruling were filed. The case proceeded to trial. There was a verdict of guilty on both counts, and, the defendant's motion for new trial being overruled, he excepted. In the brief of counsel for the plaintiff in er-

for all grounds of the motion for new trial are expressly abandoned except those which raise the identical question disposed of by the demurrer. The Supreme Court, in *Matthews v. State*, 125 Ga. 248, 54 S. E. 192, held: "Where a demurrer to an indictment calls for a construction of a penal statute, the judgment rendered thereon concludes the defendant as to the construction given the statute by the court, unless reversed or set aside by appropriate procedure." See, also, *Mayor & Aldermen of Savannah v. Monroe*, 22 Ga. App. 190, 95 S. E. 731 (2); *Id.*, 22 Ga. App. 285, 96 S. E. 500 (3-b). Under the above ruling, plaintiff in error is concluded by the ruling on the demurrer, and the judgment must be affirmed.

Error from Superior Court, Decatur County; W. M. Harrell, Judge.

Prentiss Hamilton was convicted of the forgery and uttering of a bank check, his motion for a new trial was overruled, and he brings error. Affirmed.

A. E. Thornton, of Bainbridge, for plaintiff in error.

R. C. Bell, Sol. Gen., of Cairo, and F. A. Hooper & Son, of Atlanta, for the State.

BLOODWORTH, J. Affirmed.

BROYLES, C. J., and LUKE, J., concur.

(24 Ga. App. 683)

**CORONA v. DE LAVAL SEPARATOR CO.**  
(No. 10792.)

(Court of Appeals of Georgia, Division No. 1.  
Jan. 27, 1920.)

*(Syllabus by the Court.)*

1. APPEAL AND ERROR  $\S$ 302(1, 3) — GROUND OF MOTION FOR NEW TRIAL, REQUIRING REFERENCE TO OTHER PARTS OF RECORD, WILL NOT BE CONSIDERED.

"A ground of a motion for new trial, in which error is assigned on the exclusion of certain testimony, is insufficient, when it does not appear from the ground itself that the exclusion of the testimony was prejudicial to the complaining party." *Campbell v. Walker*, 20 Ga. App. 88, 92 S. E. 545(4). "Under repeated decisions of this court and of the Supreme Court, each special ground of a motion for a new trial must be complete within itself; and, when so incomplete as to require a reference to the brief of the evidence, or to some other portion of the record, in order to determine what was the alleged error, and whether such error was material, the ground will not be considered by the reviewing court." *McCall v. State*, 23 Ga. App. 770, 99 S. E. 471(1). The only allegation of error in the fourth ground of the motion for a new trial is that a certain letter, dated October 3, 1907, signed by the plaintiff and copied in this ground of the motion, was material evidence, and was il-

legally withheld from the jury, against the demand of the movant. To ascertain how this letter was material, and how it affected the case in any way, would require reference to other parts of the record, and under the decisions cited above, and numerous other decisions of this court and the Supreme Court, this is not required.

2. CHARGE OF COURT.

The excerpt from the charge of the court, of which complaint is made in ground 5 of the motion for a new trial, is not erroneous for any reason assigned.

3. APPEAL AND ERROR  $\S$ 1078(6) — GROUND OF MOTION FOR NEW TRIAL, NOT ALLEGED IN BRIEF, IS ABANDONED.

The sixth ground of the motion is not argued in the brief of plaintiff in error, and will be treated as abandoned.

4. APPEAL AND ERROR  $\S$ 302(3) — SUFFICIENCY OF ASSIGNMENT OF ERROR TO EXCLUSION OF EVIDENCE.

The seventh and eighth grounds each complain that the court erred in admitting certain evidence "over the objection of defendant as to its irrelevancy." "Assignments of error as to the admission of testimony should be specific. It is not sufficient to say that the testimony was simply irrelevant." *Chambers v. Walker*, 80 Ga. 642(9, 10), 649, 6 S. E. 165, 168; *Ingram v. Little*, 14 Ga. 174(3), 184, 58 Am. Dec. 549.

5. SALES  $\S$ 359(1, 2) — EVIDENCE SUFFICIENT TO SUPPORT JUDGMENT FOR PRICE; AGREED PRICE PRIMA FACIE EVIDENCE OF VALUE.

There is ample evidence to support the verdict for the plaintiff for \$325. A witness swore "the purchase price was \$525. This was paid by check for \$200 and two notes, for \$162.50 each." The two notes, each for \$162.50, payable to plaintiff and signed by defendant, were in evidence. "It has been held a number of times by this court that, as between the original seller and the original purchaser, the agreed price as stated in the contract of sale is prima facie, but not conclusive, evidence of the actual value of the property, and that upon proof of the contract, in the absence of rebutting testimony as to value, the plaintiff was entitled to recover the balance due thereon." See *Carter v. American Slicing Machine Co.*, 23 Ga. App. 426, 98 S. E. 365(2), and cases cited.

Error from City Court of Savannah; John Rourke, Jr., Judge.

Action by the De Laval Separator Company against R. Corona. Judgment for plaintiff, and defendant brings error. Affirmed.

H. P. Cobb, of Savannah, for plaintiff in error.

O'Byrne, Hartridge & Wright, of Savannah, for defendant in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE J., concur.



(24 Ga. App. 712)

**WASHINGTON EXCH. BANK v. SMITH.**  
(No. 9634.)(Court of Appeals of Georgia, Division No. 1.  
Jan. 29, 1920.)*(Syllabus by the Court.)***JUDGMENT OF TRIAL COURT REVERSED IN CONFORMITY TO OPINION OF SUPREME COURT.**

The Supreme Court on January 13, 1920, (101 S. E. 769), having reversed the judgment of this court rendered in this case on February 1, 1919 (23 Ga. App. 356, 98 S. E. 418), that judgment is hereby vacated, and the judgment of the trial court is reversed.

Error from Superior Court, Wilkes County; B. F. Walker, Judge.

Action by the Washington Exchange Bank against R. M. Smith. Verdict for defendant, motion for new trial overruled, and plaintiff brought error to the Court of Appeals, which affirmed, with directions (23 Ga. App. 356, 98 S. E. 418), and plaintiff petitioned for writ of certiorari. Judgment of the Court of Appeals vacated, and judgment of the trial court reversed in conformity with opinion of the Supreme Court (101 S. E. 769), on certiorari.

Colley & Colley, of Washington, Ga., for plaintiff in error.

I. T. Irvin, Jr., of Washington, Ga., for defendant in error.

**BROYLES, C. J. Reversed.**

**LUKE and BLOODWORTH, JJ., concur.**

(24 Ga. App. 713)

**CENTRAL OF GEORGIA RY. CO. v. DEAN.**  
(No. 9746.)(Court of Appeals of Georgia, Division No. 1.  
Jan. 29, 1920.)*(Syllabus by the Court.)***1. CARRIERS §—406—LAST OF CARRIERS ON A THROUGH TICKET IS LIABLE FOR LOSS OF BAGGAGE WHETHER IT ACTUALLY RECEIVED IT OR NOT.**

"Where a passenger purchases a through ticket over a line of railroads, having a coupon attached for each road, and checks his baggage through to his destination, if upon his arrival it is found to be lost, he may hold the last road of the line responsible therefor, whether the last road actually received the baggage or not. Savannah, Florida & Western Ry. v. McIntosh, 73 Ga. 532."

**2. RULING ANNOUNCED IN PRIOR CASE IS CONTROLLING.**

In response to a question certified by this court the Supreme Court, in rendering the decision set out above, reviewed and reaffirmed

the ruling announced in Savannah, Florida & Western Ry. v. McIntosh, supra; and, that decision being controlling in this case, the judge of the superior court did not err in overruling the certiorari.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by Cornelia Dean against the Central of Georgia Railway Company. Judgment for plaintiff, certiorari overruled, and defendant brings error, and the Court of Appeals certified a question. Affirmed in conformity to answer of Supreme Court (101 S. E. 771).

Moise & Riddell, of Atlanta, for plaintiff in error.

John W. Crenshaw, of Atlanta, for defendant in error.

**LUKE, J. Judgment affirmed.**

**BROYLES, C. J., and BLOODWORTH, J., concur.**

(24 Ga. App. 518)

**WILCOX v. BANK of HAZLEHURST.**  
(No. 10321.)(Court of Appeals of Georgia, Division No. 2.  
Nov. 23, 1919. Rehearing Denied  
Feb. 10, 1920.)*(Syllabus by the Court.)***1. EXECUTION §—166—DEFENSE URGED IN AFFIDAVIT OF ILLEGALITY WITHOUT MERIT.**

Where a surety was jointly sued with his principal, and service had upon him, and the surety was informed by the plaintiff that it was not necessary for him to file a defense, or employ counsel, as the plaintiff did not intend to enforce the judgment against the surety, but that the judgment was being obtained for the surety's protection, and, relying upon the promise of the plaintiff, the surety failed to file any defense and suffered judgment to go against him, he could not, in an affidavit of illegality, urge such ground as a defense to the enforcement of the judgment. The instant case is distinguishable from Monroe v. Security Mutual Life Ins. Co., 127 Ga. 549, 56 S. E. 764, relied on by plaintiff in error. In that case it was held that "a defendant may resist the levy of an execution by affidavit of illegality, by showing an agreement between the plaintiff and himself, entered into contemporaneously with or prior to the rendition of the judgment, whereby it was stipulated, upon a sufficient consideration, that the judgment might be subsequently discharged upon performance of certain acts by the defendant, and by showing that the defendant has performed those acts, since the judgment, conformably to the terms of the agreement." In the instant case there was no agreement "entered into contemporaneously with or prior to the rendition of the judgment whereby it was stipulated, upon a sufficient consideration, that the judgment might be subsequently discharged upon

the performance of certain acts by the defendant," and there was no showing that the defendant had performed any act since the judgment conformably to the terms of the agreement. There was a mere voluntary promise on the part of the plaintiff that he would not enforce a judgment against the defendant, and that it would not be necessary for the defendant to file any defense. It does not appear that the defendant, in consequence of such promise and representation of the plaintiff, performed any act subsequent to the judgment, but that he merely suffered judgment to go against him.

## 2. OTHER ASSIGNMENTS.

The remaining assignments of error are without merit.

## 8. COSTS $\S$ 262 — DAMAGES NOT ALLOWED WHERE WRIT OR ERROR IS NOT PLAINLY SHOWN OUT FOR DELAY.

It not being plainly apparent that this writ of error was sued out for delay only, the motion of the defendant in error for damages is denied.

Error from City Court of Hazlehurst; C. A. Christian, Judge.

Executory proceeding by the Bank of Hazlehurst against A. J. Wilcox. Judgment for plaintiff, and defendant brings error. Affirmed.

S. D. Dell, of Hazlehurst, for plaintiff in error.

J. Mark Wilcox, of Hazlehurst, for defendant in error.

STEPHENS, J. Judgment affirmed.

JENKINS, P. J., and SMITH, J., concur.

(24 Ga. App. 636)

## CENTRAL OF GEORGIA RY. CO. v. HOBAN. (No. 10940.)

(Court of Appeals of Georgia, Division No. 1. Jan. 27, 1920.)

(Syllabus by the Court.)

## RELEASE $\S$ 24(2)—RELEASE OF LIABILITY UNDER FEDERAL EMPLOYERS' LIABILITY ACT CANNOT BE RESCINDED FOR FRAUD WITHOUT TENDERING CONSIDERATION.

The well-established principle of law that, before a party to a contract is entitled to have it rescinded for fraud in its procurement, he must pay back or tender any valuable consideration received under the terms of the contract, applies to an action for personal injuries brought under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), where the plaintiff, after the infliction of the injury sued for, signed, for a valuable consideration, a contract releasing the defendant from all liability therefor.

Error from City Court of Richmond County; H. C. Hammond, Judge.

Action by Frank Hoban against the Central of Georgia Railway Company. General demurrer to petition overruled, and defendant brings error. Reversed.

J. C. C. Black and W. Inman Curry, both of Augusta, for plaintiff in error.

Henry C. Roney, of Augusta, for defendant in error.

BROYLES, C. J. This was an action for personal injuries brought under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665). The petition, construed most strongly against the plaintiff, showed that subsequent to the infliction of the injury sued for, he, for a valuable consideration, to wit, \$228, signed a contract releasing the defendant from all liability on account of such injury. Conceding, but not deciding, that the petition further showed that the contract was voidable because of fraud in its procurement, it failed to show that the consideration received was paid back, or a legal tender thereof made, to the defendant. The petition therefore did not set out a cause of action, and the court erred in refusing to dismiss it on the general demurrer interposed.

It is earnestly argued by the learned counsel for the defendant in error that in a case brought under the federal Employers' Liability Act such a contract of release can be avoided without the tender of the consideration, but he cites no controlling or persuasive authority to sustain his contention. This question does not appear to have been directly or indirectly passed upon in any decision which we have been able to find, or in any submitted to us by the learned counsel on either side of the case. Upon reason, however, it is clear to us that the just, sound, and equitable principle of law that a party to a contract must restore any valuable consideration received thereunder, before he is entitled to rescind it because of fraud in its procurement, should apply under the federal act. The mere fact that the act does not specifically provide for the application of the rule is not a convincing argument that it should not be applied. Neither does the act specifically provide that a contract of settlement, for a valuable consideration, made subsequently to the infliction of the injury sued for, can be avoided because of fraud in its procurement, and yet nevertheless all the courts have held that this general principle of law is applicable in cases brought under the act.

The fact that in section 5 of the act (U. S. Comp. St. § 8661) it is provided, in effect, that in a case where a void contract of release has been made before the infliction of the injury sued for the plaintiff can maintain his action without first tendering the consideration he received, and that the act says nothing in

reference to whether an action can be maintained without the tender of the consideration in a case where the plaintiff signed the contract of release subsequently to the infliction of the injury sued for, tends to show that in the latter case the general rule of law as to the restitution of the consideration of a contract before it can be rescinded is applicable. The federal act is, of course, exclusive in its operation upon all matters of substance specifically or impliedly covered by its provisions, but nowhere in the act itself, or in the decisions of the courts construing it which have been called to our attention, can be found anything tending to show that the act does away with the ancient and equitable rule requiring that before a contract can be rescinded for fraud the consideration must be paid back or tendered.

The petition in this case, construed most strongly against the pleader, shows that the release contract was a settlement for the plaintiff's alleged injuries, and that it was not in contravention of section 5 of the federal act (35 U. S. Stat. at L. 65, c. 149), since it was not a device to avoid liability on the part of the defendant, but, on the contrary, a virtual admission of and settlement for such liability and damages, after the accrual of the course of action. "The right to make a compromise and settlement and enter into a release is a right of contract which, in our judgment, cannot be interfered with even by Congress." *Anderson v. Oregon Short Line R. R. Co.*, 47 Utah, 614, 155 Pac. 446. See, also, in this connection, *Richey, Federal Employers' Liability Act*, § 32, p. 59, L. R. A. 1918F, 1073-1076, notes; 34 Cyc. 1071; *Mitchell v. Louisville, etc., R. R. Co.*, 194 Ill. App. 77; *Ballenger v. Southern Ry. Co.*, 106 S. C. 200, 90 S. E. 1019; *Panhandle, etc., Ry. Co. v. Pitts* (Tex. Civ. App. 1916) 188 S. W. 528; *Patton v. Atchison, T. & S. F. Ry. Co.* (1916) 59 Okl. 155, 158 Pac. 576.

To avoid the binding effect of the release contract the plaintiff in his petition goes outside of the provisions of the act and pleads the well-known general rule of rescission for fraud in the procurement of the contract. Here he is met by the equally well established rule of law, and the statutes of this state, that before one can rescind a contract in such a case he must restore or tender to the other party what he has received under the contract. *Civil Code 1910*, § 4805; *East Tennessee, etc., Ry. Co. v. Hayes*, 83 Ga. 558, 10 S. E. 350; *Harley v. Riverside Mills*, 129 Ga. 214, 216, 58 S. E. 711; *Western & Atlantic R. Co. v. Atkins*, 141 Ga. 743, 82 S. E. 139 (2).

We are of the opinion that sound law and sound morals require that the plaintiff in the instant case should have paid back, or legally tendered, the sum of money which he received as the fruits of the contract vol-

untarily entered into by him subsequent to the infliction of the injury sued for, before he was entitled to bring his suit on his original cause of action. It follows from what has been said that the court erred in overruling the general demurrer interposed, and that the further proceedings in the case were nugatory.

Judgment reversed.

LUKE and BLOODWORTH, JJ., concur.

(34 Ga. App. 638)

TIFT v. SHIVER & AULTMAN. (No. 10665.)

(Court of Appeals of Georgia, Division No. 2.  
Dec. 23, 1919. Rehearing Denied  
Feb. 7, 1920.)

(Syllabus by the Court.)

1. APPEAL AND ERROR  $\S$  719(4), 744—EXCEPTIONS PENDENTE LITE CANNOT BE CONSIDERED, UNLESS ERROR IS ASSIGNED THEREON EITHER IN MAIN BILL OF EXCEPTIONS OR IN REVIEWING COURT BEFORE ARGUMENT.

Shiver & Aultman, a partnership, brought an action to recover \$303.16, of which sum \$250 was alleged to have been deposited by them with the defendant, A. C. Tift, as a bonus, in accordance with the provisions of a dealer's contract entered into between them, which contract, under authority contained therein, had been canceled by the defendant, and which provided that upon its cancellation by either party the defendant was to return this deposit to the plaintiffs, or so much thereof as should remain due, after applying such part of the deposit as might be necessary to settle and pay all indebtedness and claims owing by the plaintiffs to the defendant. The defendant set up as a defense certain damages alleged to have been sustained by him because of the failure of the plaintiffs to order out and pay for certain automobiles under the contract, and also that the plaintiffs were indebted to him in the sum of \$22.32 for certain advertising matter furnished by the defendant and accepted by the plaintiffs under the terms of the contract. He also contended that the suit for the deposit paid in under the terms of the contract could not be maintained, for the reason that the plaintiffs had not themselves complied with the contract, for the reason already stated. The defendant made a motion to dismiss the petition, upon the ground that it did not really allege that the deposit sued for had actually been paid to the defendant. This motion the court overruled, and to this judgment the defendant entered exceptions pendente lite. The jury returned a verdict in favor of the plaintiffs for the full amount sued for, but judgment was only entered up for the principal sum of \$300, since two of the items sued for were not proved. The defendant made a motion for a new trial, and to the judgment overruling the motion he excepted. *Held*:

"Exceptions pendente lite cannot be considered, unless error is assigned thereon either in the main bill of exceptions or in the reviewing

court by counsel for plaintiff in error before argument begins." *Jones v. State*, 21 Ga. App. 22, 98 S. E. 514. While the bill of exceptions recites that exceptions pendente lite were duly taken to the overruling of the motion to dismiss the plaintiff's petition, no assignment of error was made either in the bill of exceptions or in this court, and the judgment overruling the motion to dismiss cannot be considered.

**2. EVIDENCE**  $\S$ 158(2) — **TESTIMONY AS TO PAYMENT BY CHECK ADMISSIBLE WITHOUT FIRST ACCOUNTING FOR THE CHECK.**

The court did not err in permitting the witness for the plaintiff to testify to the payment made by check to the defendant, without first introducing in evidence or accounting for the check by which the payment was made. While evidence of the manner of payment, identifying the specific checks claimed to have thus been turned over in payment, would add probative value to the proof relied on to establish such payment, the act of payment is the essential fact to be shown. *Armour Fertilizer Works v. Dwight*, 22 Ga. App. 144, 95 S. E. 746 (1).

**3. CONTRACTS**  $\S$ 10(4), 278(1) — **PRINCIPAL AND AGENT**  $\S$ 77½ [New, vol. 3A Key-No. Series] — **SALES**  $\S$ 1(4) — **EXECUTORY CONTRACT FOR SALE NOT ENFORCEABLE WITHOUT MUTUALITY OF OBLIGATION AND CERTAINTY AS TO SUBJECT-MATTER; DEALER'S CONTRACT IS NOT A BINDING EXECUTORY CONTRACT OF SALE UNTIL HE SPECIFIES GOODS TO BE FURNISHED; RECOVERY OF AGENT'S DEPOSIT.**

An executory contract for the future sale of a commodity is not enforceable, unless by the terms of the agreement it is so intended, and there is mutuality of obligation and certainty as to the subject-matter and price. Under the rule just stated, a dealer's contract, establishing such a relationship between the local dealer and the defendant distributor of automobiles, which provides that the distributor is to furnish (provided he is able to do so), and in which the dealer, acting in his capacity as such, agrees to accept, a certain number of cars, to be selected from an attached schedule of models at prices which are subject to change by the distributor, does not constitute a binding executory contract of purchase and sale, and it was necessary that the dealer should, during the life of the contract, particularly specify the cars which were to be thus furnished, in order to consummate the agreement as one of absolute purchase and sale. *Overland Motor Car Co. v. Hill*, 145 Ga. 785, 89 S. E. 833. Especially is this true where it is also provided that either party had the arbitrary right to cancel the agreement on notice at any time. *White Co. v. American Motor-Car Co.*, 11 Ga. App. 285, 75 S. E. 345. While it is the general rule that a party claiming solely under and by virtue of the terms of an alleged executed contract must show performance on his own part (*Bennett v. Burkhalter*, 128 Ga. 154, 57 S. E. 231), still, even if the purport of the present suit be so construed, the expressed purpose and intent of the contract being considered, and the agreement being inchoate as to any purchase and sale, the failure of the dealer to specify and order out any of the cars would not, therefore, constitute such nonperformance on his part as

would prevent a recovery by him of the bonus paid in under the terms of the dealer's contract, nor could such failure be pleaded by way of damages in answer to such a suit.

**4. AFFIRMANCE WITH DIRECTION.**

The evidence demanded a verdict in favor of the plaintiffs in the amount of the judgment rendered, less the item set up by the defendant for advertising matter, for which sum, under the terms of the contract and the undisputed evidence, the plaintiffs are liable. This ruling being controlling, the special grounds of the motion for a new trial not specifically disposed of need not be considered, and the judgment is affirmed, with direction that, when the judgment of this court is made the judgment of the court below, the plaintiffs write off from the judgment rendered the sum of \$22.32.

Error from City Court of Tifton; J. H. Price, Judge.

Action by Shiver & Aultman, a partnership, against A. C. Tift. Verdict and judgment for plaintiffs, motion for new trial denied, and defendant brings error. Affirmed, with directions.

Fulwood & Hargrett, of Tifton, for plaintiff in error.

J. S. Ridgill, of Tifton, for defendants in error.

JENKINS, P. J. Judgment affirmed, with direction.

STEPHENS and SMITH, JJ., concur.

(128 Va. 640)

**TOWSON v. TOWSON.**

(Supreme Court of Appeals of Virginia. Jan. 22, 1920.)

**1. JURY**  $\S$ 18 — **PROPERLY IMPANELED TO TRY ISSUES MADE BY PLEA TO JURISDICTION IN DIVORCE.**

In a divorce case, where defendant filed pleas to the jurisdiction, to the effect that plaintiff had not been domiciled a year in the state before bringing the action, and issue was taken thereon, court did not err in impaneling a jury to try the issues on the pleas to the jurisdiction, in view of Code 1904, § 3274, the chancellor having no discretion about awarding a jury trial when demanded, such statute being mandatory that either party might have such an issue tried by a jury.

**2. EQUITY**  $\S$ 381 — **FINDINGS BY JURY ON PLEA TO JURISDICTION IN DIVORCE OF SAME EFFECT AS VERDICT AT LAW.**

In a divorce action, where defendant filed pleas to the jurisdiction alleging that plaintiff was not domiciled in the state for one year and was not a resident of a certain city, and plaintiff joined issue and trial was had of such issue before a jury under Code 1904, § 3274, a finding by the jury of the falsity of defendant's pleas

gave to the plaintiff the same advantages as if it had been so found by a verdict at law.

**3. TRIAL  $\S$  296(2)—OMISSION FROM INSTRUCTIONS HARMLESS, WHEN SUPPLIED BY OTHER INSTRUCTIONS.**

Complaint cannot be made of omissions from certain instructions, where the theories of the parties were fully presented by instructions given at the instance of one or the other of the parties covering all of the material evidence in the cause.

**4. APPEAL AND ERROR  $\S$  882(12)—APPELLANT CANNOT COMPLAIN OF OWN INSTRUCTIONS.**

Appellant cannot complain of error in instructions given at her request.

**5. JUDGMENT  $\S$  266—MOTION IN ARREST LIES ONLY FOR ERROR APPARENT ON FACE OF RECORD.**

A motion in arrest of judgment lies only for error apparent on the face of what is *per se* a part of the record at common law, and not for what is placed on the record by bills of exception.

**6. DIVORCE  $\S$  66—"DOMICILE" AND "RESIDENCE" AS USED IN STATUTE DEFINED.**

Under Code 1904,  $\S$  2259, declaring that no suit for divorce shall be maintained unless one of the parties has been domiciled in the state for at least one year and that suit may be brought in the county or corporation in which plaintiff resides, the word "domicile" means a legal residence within the state, while the word "resides" relates merely to a matter of venue and does not require that the plaintiff be actually domiciled in the county or corporation where he brought his action.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Domicile; Residence.]

**7. DIVORCE  $\S$  144—JUDGMENT UPON VERDICT ON PLEA TO JURISDICTION BEFORE HEARING ON MERITS PROPER.**

In a divorce case, where defendant filed pleas to the jurisdiction alleging that plaintiff had not been domiciled in the state for a year and a jury was impaneled under Code 1904,  $\S$  3274, and found in favor of plaintiff on the pleas, court did not err "in entering up judgment on the verdict of the jury before a hearing of the case upon its merits."

**8. DIVORCE  $\S$  37(22)—DESERTION JUSTIFIED ONLY BY SHOWING CONDUCT ENTITLING OTHER TO DIVORCE A MENSA.**

Desertion by one consort of the other can only be justified by showing such conduct on the part of the deserted party as would entitle the other to a divorce a mensa, and nothing short of this will justify a willful desertion or a continuance of it.

**9. DIVORCE  $\S$  326—FOREIGN DECREE DENYING DIVORCE TO WIFE RES JUDICATA OF HUSBAND'S INNOCENCE OF CRUELTY.**

Where wife brought action in the District of Columbia for divorce a mensa et thoro on the ground of cruelty and a decree was entered refusing the divorce on the ground that the charge of cruelty was not sustained, such decree was *res judicata* in another action by the hus-

band in Virginia to obtain a divorce on the ground of desertion, wife's defense being that she did not live with her husband because of his cruelty, and husband was entitled to a decree in his favor.

**Appeal from Circuit Court of City of Alexandria.**

Suit by Richard M. Towson against Nannie C. Towson. Decree for plaintiff, and defendant appeals. Affirmed.

This is a suit for divorce brought by the husband, in which a divorce a mensa was granted to him, on the ground of desertion, and the wife appeals.

Two pleas to the jurisdiction were filed by the wife, one denying that the husband had been domiciled in the state for one year before the suit was brought, and the other denying that the husband was a resident of the city of Alexandria, where the suit was brought, at the time the suit was instituted. Issue was taken on these pleas, and a verdict found by a jury on both pleas in favor of the husband. There was afterwards a hearing on the merits and a decree rendered in favor of the husband.

On September 22, 1916, the wife filed her bill against her husband, in the Supreme Court of the District of Columbia, praying for a divorce a mensa et thoro, for alimony, counsel fees, and the custody of their infant child, a son then 15 years of age. The ground of this suit was cruelty on the part of the husband, and the bill also charged that the husband had contributed nothing to her support since September 16, 1916, six days before the suit was brought. The husband answered denying the allegations of the bill. The witnesses were examined *ore tenus* before the judge, and, in an elaborate written opinion, he decided that the charge of cruelty was not sustained, and entered a decree refusing the divorce, but granting to the wife permanent alimony, counsel fees, and the custody of the child. From so much of the decree as allowed alimony and counsel fees, the husband appealed. The Court of Appeals of the District decided "that the decree, in so far as it provides for the separate maintenance for the wife, and affects the custody of the child, should be reversed; but in all other respects affirmed," and awarded costs and attorney's fees to the wife. See *Towson v. Towson* (App. D. C.) 258 Fed. 517.

On October 9, 1916, just seventeen days after the wife brought her suit, this suit was brought by the husband in the circuit court of the city of Alexandria, so that both suits were pending at the same time. The final decree in the Supreme Court of the District of Columbia was entered January 2, 1918. That in the circuit court of Alexandria on March 7, 1918, and that in the Court of Appeals of the District on —, 1918. The

wife entered a special appearance in filing her pleas to the jurisdiction, one of which was filed December 4, 1916, and the other March 7, 1917. She also filed another plea setting up the pendency of her suit in the District of Columbia, but the decree entered in the cause of March 16, 1917, states that the "pleas to the pendency of another suit were withdrawn in open court by counsel for the defendant." The decree last mentioned also directed a jury to be impaneled to try the issues joined on the two pleas to the jurisdiction, and that no further proceedings be had in the cause until said issues were decided. The jury trial was demanded by the husband, who was the complainant in the cause. The first jury summoned were unable to agree on a verdict and were discharged. At a subsequent term, another jury was impaneled to try said issues, to wit:

"(1) Whether the complainant, Richard M. Towson, was domiciled in the state of Virginia one year next before the institution of this suit, to wit, October 9, 1916.

"(2) Whether the complainant at the date of the issuance of the writ in this suit, to wit, October 9, 1916, was a bona fide legal resident of the city of Alexandria."

This jury found both issues for the husband. The court refused to set aside the verdict on the motion of the wife, but entered up judgment in accordance with the verdict, and the case was continued for proof on the merits. The defendant filed her answer in the cause January 3, 1918, and a supplemental answer on January 19, 1918. These answers put in issue all the allegations of the bill setting forth the grounds for divorce. Depositions were taken by both parties, and in addition thereto, by consent of the parties, the evidence given in the wife's suit in the District of Columbia, the opinion of the court and decree, were also read as evidence in this suit on the merits of the case, but not on the question of jurisdiction.

The following are the assignments of error in the petition for this appeal:

"(1) The court erred in ordering the issues upon the pleas to the jurisdiction, to be tried by a jury, because: (a) At the time the issues were ordered, neither party had taken proof upon the issues raised by the pleas. (b) The motion for an order directing the trial by a jury upon the issues joined was not supported by affidavits, as required by section 3831 of the Code.

"(2) The court erred in granting the three instructions prayed by the complainant, because: (a) They do not correctly propound the law upon the issues joined, and are misleading. (b) They conflict with the instructions granted the defendant, and tended to confuse and to mislead the jury. (c) They state mere abstract propositions of law, and make no application of the law to the facts at issue, and are misleading.

"(3) The court erred in overruling the motions of the defendant to set aside the verdict of the jury in arrest of judgment, and for a new trial, and in entering judgment on the verdict of the jury, because: (a) The verdict was contrary to the law and evidence of the case. (b) The court erred in entering judgment upon the verdict before a hearing of the case upon its merits.

"(4) The court erred in entering the final decree of March 7, 1918, because: (a) The decree is not supported by either the law or the evidence of the case. (b) The decree of the Supreme Court of the District of Columbia, in the suit of the defendant against the complainant, was entitled to full faith and credit, and while it remained in force was a bar to any further proceedings in this cause, on the ground of desertion; the decree of said court having been rendered and pleaded before the final decree in this cause of March 7, 1918."

Jas. R. & H. B. Caton, of Alexandria, for appellant.

C. E. Nicol, of Alexandria, for appellee.

BURKS, J. (after stating the facts as above). [1] The trial court committed no error in impaneling a jury to try the issues made on the pleas to the jurisdiction. This was not a case of an issue out of chancery, and is not controlled by the rules regulating the awarding of such issues, but is a wholly statutory proceeding. Section 3274 of the Code (1904) declares that—

"A plaintiff in equity may take issue upon a plea, and either party may have such issue tried by a jury."

The object is, not to inform the conscience of the chancellor, but to determine the issue of fact raised by the plea. The chancellor has no discretion about awarding the jury trial. The statute is mandatory that "either party may have such issue tried by a jury," and the verdict when rendered stands like any other verdict of a jury where the right to such trial is given without discretion on the part of the court. The court cannot disregard the verdict nor discharge the jury before verdict, as he may on the trial of an issue out of chancery. As to issues out of chancery, see *Miller v. Willis*, 95 Va. 337, 28 S. E. 337; *Catron v. Norton Hardware Co.*, 123 Va. 380, 96 S. E. 853. The statute was probably suggested by the remarks of Judge Pendleton in *Pryor v. Adams*, 1 Call (5 Va.) 382, 1 Am. Dec. 533. In that case it is said:

"On the next day, Pendleton, president, observed, he was apprehensive, that when speaking of the jurisdiction, yesterday, he said that the defendant 'may by plea deny the fact, and on that, ground his objection. The fact thus put in issue is to be tried, and if found for the defendant, his objection operates, if found for the plaintiff, the question occurs whether the fact alleged be a sufficient ground of equity.' It might be inferred that he thought it ought to be tried by a jury, but that however, was not his meaning, for he meant only that it

should be tried according to the usual course of chancery causes."

The revisors of 1819 manifestly thought the case a proper one for a jury trial and enacted that—

"If the complainant conceives any plea or demurrer to be naught, either for the matter or manner of it, he may set it down with the clerk to be argued; or if he thinks the plea good, but not true, he may take issue upon it, and proceed to trial by jury, as has been heretofore used in other causes in Chancery, where trial hath been by jury; and if, thereupon, the plea shall be found false, the complainant shall have the same advantages, as if it had been so found by verdict at common law." 1 Rev. Code 1819, c. 66, § 97, p. 215.

This section is in the chapter on "Courts of Chancery." The same identical words also appear as section 55 of chapter 71 on "County and Corporation Courts."

Pleas in chancery were then and since that time seldom used. When such a plea was used, it was generally to present some single fact, vital to the cause, and the determination of which would end the litigation at once. For example, a married woman was sued in equity to subject lands to the payment of a debt prior to the enactment of the married women's statute. She simply pleading coverture and the plea being found in her favor ended the case. That class of cases seems proper for a jury trial. At the revision of 1849 the section appears as section 83 of chapter 171, in the following words:

"A plaintiff in equity may take issue upon a plea and have such issue tried by a jury. If the plea be found false, he shall have the same advantage as if it had been so found by a verdict at law."

At the revision of 1887 the section appears as section 3274 in the following words:

"A plaintiff in equity may take issue upon a plea, and either party may have such issue tried by a jury."

This section omits the statement as to the effect of the verdict contained in the previous statutes, probably because unnecessary, for Judge E. O. Burks, one of the revisors, speaks of the change made in the section as follows:

"Under the former law, it would seem that, if a plaintiff in equity took issue upon a plea, he only could have such issue tried by a jury. This is changed, so as to allow either party to have such trial." Burks' Address, p. 39.

It seems reasonably certain that if any other change was intended it would have been mentioned.

[2] In the case in judgment, there was a great deal of testimony on the subject of the "domicile" and "residence" of the husband prior to, and at the time of, the institution of the suit, and much of it was of a conflicting nature. It was pre-eminently a case for a jury whose finding of the falsity of the de-

fendant's pleas should give him "the same advantages as if it had been so found by verdict at law."

[3, 4] The next error assigned is that the trial court erred in the instructions given on the trial of issues on the pleas to the jurisdiction (a) because they do not correctly propound the law and are misleading, (b) because they conflict with instructions given for the defendant, and (c) because they state abstract propositions of law and are misleading. The court gave three instructions for the plaintiff and seven for the defendant. They all relate to either or both of the subjects of "domicile" and "residence," questions often arising and frequently difficult to answer accurately. What constitutes each has been very fully discussed in recent opinions of this court, and we have nothing new to add thereto. *Cooper v. Commonwealth*, 121 Va. 338, 93 S. E. 680; *Williams v. Commonwealth*, 116 Va. 272, 81 S. E. 61. No one of the instructions asked for by the plaintiff directs a verdict. Instruction No. 1 was on the subject of what constituted residence, No. 2 was chiefly on the subject of what constituted domicile and who has the burden of proof on an allegation of change of domicile, and No. 3 chiefly on the subject of the effect on domicile of an absence from the state in discharge of duties under the United States government. They all conform substantially to the law as stated in the cases cited, though there are some occasional inaccuracies of statement. We do not think, however, that the jury could have been misled by such inaccuracies. None of them is amenable to the objection of being mere abstract propositions of law. They bore directly upon the issues submitted to the jury and there was ample evidence on which to base them. Nor do we think that they conflict with the instructions given for the defendant. The two sets of instructions presented the different theories of the contesting parties. In the mass of evidence introduced it is not always possible to introduce it all, even on a single subject, in a single instruction, and if no instruction were given which covered the omitted evidence it might be error; but this question does not arise where the different theories of the parties are fully presented by instructions given at the instance of one or the other of the parties covering all of the material evidence in the cause, as was done in this case. In *Ches. & O. R. Co. v. McCarthy*, 114 Va. 181, 188, 189, 76 S. E. 319, 322, it is said:

"Although an instruction standing alone may have been misleading, the verdict of the jury will not on that account be set aside, where it appears that the objection thereto was corrected by other instructions given by the court. In other words, instructions in a given case are to be read as a whole, and when so read, if it can be seen that the instruction could not have misled the jury, their verdict will not be disturbed, even though one or more of the instructions were defective; and defects in one in-

struction may be cured by a correct statement of the law in another. Wash., etc., *R. Co. v. Quayle*, 95 Va. 741, 80 S. E. 391; *Adamson v. Norfolk, etc., Co.*, 111 Va. 556, 69 S. E. 1055."

In the case in judgment we do not think there was any error of law in any of the instructions given for the plaintiff, and if there was any deficiency in the evidence recited in them it was supplied by the instructions given for the defendant. If there was error of law in the instructions given for the defendant, she cannot complain of it. We do not think the jury could have been misled by the instructions.

The next error assigned is that—

The trial "court erred in overruling the motions of the defendant, to set aside the verdict of the jury, in arrest of judgment and for a new trial, and in entering judgment on the verdict of the jury."

[5] There was no error in overruling the motion in arrest of judgment. Such a motion lies only for error apparent on the face of what is per se a part of the record at common law, and not for what is placed on the record by bills of exception. The motion existed at common law before bills of exception were authorized by statute. See *Graves' Pleading*, 89; *Ivanhoe Furnace Co. v. Crowder*, 110 Va. 387, 66 S. E. 63.

There were two issues submitted to the jury: First, was the complainant domiciled in Virginia for one year next before the institution of his suit; and, second, was he at the time of instituting his suit, to wit, on October 9, 1916, a bona fide resident of the city of Alexandria?

[6] Section 2259 of the Code (1904) declares that no suit for divorce shall be maintainable in the courts of this commonwealth unless one of the parties has been domiciled in the state for at least one year preceding the commencement of the suit, and that, if the defendant is a nonresident, the suit may be brought in the county or corporation in which the plaintiff resides. The latter provision was manifestly a mere matter of venue. The statute draws a clear distinction between domicile and residence, and it seems clear that the object of the first provision was to prevent the opening of the courts of this commonwealth to mere residents and to restrict them to litigants who had a more permanent identification with the state and the welfare of its citizens. The words "domiciled" and "resident" are technical words, and, according to the usual rule of construction of statutes, are presumed to have been used in their technical sense. This is especially true where both words are used in the same section of a statute. But, as said in *Cooper v. Commonwealth*, supra:

"Though frequently so used, 'residence' and 'domicile' are not synonymous words and domicile has the larger significance. The meaning

of the word residence depends upon the subject-matter and connection in which it is used. In general terms it may be said to be the dwelling place of a person, but it may be either his permanent or temporary abode. In the construction of statutes, the meaning of the word residence depends upon the context and purpose of the statute. As used in one statute it may clearly refer to a mere business residence, while as used in another it may just as clearly refer to domicile as technically and strictly defined. In determining the meaning of the word in a particular statute, the legislative purpose and the context must always be kept in view."

Great stress is laid by counsel for the appellee, Mrs. Towson, on the fact that, about the time this suit was brought, the complainant registered as a voter in Stafford county and voted at the presidential election held November 7, 1916, and it is insisted that he could not be a resident of the city of Alexandria at the time of the institution of his suit, and at the same time a resident of Stafford county. He seems to ignore the fact that, while a man can have but one domicile at a time, he may have had more than one residence at the same time. In the *Cooper Case*, supra, we held that Cooper had a domicile and also a domiciliary residence in West Virginia, though his actual residence and place of permanent abode for the time being was at Salem, Va. The opinion in that case is very full and instructive on this subject. Amongst other things, it is said in the opinion:

"The residence of the President is in the White House at Washington, while the domicile of the incumbent is in New Jersey; the residence of ambassadors during their terms must be at the capitals of the foreign countries to which they are accredited, while their domiciles remain in the territory of their own governments; many other public officials, voluntarily or because required by law to do so, change their residence during their terms but retain their original domiciles, in which they continue to exercise their political rights during their terms and to which they return at the expiration thereof; and many other persons, either for pleasure, health, or business reasons, have and maintain several residences while they retain and can retain but one domicile. As to all of these classes of persons, and those included therein are numerous, their domiciles determine their right to vote as well as the situs for taxation of their intangible property."

The opinion in the *Cooper Case*, supra, also quotes at length from the opinion of Kelly, J., now a member of this court, but then judge of the corporation court of the city of Bristol, in *Bruner v. Bunting*, 15 Va. Law Reg. 516, in which Judge Kelly held that, within the meaning of the Virginia election laws, domicile carried with it what may be called legal residence, or all the residence necessary to entitle a party to vote, and this we understand to be the general rule prevailing elsewhere. *Lankford v. Gebhart*, 130



(102 S.E.)

Mo. 621, 32 S. W. 1127, 51 Am. St. Rep. 585; 9 R. C. L. §§ 47, 49, and cases cited. Indeed, we do not understand counsel for the appellee to deny that, if the facts justified it, the complainant could have shown that he had retained his domicile in Stafford county with the right to vote there, and at the same time have had a residence for other purposes in the city of Washington, D. C. He did not object to the admissibility of the evidence to prove these facts, but, on the contrary, took evidence in rebuttal, and argued strenuously to show that the complainant had not established them. If the complainant could have a domiciliary residence in Stafford county with the right to vote there, and at the same time a residence for other purposes in the city of Washington, D. C., why could not the latter residence have just as well been in Alexandria as in Washington? If it was cheaper to live in Alexandria, or if for any other reason the complainant preferred to reside there, what difference could it make to the state of Virginia? What difference could it make to the state whether the suit for divorce was brought in the city of Alexandria, or in the county of Stafford? The state was careful to provide that its courts should not be open to suits for divorce at the instance of mere residents, and confined their cognizance to cases where "one of the parties had been domiciled in this state for at least one year preceding the commencement of the suit," but, having done this, it then gave a choice of venues for the suit. In the matter of venue the state was not particularly interested further than to provide for the convenience of those to whom the courts were open. Having tendered the jurisdiction of the courts to a certain class of litigants, it was immaterial to the state in what locality that jurisdiction was exercised. It did, however, fix the venue of such suits, and this venue must be followed if the defendant objects to any other. Whether or not the complainant followed the venue fixed by the statute was a question of fact which the verdict of the jury answered in the affirmative upon ample evidence to support their verdict and that is conclusive.

[7] The sixth instruction given for the defendant is in conflict with the views hereinbefore expressed, and was therefore erroneous; but the error was harmless. The plaintiff cannot complain because the verdict was in his favor, and the defendant cannot, as it was given at her request. Under the circumstances, neither party is hurt by it. The circuit court did not commit any error "in entering up judgment on the verdict of the jury before a hearing of the case upon its merits." The defendant called in question the jurisdiction of the court by her pleas, and it was proper to settle that question before proceeding to hear the cause on its merits.

[8] Upon the merits of the case not a great deal need be said. In the suit between the same parties in the District of Columbia, this same trouble between the husband and wife was fully investigated. The witnesses were brought before the judge and testified *ore tenus*. After a review of all the testimony in an elaborate written opinion, which evidence and opinion were made part of the record in this case by consent of parties, he entered a decree that the wife had not sustained her charge of cruelty on the part of her husband and was not entitled to a divorce on that account. In the case before us, the desertion on the part of the wife is admitted; but she claims it was justified by reason of his cruel treatment. She now declares that the separation is final and that she would not return to live with him even "in the White House."

In *Alkire v. Alkire*, 33 W. Va. 517, 11 S. E. 11, it is said:

"According to the weight of authority, and what seems to be the only safe and practicable rule, the justifiable cause which will excuse one of the parties for leaving the other must be such conduct as could be made the foundation of a judicial proceeding for divorce *a mensa et thoro*. Nothing short of such conduct will justify a willful separation or a continuance of it. The interests of society, the happiness of the parties, and the welfare of families demand such a rule. Separation is not to be tolerated for light causes, and all causes are light which the law does not recognize as grounds for divorce."

In *Crounse v. Crounse*, 108 Va. 108, 60 S. E. 627, it was held that desertion by one consort of the other can only be justified by showing such conduct on the part of the deserted party as would entitle the other to a divorce *a mensa*, and that nothing short of this will justify a willful desertion, or a continuance of it.

[9] The decree of the Supreme Court of the District of Columbia is binding on the parties to this suit, and, as that decree holds that the conduct of the husband was not such as to entitle the wife to a divorce *a mensa*, it follows that the desertion by the wife and her continuance of it are wrongful. That question is *res judicata*. The situation then is this: The wife admits the desertion and declares that her determination not to return to her husband is irrevocable, and it has been judicially determined in a suit between the same parties that this desertion and its continuance is wrongful, and that the wife is not entitled to a divorce on account of the alleged misconduct of her husband. Under the circumstances, it is unnecessary to consider the evidence adduced in the present suit. There was no error in decreeing the divorce to the husband on the ground of desertion.

The decree of the trial court makes no order as to the custody of the infant, a boy

now about 18 years of age, and we are not asked to make any.

Under the circumstances of the case, a decree will be entered here, affirming the decree of the circuit court, but awarding costs to the appellant.

Affirmed.

(126 Va. 657)

**UPTON & WALKER v. R. D. HOLLOWAY & CO.**

(Supreme Court of Appeals of Virginia. Jan. 22, 1920.)

**1. APPEAL AND ERROR §1002—FINDING ON CONFLICTING EVIDENCE CONCLUSIVE.**

Finding of jury, based on conflicting evidence, is conclusive on appeal.

**2. TRIAL §252(2)—INSTRUCTIONS UNNECESSARY WHERE EVIDENCE SUPPORTING THEM INSUFFICIENT TO SUSTAIN VERDICT FOUNDED THEREON.**

Since the repudiation in this state of the scintilla doctrine, it is no longer necessary to give an instruction, where the evidence to support it is such that a verdict founded upon it could not be maintained.

**3. CONTRACTS §97(2)—RATIFICATION MUST BE WITH FULL KNOWLEDGE.**

The rule that no man will be held bound by a waiver of his rights, unless it plainly appears he had full knowledge of them and a distinct intention to waive them, applies to ratification of a voidable contract, which involves a waiver of objection to that which rendered the contract voidable.

**4. CONTRACTS §94(5)—REQUISITES OF MISREPRESENTATION TO AVOID CONTRACT STATED.**

In order that a misrepresentation be sufficient to avoid a contract, it must not only have been false, but must have been believed to be true by the other party.

**5. SALES §421—EVIDENCE OF DEFENDANT'S KNOWLEDGE OF FRAUD AT CLAIMED RATIFICATION OF CONTRACT INSUFFICIENT TO REQUIRE INSTRUCTION AS TO RATIFICATION.**

In an action for defendant's breach of contract to deliver oats and bran, defended on the ground that plaintiffs had falsely represented to defendant that a government contract for supplying feed had been awarded them, evidence as to defendant's knowledge of the fraud at the time he wrote a letter relied on by plaintiffs as a ratification of the contract, held to amount only to a scintilla of evidence, so that it was not error to fail to instruct as to ratification by defendant.

Error to Circuit Court of City of Newport News.

Action by Upton & Walker against R. D. Holloway, doing business under the style of R. D. Holloway & Co., with cross-demand by defendant. Judgment for defendant, and plaintiff brings error. Affirmed.

Upton & Walker brought an action of assumpsit against R. D. Holloway, doing business under the style of R. D. Holloway & Co., and there was a judgment for the defendant, to which this writ of error was awarded. The parties occupy the same relation to each other in this court that they occupied in the trial court.

The United States government, in November, 1917, called for bids for large quantities of oats and bran for the embarkation camp at Newport News, Va. The bids were to be opened on November 15th. The plaintiffs, who were wholesale dealers at Newport News, desiring to make a bid for these supplies, applied to the defendant, a wholesale broker in such supplies, for a one-day option, at stated prices, on such supplies, and it was given. When the bids were opened, it was found that the plaintiffs were the lowest bidders, and it was supposed the contract would be awarded to them. It seems fairly plain that both parties understood that the option was requested and given to enable the plaintiffs to make a bid. The call for bids required deliveries at Newport News. Supplies of this nature had to be purchased elsewhere and transported to Newport News, and the United States government had practically laid an embargo on private shipments, so that the dealers in such supplies in the Western states, from which the great bulk of them had to come, would not sell and deliver them in considerable quantities, except to purchasers for the use of the government, who could furnish a government permit for speedy shipment. On November 19, 1917, just four days after the bids were opened, the defendant entered into a written contract with the plaintiffs to furnish them 132 carloads of oats at 74 cents per bushel and 15 carloads of bran at \$36 per ton. There is serious conflict in the testimony as to what took place when this contract was entered into, and immediately preceding that time; the plaintiffs' testimony showing that they stated to the defendant that they were the lowest bidders, though the contract had not been actually made, but that they would take the oats and bran, whether they got the contract or not, and the defendant's testimony showing that the plaintiffs stated to the defendant that they had obtained the contract with the government, and that he was ignorant of anything to the contrary. After this contract was entered into, the defendant made purchases in Ohio to enable him to fulfill his obligation, and the sellers there were urging him to send on the government permit for transportation, or the "serial number" of the contract, so as to enable them to promptly forward the supplies, and thus avoid warehouse or storage charges, and the defendant claims that he made similar demands upon the plaintiffs,

and the plaintiffs promised compliance from day to day. As the contract between the plaintiffs and the government had not in fact been entered into, they could not furnish the permit; but the defendant claims that he was ignorant of this fact, and expected daily that the plaintiffs would furnish the permit to him, so that he could forward it to his shippers. Finally, on the 29th of November, the government rejected the bid of the plaintiffs, and gave notice that it would accept bids on November 30th, for practically the same supplies mentioned in the first call. The plaintiffs were again bidders for the same amount of supplies as they had bid for under the first call, but at increased prices. The plaintiffs were again the lowest bidders, and the contract was awarded to them, and was subsequently executed by them. In the meantime, to wit, on November 28th, the defendant left for Oklahoma on a hunting trip, where he remained for two weeks, returning about the middle of December. At the time he left Virginia the defendant testified that he did not know of the rejection of the bid of the plaintiffs under the first call, nor of the call by the government for new bids. When the defendant went to Oklahoma, he left an agent, W. E. Vassar, in charge of certain portions of his business.

On December 4th, Vassar wired the defendant that—

"Walker got the last contract and is after me about the goods you sold him, but have done nothing yet. Your last intimation was that you would cancel as he did not furnish contract number. Will wait to hear from you before I deliver anything."

After the return of the defendant from Oklahoma, to wit, on December 17, 1917, the plaintiffs addressed to him a written communication "referring to your contract dated November 19, 1917," and giving directions as to the quantities and times for delivery of the supplies mentioned in the contract. To this the defendant replied on December 18, 1917, as follows:

"Your favor of December 17th is received. The same shall have our attention at the proper time."

On the next day the defendant repudiated the contract on the ground, as he states, that the plaintiffs had defrauded him and obtained the contract by false representations, and that he did not consider himself bound by it and would not deliver a pound of the oats. The plaintiffs, being under obligations to the government to deliver the oats and bran at specified times and prices, went upon the market and bought them at advanced prices, and charged the difference to the defendant. This difference amounted to \$59,868.18, for which the present action was brought.

About December 15, 1917, before defendant

alleges he first discovered the fraud, he obtained from the plaintiffs \$10,774.40 for eight carloads of oats then on the railroad tracks in Newport News, which was the value of the oats at 74 cents per bushel. After the alleged discovery of the fraud, the defendant refused to deliver these oats, but was compelled by the government to deliver them, without passing upon the rights of the parties, or prejudicing them in any way. Between November 19, 1917, and December 15, 1917, oats advanced in price on the market from 74 cents a bushel to 95 cents a bushel, making a difference on the eight cars of \$3,057.60. The defendants denied any liability under the contract of November 19, 1917, on the ground of fraud and false representations in its procurement, and also filed a special plea under section 3299 of the Code (1904), claiming a recovery over against the plaintiffs of the sum of \$3,057.60 aforesaid, for advance in the price of the eight carloads of oats. The plaintiffs denied all fraud and false representations, and further insisted that, if there had been any such, the defendant, with full knowledge thereof, had subsequently ratified the contract. The jury found for the defendant on both defenses offered by him, and rendered a verdict in his favor for the sum of \$3,057.60. It is admitted by the plaintiffs that the verdict is for the correct amount, if the finding of the jury is correct on the question of fraud and ratification. Other facts, as far as necessary, are given in the opinion of the court.

Lett & Massie, of Newport News, and Thos. H. Willcox, of Norfolk, for plaintiff in error.

Jno. N. Sebrell, Jr., of Norfolk, and S. R. Buxton and Nelms, Colonna & McMurran, all of Newport News, for defendant in error.

BURKS, J., after making the foregoing statement, delivered the opinion of the court.

[1] The evidence on the subject of fraud in the procurement of the contract being conflicting, the finding of the jury on that subject is final and conclusive, and, even if the case had to be reversed on other grounds, this finding would not be disturbed under the provisions of section 6365 of the new Code. But that finding is not assigned as error in the petition for writ of error, and will be accepted as correct in the further consideration of the case. The only errors assigned are the giving to the jury, at the request of the defendant, of instructions 2, 3, and 6, and the refusal of the court to set aside the verdict on the ground of misdirection of the jury. As the same alleged error inheres in all three instructions and in both motions, the case will be fully disposed of by considering the objection to only one of the instructions.

Instruction No. 2, given for the defendant, was as follows:

"The court instructs the jury that if they shall believe from the evidence that Holloway was led into making his contract with Upton & Walker on the 19th of November by reason of any representation by Walker to the effect that Walker & Upton had been the successful bidders at the bidding of November 15th, and had been awarded a contract to furnish the government with oats and bran, and that such representation was material, they must find for the defendant."

The objection urged against the instruction is that it takes only a partial view of the evidence, and directs a verdict for the defendant, if the jury believe that the fraud in the procurement of the contract was proved, and wholly ignores the other contention of the plaintiffs that they were entitled to recover, notwithstanding the fraud, if, with knowledge of the fraud, the defendant ratified the contract. The plaintiffs further contended that, if the omission of any reference to ratification produced a conflict between the instructions given for the plaintiffs and the defendant, respectively, they were entitled to a new trial on account of such conflict. A number of decisions of this court were cited for both propositions, but it will not be necessary to cite them. The jury was fully instructed on the subject of ratification in the instructions given at the instance of the plaintiffs.

The defendant, while not conceding the application of either of the above legal propositions to this case, insisted that there was no evidence in the cause upon which to base an instruction on the subject of ratification, and hence there was no error in failing to make any reference to it in the instructions given at the instance of the defendant. The plaintiffs insisted that there was, and to this question much of the argument of counsel, both oral and printed, was addressed.

[2] Since the repudiation in this state of the scintilla doctrine, it is no longer necessary to give an instruction where the evidence to support it is such that a verdict founded upon it could not be maintained. *Ches. & O. Ry. Co. v. Stock*, 104 Va. 97, 51 S. E. 161. In other words, if an instruction is asked which correctly propounds the law, it should be given, if there is sufficient evidence in the cause to support a verdict found in accordance therewith. If, however, the situation is such that a verdict in accordance with a proposed instruction would have to be set aside, either, because without evidence to support it, or *plainly* contrary to the evidence, then the instruction should be refused. *Trotter v. Du Pont Co.*, 124 Va. 680, 98 S. E. 621.

[3] If there was not sufficient evidence in this cause to sustain a verdict in favor of the plaintiffs on the question of ratification, then there was no error in the instruction, and the judgment of the trial court should be affirmed. Ratification of a voidable contract

involves a waiver of objection to that which rendered the contract voidable, but no man will be held bound by a waiver of his rights, unless it plainly appears that he has full knowledge of his rights and a distinct intention to waive them. It is said that—

"When the original transaction is infected with fraud, the confirmation of it is so inconsistent with justice and so likely to be accompanied with imposition, that the courts watch it with the utmost strictness, and do not allow it to stand but on the clearest evidence." *Wilson v. Carpenter*, 91 Va. 183, 21 S. E. 243, 50 Am. St. Rep. 824; *Montague v. Massey*, 76 Va. 307.

The plaintiffs claim that the contract was ratified by the defendant's letter to them of December 18, 1917. They had written to him the day before, specifically referring to the contract of November 19, 1917, requesting delivery of the oats and bran in certain quantities and on certain dates specified in their letter, and on the next day he replied, saying:

"Your favor of December 17th is received. The same shall have our attention at the proper time."

This is the only ratification relied on by the plaintiffs, and it may be conceded, as the defendant did, that it was adequate for the purpose, provided the plaintiffs could show that at that time the defendant had knowledge of the fraud which had been perpetrated upon him in the procurement of the contract. All of the other evidence of the plaintiffs on this subject was directed to the establishment of knowledge on the part of the defendant at the time he wrote that letter.

[4] In order to show knowledge on the part of the defendant, the plaintiffs introduced several witnesses who testified that at the time of making the contract Mr. Walker, a member of the plaintiffs' firm, stated to the defendant that the plaintiffs had the lowest bid, though the contract had not been let, and that they would take the supplies mentioned in the contract, whether they got the contract or not. These statements all refer to the time of the making of the contract, and cannot be evidence of ratification of a contract obtained by fraud. If the facts be in accordance with the statements of these witnesses, then there was no fraud in the contract, and there was nothing to be waived or ratified. All of the cases agree that, in order for a misrepresentation to be sufficient to void a contract, it must not only have been false, but must have been believed to be true by the other party. If, in fact, the defendant knew that the plaintiffs did not have the contract, he could not have believed to the contrary, as no one can believe that to be true which he knows to be false. So that the statements of the witnesses as to what occurred at the time of the making of the contract are not evidence of ratification

of the contract, which the verdict of the jury ascertained to have been obtained by fraud. This finding of the jury is not excepted to and must be accepted as true. The testimony, therefore, with reference to what took place at the time of the making of the contract may be laid out of consideration on the question of ratification.

It is next sought to prove knowledge on the part of the defendant by showing that Vassar knew that the plaintiffs' bid of November 15, 1917, had been rejected, and that he had communicated that fact to the defendant. To establish this fact the plaintiffs relied upon the telegram dated December 4, 1917, which was sent by Vassar to the defendant while he was in Oklahoma on his hunting trip. Vassar was not the general agent of the defendant, nor did he have anything to do with the contract of the plaintiffs, except to carry out such specific orders as the defendant might give him. It is not claimed by the plaintiffs that the knowledge of Vassar was imputed to the defendant, but that he communicated the knowledge which he had on the subject to the defendant in the telegram aforesaid. This telegram was in the following words:

"Walker got the last contract, and is after me about the goods you sold him, but have done nothing yet. Your last intimation was that you would cancel as he did not furnish contract number. Will wait to hear from you before I deliver him anything. Did not call James about selling oats as I sold Hiden the seventy-five thousand at seventy-seven and wired shippers his contract number before they canceled and got his check for profit. No oats on inspection track yet. Answer so I will know whether to get government order for cars on Walker's contract number. Will not do anything until I hear from you."

The defendant left Virginia for Oklahoma on November 28, 1917. The plaintiffs' bid of November 15 was not rejected until November 29th, so that it was impossible for the defendant to have known of the rejection of the bid before he left Virginia, and he testifies most positively that he knew nothing of the rejection of that bid. He had been daily expecting a shipping permit to be furnished him by the plaintiffs, and while at the station starting on his trip, he told P. W. Hiden to inform Vassar, unless this permit was furnished by the plaintiffs, that Vassar should sell the oats to him, Hiden. This statement was in exact accord with the testimony of the defendant that he had been urging the plaintiffs to furnish the permit, and had been promised it from day to day, and was expecting it from them. The defendant testified that when he received this telegram he supposed that Vassar referred to the contract of November 15th, as that was the last contract, and the only contract of which he had any knowledge; that he knew nothing of the bid of

November 30th. This statement accords with other facts shown in the case. While Vassar, in sending the telegram, had in mind the bid of November 30th, there was nothing on the face of the telegram to indicate that fact, and the defendant was in entire ignorance thereof; nor did the defendant obtain any other information on the subject until after his letter of December 18th had been written and delivered. On the morning of December 19th he learned for the first time that there had been a second bidding and that the plaintiffs had been awarded the contract under that bid. He then promptly repudiated the contract and refused to furnish any supplies thereunder. It is not deemed necessary to recite the evidence in detail, which is lengthy; but we have been unable to find anything in the language of the telegram and the evidence relating thereto, which would justify the jury in finding that the defendant knew of the plaintiffs' fraud at the time he wrote the letter of December 18, 1917.

The plaintiffs also endeavored to show knowledge on the part of the defendant by proving that Vassar had ascertained on November 28th that the plaintiffs had not secured the contract, and that he informed the defendant thereof two or three days later. Vassar testified that he learned on the 28th of November that the contract had not been awarded, and on the 29th he learned that it was refused, and he states that two or three days after the 28th he wired Mr. Holloway, but he nowhere states that he gave the defendant any other information that the bid of November 15th had been rejected, except what was contained in the telegram. On the contrary, he testifies explicitly that the first time that he told the defendant that the plaintiffs did not have the contract of November 15th was about the 18th or 19th of December. He undertakes to give the circumstances under which this information was furnished, and it sufficiently appears from other testimony that this information was conveyed to the defendant on the morning of December 19th. It is true that he states that he thought that the defendant knew that the bid of November 15th had been rejected, but he got this impression or thought from a conversation he had with Hiden with reference to what had taken place between Hiden and the defendant at the station on the morning of November 28th, when the defendant was starting on his trip to Oklahoma. The defendant sought to bring out this conversation in the testimony, but it was excluded on the motion of the plaintiffs, so that the entire conversation does not appear. Vassar testifies, however, that Hiden told him that the bids had been thrown out, "and said he saw the chief down at the station, and Holloway told him to go back to the office and tell me, if I did not get a permit to get the oats shipped, to sell them to him."

We do not see how Vassar could have got the impression from this statement that the defendant had notice that the bid of November 15th had been rejected. Not only was the bid not rejected until November 29th, but the statement that Vassar was to sell the oats to Hiden, if Vassar did not get a permit to get the oats shipped, was in entire accord with the statements of the defendant that the plaintiff had been daily promising to furnish the permit, and he was daily expecting it, and while he had been threatening to cancel the contract for failure to furnish the permit, still the message to Vassar indicated that he was still willing to deliver the supplies if the permit was furnished. Of course, no permit would be furnished if the contract was not let, and defendant's statement would seem plainly to indicate that he was in ignorance of the fact that the contract of November 15th had not been let to the plaintiffs. The defendant himself testified in the case most explicitly and positively that Walker stated to him that the plaintiffs had the contract with the government of November 15th, and that he had no knowledge of anything to the contrary, and in fact believed that they did have such a contract until informed to the contrary by Vassar on the morning of December 19th; that he then stated to the plaintiffs that he would not furnish one pound under the contract because they had defrauded him and misrepresented the facts to him. In opposition to the explicit and positive testimony on behalf of both the defendant and Vassar, as to the time when the defendant had knowledge of the fraud, there is opposed only the testimony of Vassar that he thought from the conversation he had with Hiden that the defendant knew that the bids of November 15th had been thrown out. This thought of Mr. Vassar, it appears, was unwarranted and unfounded, and was a mere deduction from a conversation had with Hiden, the whole of which the defendant was not permitted to introduce in evidence on account of objections from the plaintiffs.

[5] Looking to all the evidence introduced on behalf of the plaintiffs to show knowledge on the part of the defendant of the fraud committed upon him by the plaintiffs, it amounts to nothing more than a scintilla of evidence, if so much, and the placing of the unfounded thought of Mr. Vassar against the positive evidence of the defendant. If, under these circumstances, the instructions given for the defendant had been modified to conform to the plaintiffs' view, and the verdict had been rendered in accordance therewith, holding that there had been ratification by the defendant after full knowledge of the fraud perpetrated upon him, it would have been the duty of the trial court to have set it aside as plainly contrary to the evidence.

For the reasons hereinbefore stated, we are

of opinion that no error was committed by the trial court, and its judgment must therefore be affirmed.

Affirmed.

WHITTLE, J., absent.

(126 Va. 469)

COMMONWEALTH et al. v. CARTER et al.

(Supreme Court of Appeals of Virginia. Jan. 22, 1920.)

1. TAXATION  $\S$  891½—ILLEGAL ASSESSMENT OF INHERITANCE TAX MAY BE ENJOINED, THERE BEING NO ADEQUATE LEGAL REMEDY.

Acts 1916, c. 64, providing that no suit to restrain assessment or collection of any state or local tax shall be maintained, except where the party has no adequate remedy at law, does not preclude a suit to enjoin the assessment of inheritance taxes under Tax Bill, § 44 (Acts 1916, c. 484), since Code 1904, §§ 567-573 (Code 1919, § 2385 et seq.), do not provide a remedy at law for illegal assessment of inheritance taxes.

2. APPEAL AND ERROR  $\S$  186—OBJECTION TO VENUE CANNOT BE FIRST RAISED ON APPEAL AFTER WAIVER BELOW.

Code 1919, § 6049, requires that a suit in which the auditor is a necessary defendant be brought in the city of Richmond, and section 6061 provides for transferring to the circuit court of such city any such action or suit; so it would have been the trial court's duty to change the venue, had proper motion been made, but such question cannot be raised for the first time on appeal, after waiver in the trial court.

3. STATUTES  $\S$  121(4) — INHERITANCE TAX ACT NOT INVALID AS EMBRACING MORE THAN ONE OBJECT IN TITLE.

Acts 1916, c. 484, providing for assessment of inheritance taxes, is not void, as in violation of Const. § 52, providing that no law shall embrace more than one object, which shall be expressed in its title, its title reciting that it amends General Tax Bill, § 44, entitled "An act to raise revenue for the support of the government," in relation to taxes on inheritances, clearly indicating the changed legislative purpose to impose taxes on direct as well as collateral inheritances.

4. CONSTITUTIONAL LAW  $\S$  284(1) — TAXATION  $\S$  859(1)—INHERITANCE TAX ACT DOES NOT DENY DUE PROCESS.

Acts 1916, c. 484, relating to taxes on direct and collateral inheritances, and authorizing, in paragraph F thereof, collection of such taxes in certain contingencies by motion in court, is not in violation of the due process clauses of the federal and state Constitutions; an inheritance tax not being one on property, but a condition precedent to the transfer of property, and particularly since by Code 1904, §§ 567-573, and otherwise, the Legislature has provided a remedy in equity for illegal assessments.

**5. CONSTITUTIONAL LAW §284(2)—INHERITANCE TAX ACT REQUIRING NO NOTICE OF ASSESSMENT TO RECEIVER OF GIFT OR INHERITANCE VALID.**

There is no inherent right to succeed to property of decedents, and the state has the inherent sovereign right to impose conditions on such succession, and such successor has no property interest in the part of such property which the General Assembly withholds from him, so that an act providing that the clerk of court shall assess such inheritance tax, without requiring any previous notice to those who are to receive a gift or inheritance, is valid, and an assessment thereunder is valid, if based on proper valuation, since no right has been invaded.

**6. CONSTITUTIONAL LAW §48—WHERE STATUTE SUSCEPTIBLE TO VALID AND INVALID CONSTRUCTIONS, THE FORMER MUST PREVAIL.**

If under one construction an inheritance tax law may be held not to provide due process and under another to afford such due process, the latter construction should be adopted, for the Legislature will not be presumed to have intended to pass on the invalid law.

**7. CONSTITUTIONAL LAW §284(2)—INHERITANCE TAX ACT AFFORDING OPPORTUNITY TO CONTEST VALIDITY BEFORE FIXING OF FINAL LIABILITY AFFORDS DUE PROCESS.**

All that is essential in an inheritance tax law to constitute due process is that the taxpayer be afforded an opportunity to contest its validity, and to show that it is an illegal exaction before it is enforced or his liability therefor is irrevocably fixed, and the character of the tax, whether property or license tax, is immaterial; notice of previous assessment not being required as to either.

**8. TAXATION §891½—SUIT TO ENJOIN INHERITANCE TAX ASSESSMENT CANNOT BE ENTERTAINED, UNLESS COMPLAINANT IS READY AND WILLING TO PAY AMOUNT JUSTLY DUE.**

In a proceeding to enjoin the assessment of an inheritance tax, where the precise value of the property is admitted, and the successors to the property can take only by the state's permission what remains after deducting the tax, no court of equity should entertain the bill, unless the complainant is ready and willing to pay the amount of tax which is justly due on a fair valuation of the property.

**9. TAXATION §859(1) — INHERITANCE TAX STATUTES SUFFICIENTLY SAFEGUARD AGAINST INJUSTICE.**

Code 1904, § 2647, and section 2671 et seq. (Code 1919, c. 219), require appraisers appointed by the court in which the personal representative qualifies to appraise the property and return an inventory, all of which are recorded in the public records, and if such statutes be substantially followed, the character and value of the property to be transmitted on which inheritance taxes are assessed, will usually be shown, rendering the danger of injustice remote and the statute sufficient.

**10. TAXATION §891½—SUIT TO ENJOIN INHERITANCE TAX ASSESSMENT PROPERLY ENTERTAINED.**

Where, at the time a bill was filed to enjoin assessment of inheritance taxes, the Legislature had already amended Tax Law, § 44, by Acts 1918, c. 238, providing a remedy by motion, corresponding with that afforded by Code 1904, § 567 et seq., but the 1918 statute had not become effective when the auditor appeared by intervention in a court other than the circuit court of the city of Richmond, without protest or motion to remove, the court properly entertained jurisdiction of the cause, yet, had the institution of the suit been postponed until after the statute went into effect, it would have been unnecessary to do so, for the remedy by motion to transfer under the amended statute would have been clearly adequate.

**11. TAXATION §864—INHERITANCE TAX, NOT ON ENTIRE ESTATE, BUT PROPERTY RECEIVED BY BENEFICIARY, "PROPERTY OR INTEREST" AND "ESTATE" BEING USED INTERCHANGEABLY.**

Acts 1916, c. 484, relating to assessment of inheritance taxes, places the tax, not on the value of the entire estate, but on the value of the property received by the beneficiary; the word "estate" referring, not to the entire estate, but to the estate or property passing to the several beneficiaries, and the words "property or interest" and "estate" are used interchangeably to convey the same meaning.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Estate.] Sims, J., dissenting.

**Appeal from Circuit Court, Clarke County.**

Suit by Agnes Mayo Carter, executrix of Thomas Nelson Carter, deceased, and another, against the Commonwealth of Virginia, in which the Auditor of Public Accounts intervened. From the decree therein, defendants appeal. Affirmed.

The Attorney General and El. Warren Wall, of Richmond, for appellants.

W. Brydon Tennant and R. W. Carrington, both of Richmond, for appellees.

PRENTIS, J. Agnes Mayo Carter, executrix, widow of Thomas Nelson Carter, deceased, and Isabella Burwell Carter, his daughter, the sole beneficiaries under his will, instituted their suit in equity in the circuit court of Clarke county on June 5, 1918, complaining of the assessment of inheritance taxes under section 44 of the Tax Bill, as amended March 22, 1916 (Acts 1916, p. 812). The auditor of public accounts was not made a party to the suit, but promptly appeared by counsel, upon his own motion was made a party defendant, and filed his demurrer and answer to the bill. The court overruled the demurrer, held the statute constitutional, but enjoined the amended or supplemental assessment, which had been made by the clerk of the court under instructions from the au-

ditor, holding that the proper construction of the statute is that, instead of being determined by the value of the entire estate of the decedent, the tax thereby imposed should be computed upon each distributive share thereof, after deducting the exemption allowed, and enjoined the enforcement of the larger and later assessment.

The commonwealth assigns as error—

1. The overruling of the demurrer and refusing to dismiss the bill.

[1] (a) It is claimed that the demurrer should have been sustained, upon the ground that the complainants had an adequate remedy at law—citing *Commonwealth v. Tredgar Co.*, 122 Va. 506, 95 S. E. 279. If this be true, of course, the court erred, for the act of February 24, 1916 (Acts 1916, p. 89), provides that:

"No suit for the purpose of restraining the assessment or collection of any tax, state or local, shall be maintained in any court of this Commonwealth, except when the party has no adequate remedy at law."

Before the enactment of that statute, the taxpayer, who felt aggrieved by assessment of his property for taxation, at his election, could either institute his suit in equity to enjoin the collection of the tax, or proceed by motion under Code, §§ 567 to 573, inclusive (Code 1919, § 2385 et seq.). This jurisdiction has been so long firmly established in this state that it no longer admits of question. *Wytheville v. Johnson*, 108 Va. 590, 62 S. E. 328, 18 L. R. A. (N. S.) 960, 128 Am. St. Rep. 981; *Tiller v. Excelsior Coal Corp.*, 110 Va. 153, 65 S. E. 507. So that the question here arising as to this point is whether or not those sections provide a remedy for the illegal assessment of an inheritance tax. The reading thereof is sufficient to show that they afford no such remedy. They refer in terms to taxes on land or other property, and the assessments thereof made by the commissioners of the revenue. It is true that in *Posey v. Commonwealth*, 123 Va. 551, 96 S. E. 771, this statutory remedy for the correction of an assessment of an inheritance tax alleged to be erroneous was invoked in the trial court and here by counsel of ability. The point, however, was either waived or unnoticed, and that case is not authority for the proposition which the commonwealth here contends for, because the question was neither raised nor considered.

[2] (b) It is claimed that the circuit court of Clarke county had no jurisdiction to entertain this suit, because the auditor of public accounts was a necessary party thereto, and it is true that Code 1919, § 6049, requires a suit in which the auditor is a necessary party defendant to be brought in the city of Richmond, and that section 6051 provides for the transfer to the circuit court of the city of Richmond of any such action or suit which is brought in any other court of the state.

If the auditor had not appeared or had objected to the bill on this ground, or had made a motion for the transfer of the case to the circuit court of the city of Richmond, it would certainly have been the duty of the court under this statute to transfer the case. *Johnson v. Hampton Institute*, 105 Va. 319, 54 S. E. 31. No such motion, however, was made in the circuit court, and the auditor voluntarily answered the bill, and the record shows that the case was docketed and heard there upon the merits by consent. Although, as stated, it would have been the duty of the trial court to change the venue, had the proper motion been made, such a question cannot be raised for the first time in this court after such a waiver in the trial court.

2. The appellees assign cross-error under rule 8 (71 S. E. viii).

[3] (a) It is claimed that the inheritance tax law of 1916 is void as in violation of section 52 of the Constitution, which provides that no law shall embrace more than one object, which shall be expressed in its title.

This question has been so frequently considered by this court that it is not considered necessary to review the authorities. We think it sufficient to say in this case that the title of the act recites that it amends section 44 of the general tax bill, entitled "An act to raise revenue for the support of the government," etc. This and other sections of that general act have been frequently amended by reference to its original title, with the number of the amended section only. Section 44 had been previously amended, and the title of that amendment referred specifically to taxes on collateral inheritances. When this amendment of 1916 was made, the title not only referred to section 44 of the general tax bill, but omitted the word "collateral" from its title, and plainly stated that the amendment was "in relation to tax upon inheritances." The general purpose of the act being to raise revenue, and the title of this amendment of 1916 showing that it was to raise revenue upon inheritances, clearly indicates the changed purpose of the Legislature to impose taxes upon direct as well as upon collateral inheritances, and the act does not violate section 52 of the Constitution.

[4, 5] (b) It is also contended that the act violates both the federal and the state Constitutions, in that it deprives the appellees of their property without due process of law.

The case of *Heth v. City of Radford*, 96 Va. 272, 31 S. E. 8, is cited. That case determines that assessments of property under the charter of the city of Radford were invalid, because there was no provision either in the charter or general law whereby such assessments could be corrected, and there is a general statement of the law governing the question. The cases of *Norfolk v. Young*, 97 Va. 728, 34 S. E. 886, 47 L. R. A. 574, and *Violett v. Alexandria*, 92 Va. 501, 23 S. E.



909, 81 L. R. A. 382, 53 Am. St. Rep. 825, are both cases of local assessments for street improvements, and the same strict rules do not prevail in tax cases as in proceedings to take private property by condemnation for public use.

This act (paragraph F) authorizes the collection of inheritance taxes in certain contingencies by motion in court, and in Winona, etc., Land Co. v. Minnesota, 159 U. S. 526, 16 Sup. Ct. 83, 40 L. Ed. 251, where the statute under consideration authorized the collection of the tax by suit in court, and the contention was made that this did not provide due process of law, this is said (159 U. S. at page 537, 16 Sup. Ct. 87, 40 L. Ed. 251):

"Questions of this kind have been repeatedly before this court, and the rule in respect thereto often declared. That rule is that a law authorizing the imposition of a tax or assessment upon property according to its value does not infringe that provision of the Fourteenth Amendment to the Constitution which declares that no state shall deprive any person of property without due process of law, if the owner has an opportunity to question the validity or the amount of it, either before that amount is determined or in subsequent proceedings for its collection. *McMillen v. Anderson*, 95 U. S. 37, 24 L. Ed. 335; *Davidson v. New Orleans*, 98 U. S. 97, 24 L. Ed. 616; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569; *Spencer v. Merchant*, 125 U. S. 345, 8 Sup. Ct. 921, 31 L. Ed. 763; *Palmer v. McMahon*, 133 U. S. 660, 10 Sup. Ct. 324, 33 L. Ed. 772; *Lent v. Tillson*, 140 U. S. 316, 11 Sup. Ct. 825, 35 L. Ed. 419; *Pittsburg, C., O. & St. L. R. Co. v. Backus*, 154 U. S. 421, 14 Sup. Ct. 1114, 38 L. Ed. 1031."

Since that case was decided, the same doctrine has been approved in *Weyerhaeuser v. Minn.*, 176 U. S. 550, 20 Sup. Ct. 485, 44 L. Ed. 583; *Security Tr. Co. v. Lexington*, 203 U. S. 323, 27 Sup. Ct. 87, 51 L. Ed. 204; *Powers v. Richmond*, 122 Va. 328, 94 S. E. 803, affirmed by Supreme Court of the United States without an opinion on December 9, 1919, 251 U. S. 539, 40 Sup. Ct. 118, 64 L. Ed. —.

The decisions are so numerous and the underlying reasons therefor have been so frequently announced by the courts, that it is not deemed necessary to multiply authorities. The general doctrine is succinctly and clearly stated by that great master, Judge Cooley, thus:

"In order to bring taxation imposed by a state, or under its authority, within the scope of the provision of the Fourteenth Amendment, which prohibits the deprivation of property without due process of law, the case should be so clearly and palpably an illegal encroachment upon private rights as to leave no doubt that such taxation by its necessary operation is really spoliation under the power to tax." 1 Cooley on Taxation (3d Ed.) p. 55.

The nature of inheritance taxes is almost everywhere conceded (and this appears to be ignored in *Ferry v. Campbell*, 110 Iowa, 290, 81 N. W. 604, 50 L. R. A. 92, so much relied on), and in this state has been settled since the case of *Eyre v. Jacob* (1858) 14 Grat. (55 Va.) 422, 73 Am. Dec. 367. This case, which arose under the act of February 6, 1844 (Acts 1843-44, c. 3), as amended by Code 1849, c. 39, § 6, has been frequently cited, and is everywhere regarded as a leading case. An inheritance tax is not a tax upon property, but must be paid as a condition precedent to the transmission or transfer of property from the dead to the living.

"The right to take property by devise or descent is the creature of the law and secured and protected by its authority. The Legislature might, if it saw proper, restrict the succession to a decedent's estate, either by devise or descent to a particular class of his kindred, say, to his lineal descendants and ascendants; it might impose terms and conditions upon which collateral relations may be permitted to take it; or it may to-morrow, if it pleases, absolutely repeal the statute of wills and that of descents and distributions. \* \* \* *Eyre v. Jacob*, supra, 14 Grat. (55 Va.) 430, 73 Am. Dec. 367.

It is an excise tax, a tax upon a civil right or privilege, which only exists because granted by the state. The person who succeeds to the property of a decedent can only do so upon such terms as the Legislature imposes. He has no property right therein, except such as the Legislature sees fit to permit. *Peters v. Lynchburg*, 76 Va. 931; *Magoun v. Illinois*, etc., Co., 170 U. S. 283, 18 Sup. Ct. 594, 42 L. Ed. 1037. The authorities, which are numerous, are collected in a note 33 L. R. A. (N. S.) 606; *Gleason & Otis on Inheritance Taxation*, 2.

It being perfectly clear that there is no inherent right to succeed to property of decedents (on the contrary, the state has the inherent sovereign right to impose conditions on such succession), it follows that the person who takes it has no property interest in so much of that property which the General Assembly withholds from him. Having no such interest therein, he is not entitled either to notice or day in court with reference to such part as the state under its unquestioned and inherent power withholds. The act under review provides that the clerk or court shall assess such inheritance tax, and does not require any previous notice to those who are to receive the gift or inheritance. If the assessment is proper—that is, if it be based upon the proper valuation—then no right has been invaded. It is only in case the assessment is based upon an excessive valuation, or at an excessive rate, that any injury can be done or the property of the beneficiary taken. The question presented is whether or not the laws of Virginia afford a remedy for such an injury.

It is a matter of common knowledge that the General Assembly of Virginia was engaged in a general revision of the tax laws at the 1916 session. Among several new statutes enacted pursuant to this general purpose are the two that have been referred to; one imposing taxes upon inheritances, and the other forbidding the institution of any suit in equity for the purpose of restraining the assessment or collection of any state or local tax, except when the complaining party has no remedy at law. These statutes should be construed together as parts of the general plan of taxation. It has been an established equity practice in Virginia for many years that an injunction will lie to restrain the illegal collection of taxes. The Legislature had also provided in Code, §§ 567 to 573, inclusive, a simple method by motion for the correction of erroneous assessments for taxation, for exoneration of the property thus improperly assessed, and for the refunding of such amounts as had been wrongfully collected of the taxpayer. Never before that session, however, had the Legislature by statute recognized the right of a taxpayer to maintain a suit in equity to enjoin the collection of taxes, though, as above stated, the jurisdiction had existed for many years.

Considering these facts, it is apparent that when the Legislature had provided remedies by motion for the correction of erroneous taxation, and then curtailed the equity jurisdiction to grant injunctions, unless there was no other adequate remedy provided by the other statutes for the correction of such wrongs, it by that statute and by necessary implication therefrom sanctioned the right of the taxpayer to sue in the courts of equity, and thereby authorized such suits in every case for which the Legislature had not otherwise provided. It is everywhere now conceded that, if the tax statute or the general laws of the state provide an opportunity in the courts for the correction of erroneous assessments, and for relief from improper taxation, this constitutes due process of law.

We conclude, then, that this statute, fairly construed, means that the Legislature has thereby provided a remedy in equity for every case which is not provided for by section 567 et seq., or otherwise. This act constitutes the provision by statute for such relief which has been said to be essential.

If it be urged that this conclusion is at variance with those many cases in which it is held that the remedy must be expressly provided in the tax law, or in some other statute, then it is replied that it is nevertheless in full accord with the reason of those cases, and my Lord Coke saith that, "The reason of the law is the life of the law." There are precedents, however, which sustain this conclusion.

In the case of *McMillen v. Anderson*, 95 U. S. 37, 24 L. Ed. 335, it is held that an act

of Louisiana which recognizes the right to an injunction to stay the collection of an illegal license tax, and which regulates the proceedings in such a case, constitutes due process of law, and that under such a statute the complaining taxpayer could not claim to be without a legal remedy. It is said that, because a license tax was there involved, this fact differentiates that case from this one; there being no question of valuation of property, the tax itself being fixed in amount by the statute. The court, however, did not rest its decision upon that ground, but expressly held that the statutory recognition of the right to an injunction afforded all the remedy for relief from an illegal tax which is necessary to constitute due process of law. This case has never been questioned or modified, and was cited with approval in the case of *King v. Portland*, 184 U. S. 70, 22 Sup. Ct. 293, 46 L. Ed. 436, where it is said that—

"The manner of notice and the specific period of time in the proceedings when he may be heard are not very material, so that reasonable opportunity is afforded before he has been deprived of his property or the lien thereon is irrevocably fixed."

It is also cited in *Kentucky Union Co. v. Kentucky*, 219 U. S. 140, 31 Sup. Ct. 171, 55 L. Ed. 155, in *United States v. Sherman & Sons Co.*, 237 U. S. 157, 35 Sup. Ct. 520, 59 L. Ed. 883, and in other cases.

It is held in the case of *Oskamp v. Lewis* (C. C.) 103 Fed. 906, under an Ohio statute, that the assessment of property for taxation, although without notice to the owner, is not in violation of the constitutional inhibition against taking property without due process of law, where by statute the owner is expressly given the right to test the validity of the assessment by a suit to enjoin the collection of the tax, the amount of, which and of the assessment being matters of public record at all times after the assessment is made. The same conclusion is reached in other Ohio cases. *Hostetter v. State*, 26 Ohio Cir. Ct. R. 702. This case was reversed in the appellate court, but not upon this ground. *Eury's Ex'rs v. State*, 72 Ohio St. 448, 74 N. E. 650; *Adler v. Whitbeck*, 44 Ohio St. 571, 9 N. E. 680; *Musser v. Adair*, 55 Ohio St. 474, 45 N. E. 903; *Taylor v. Crawford*, 72 Ohio St. 560, 74 N. E. 1065, 69 L. R. A. 805; L. R. A. 1916E, 42.

In *Hagar v. Reclamation District*, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569, this is said:

"But where the taking of property is in the enforcement of a tax, the proceeding is necessarily less formal, and whether notice to him is at all necessary may depend upon the character of the tax and the manner in which its amount is determinable. The necessity of revenue for the support of the government does not

admit of the delay attendant upon proceedings in a court of justice, and they are not required for the enforcement of taxes or assessments. As stated by Mr. Justice Bradley, in his concurring opinion in *Davidson v. New Orleans*: "In judging what is 'due process of law,' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or some of these; and if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law,' but if found to be arbitrary, oppressive, or unjust, it may be declared to be not 'due process of law.'"

This language from the opinion in *Security Trust, etc., Co. v. Lexington*, 203 U. S. 323, 27 Sup. Ct. 87, 51 L. Ed. 204, might have been written of the case in judgment:

"But in this case the state court has afforded to the taxpayer full opportunity to be heard on the question of the validity and amount of the tax, and, after such opportunity, has rendered a judgment which provides for the enforcement of the tax as it has been reduced by the court. \* \* \* The plaintiff has, therefore, been heard, and on the hearing has succeeded in reducing the assessment. What more ought to be given? Whether the opportunity to be heard which has been afforded to the plaintiff has been pursuant to the provisions of some statute, as in *McMillen v. Anderson*, 95 U. S. 87, 24 L. Ed. 335, and *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. Ed. 569, 4 Sup. Ct. 663, or by the holding of the court that the plaintiff has such right in the trial of a suit to enjoin the collection of the tax, is not material."

The same case is reported in *Bell's Trustee v. Lexington*, 120 Ky. 199, 85 S. W. 1081; *Gallup v. Schmidt*, 154 Ind. 196, 56 N. E. 443; *Id.*, 183 U. S. 306, 22 Sup. Ct. 162, 46 L. Ed. 212.

[6] If there be any fair doubt as to the proper construction of these statutes and of the legislative intent, that doubt must be resolved in favor of the validity of the statutes, for if under one construction they may be held not to provide due process and under another to afford such due process, that construction which is favorable to the validity of the statute should be adopted, for the Legislature will not be presumed to have intended to pass an invalid law. *Fletcher v. Peck*, 6 Cranch, 128, 3 L. Ed. 162; *Whitlock v. Hawkins*, 105 Va. 248, 53 S. E. 401; *Ex parte Settle*, 114 Va. 716, 77 S. E. 496; *White & Co., Inc. v. Jordan*, 124 Va. 465, 98 S. E. 24. If the laws of the state as interpreted and administered in its own courts accord to one assessed with taxes an adequate corrective method this is sufficient.

[7] The character of the tax—that is, whether it be a property or a license tax—is immaterial. Notice to the taxpayer previous to the assessment is not required as to either. All that is essential in such cases to constitute due process of law is that the law

shall afford the taxpayer an opportunity to contest its validity and to show that it is an illegal exaction before it is enforced or his liability therefor is irrevocably fixed.

It is not the purpose of these constitutional inhibitions to embarrass or hinder the states in the exercises of the essential powers of taxation, for merely fanciful reasons, or for the correction of imaginary grievances. They constitute a sufficient shield for the prevention of substantial injuries and should not upon doubtful construction be welded into a sword for the destruction of these necessary governmental powers.

[8] Another view which demonstrates the justice of our conclusions in this case grows out of the fact that here there is no doubt whatever as to the precise value of the property upon which the inheritance tax is claimed, for its exact value appears in the record in the statement of facts, by the admission of counsel for the executrix, and is nowhere questioned.

In *People's National Bank v. Marye* (C. C.) 107 Fed. 570, which went to the Supreme Court of the United States (191 U. S. 272, 24 Sup. Ct. 68, 48 L. Ed. 180), this is said:

"The universal rule of a court of equity is that he who seeks its equitable interposition must himself do equity. Is there any higher equity than that a citizen should pay the amount of a tax which he concedes to be just and equitable before asking the aid of a court of equity to grant an injunction to enjoin the collection of any greater sum? The complainant, however, insists that the rule does not exist where the assessments are void, and not merely irregular, and it asserts that these assessments are void, because the acts under which they were laid do not provide for notice to the shareholder before determining the value of the share upon which the tax is to be laid, and also because the assessment violated the act of Congress in being at a greater rate than is assessed upon other moneyed capital.

"We are of opinion, however, that these assessments were not void within the meaning of the rule which absolves the taxpayer from the necessity of paying or tendering the amount equitably due from him. If there were no right to assess the particular thing at all, either because it is exempt from taxation, or because there is no law providing for the same, an assessment under such circumstances would be void, and, of course, no payment or tender of any amount would be necessary before seeking an injunction, because there could be no amount equitably due where there never had been a right to assess at all. Where, however, there is a statute which provides for an assessment and gives jurisdiction to the taxing officer, under some circumstances, to make one, but the particular assessment is invalid for want of a notice to the taxpayer, or some other kindred objection, the equitable duty still rests upon him to pay what would be his fair proportion of the tax as compared with that laid upon other property, before he can ask the aid of the chancellor to enjoin the collection of the balance. This is the equitable rule, and it is good

morals as well. To say that the act under which the tax is levied is unconstitutional, and therefore is the same as no law, and hence there is no duty to pay anything, because no tax can be levied without some law therefor, is to state the proposition too broadly. We concede that, if the law were unconstitutional because, for instance, there was no constitutional power to tax the particular property, there is no necessity to pay anything. But where some part of the law may be unconstitutional, because of a failure to comply with some matter of detail, but the amount which the owner of the property ought to pay is perfectly clear under the provisions of law, then if the taxpayer desire to be exempted from paying more than his share, he must pay or offer to pay his proportion before equity will aid him in his effort to escape paying a disproportionate share."

That language appears peculiarly appropriate as to inheritance taxes. The recipient has no inherent right to receive any part of decedent's property. He can only do so by permission of the state; the state has by statute provided that he shall only receive such part of it as remains after deducting the inheritance tax, and has required the personal representative to retain such tax upon settlement with the beneficiary. Under these circumstances, it would seem that no court of equity should entertain a bill unless the complainant is ready and willing to pay the amount of tax which is justly due upon a fair valuation of the property claimed, of which valuation no one else has any better means of information.

[8] The danger of any injustice to a beneficiary is exceedingly remote, also, because of the statutes (Code 1904, § 2647; *Id.*, c. 121, § 2671 et seq.; Code 1919, c. 219) requiring appraisers to be appointed by the court in which the personal representative qualifies, who after being duly sworn must appraise the property with which the fiduciary is chargeable, and requiring him to return promptly to the commissioner of accounts an inventory of the decedent's estate, as well as an account of all sales of property made by him, and all these to be recorded in the public records of the court for the information and protection of the beneficiary. Then the accounts of the personal representative must be annually audited by the commissioner of accounts, returned to the court, with leave and opportunity to any one interested to file exceptions thereto, and when approved by the court the accounts must also be recorded, subject to be thereafter surcharged and falsified for errors or omissions. These statutes, if substantially followed, and these documents upon the records of the court in which the decedent had his domicile and in which the fiduciary qualified, will usually show the character, amount, and value of the property transmitted, and therefore necessarily determine the amount of the inheritance taxes due thereon.

[10] At the time this bill was filed the Legislature had already amended section 44 of the tax law (Acts 1918, p. 416), and provided a remedy by motion corresponding with that afforded by section 567 et seq. of the Code; but this 1918 statute had not then become effective, and hence (because the auditor appeared without protest or motion to remove) the court properly entertained jurisdiction of the cause; yet, had the complainants postponed the institution of their suit from June 5th to June 21st, it would have been unnecessary to do so, for their remedy by motion under that amended statute would have been clearly adequate. *Heth v. Commonwealth*, 102 S. E. 66, this day decided.

[11] 3. The only question remaining to be determined is as to the amount of the tax. The trial court decreed that it should be determined by the value of the estate passing to each beneficiary, whereas the commonwealth claims that it should be determined by the value of the whole estate of the decedent.

There are many cases from various states to which we have been referred by learned counsel, and by the very great weight of authority it is held, in construing statutes somewhat similar to this, in the absence of a clear provision in the statute to the contrary, that an inheritance tax is levied, not upon the value of the entire estate, but upon the value of the property received by the beneficiary. *Eyre v. Jacob*, supra; *Miller's Ex'or v. Commonwealth*, 27 Grat. (68 Va.) 110; *Goddard v. Goddard*, 9 R. I. 293; *State v. Switzler*, 143 Mo. 287, 45 S. W. 253, 40 L. R. A. 280, 65 Am. St. Rep. 653; *Booth v. Commonwealth*, 130 Ky. 88, 113 S. W. 61, 33 L. R. A. (N. S.) 592; *State v. Hamlin*, 86 Me. 495, 30 Atl. 76, 25 L. R. A. 632, 41 Am. St. Rep. 569; *People v. Union Trust Co.*, 255 Ill. 168, 99 N. E. 377, L. R. A. 1915D, 450, Ann. Cas. 1913D, 515; *Estate of Howe*, 112 N. Y. 100, 19 N. E. 513, 2 L. R. A. 825; *Knowlton v. Moore*, 178 U. S. 41, 20 Sup. Ct. 747, 44 L. Ed. 969.

The Virginia statute of 1916 (printed in the margin<sup>1</sup>) we think should be construed in

<sup>1</sup> Section 44. (A) *Tax on Inheritance*.—Where any estate in the commonwealth of any decedent shall pass under a will or under the laws regulating descents and distributions, to any person, or to or for the use of any person, the estate so passing shall be subject to a tax of one per centum on every hundred dollars' value thereof: Provided, that estates passing to or for the use of the grandfather, grandmother, father, mother, husband, wife, brother, sister or lineal descendant of such decedent shall be subject to a tax of one per centum on every hundred dollars' value thereof in excess of fifteen thousand dollars; and provided further that such tax shall not be imposed upon any property bequeathed or devised where such bequest or devise is exclusively for state, county, municipal, benevolent, charitable, educational or religious purposes. The foregoing rates are for convenience

accordance with the prevailing view. While the language is not perfectly clear, it would be impossible to administer it fairly, if the contention of the commonwealth should be sustained. For instance, it is expressly provided that a bequest or devise for state, county, municipal, charitable, educational, or religious purposes shall be exempt, so that it is manifest that the value of the entire estate does not determine the tax, if any part of it is thus disposed of by will. Such part must be first deducted from the gross value of the estate. Then, while subsection (A) refers to estates of decedents which pass, thereby implying the entire estate of the decedent, still in the next clause the statute provides for the exemption of \$15,000 in favor of the nearest relatives, and uses the words "property" or "interest" as subject to this exemption, and clearly does not refer to the entire estate of the decedent, but only to the property or interest which passes to such favored relatives. Suppose an entire estate were bequeathed, one-third to a stranger, one-third for benevolent purposes, and the residuum to a son. In such a case the son, who is clearly intended to be favored, by the terms of the statute, would bear the greatest pecuniary burden, for if the tax is based upon the value of the whole estate, its amount would be greater than if based upon the separate

shares, and hence the residuum would suffer the greatest diminution. Then which of the differing rates would such an estate bear? The gift for benevolent purposes is wholly exempt from the inheritance tax, while property given to the stranger is subject to a larger inheritance tax than that given to the son. Then real estate passing to an heir or devisee is subject to a lien. If the tax is on the entire estate of the decedent, how is the amount of such lien to be determined, if not upon its value, rather than upon the value of property which passes to some other beneficiary. So, as pointed out by Mr. Justice White in the case of Knowlton v. Moore, supra, the difficulties of construing such a tax as determined by the value of the entire estate appear to be numerous, if not insuperable.

It is claimed by the commonwealth that the higher rates should be imposed, unless the entire property of the decedent goes to the direct or preferred beneficiaries; that if any part of it goes to the other class, then the higher rates should be imposed upon the entire estate, including that portion received by the preferred class, as well as upon that received by the other class, though how, in such case, the gross amount of the tax is to be apportioned between the individuals in the several classes does not appear, and we

termed the primary rates. When the amount of the market value of such property or interest exceeds fifteen thousand dollars, the rate of tax upon such excess shall be as follows:

(1) Upon all in excess of fifteen thousand dollars up to fifty thousand dollars, at the primary rates.

(2) Upon all in excess of fifty thousand dollars and up to two hundred and fifty thousand dollars, two times the primary rates.

(3) Upon all in excess of two hundred and fifty thousand dollars and up to one million dollars, three times the primary rates.

(4) Upon all in excess of one million dollars, four times the primary rates.

(B) The personal representative of such decedent shall pay the whole of such tax, except on real estate, to sell which or to receive the rents and profits of which he is not authorized by the will, and the sureties on his official bond shall be bound for the payment thereof.

(C) Where there is no personal estate, or the personal representative is not authorized to sell or receive the rents and profits of the real estate, tax shall be paid by the devisee or devisees, or those to whom the estate may descend by operation of the law and the tax shall be a lien on such real estate, and the treasurer may rent or levy upon and sell so much of said real estate as shall be sufficient to pay the tax and expenses of sale, et cetera.

(D) Such payment shall be made to the treasurer of the county or city in which certificate was granted such personal representative for obtaining probate of the will or letters of administration.

(E) The corporation or hustings court of a city, or the circuit court of a county or city, the chancery court of the city of Richmond, the law and chancery court of the city of Norfolk, or the clerk of the circuit court of a county or city before whom a will is probated or administration is granted, shall determine the inheritance tax, if any, to be

paid on the estate passing by will or administration, and shall enter of record in the order book of the court or clerk, as the case may be, by whom such tax shall be paid and the amount to be paid. The clerk of the court shall certify a copy of such order to the treasurer of his county or city and to the auditor of public accounts, for which services the clerk shall be paid a fee of two dollars and fifty cents by the personal representative of the estate. The auditor of public accounts shall charge the treasurer with the tax and the treasurer shall pay the same into the treasury as collected, less a commission of five per centum. Every personal representative or other party or officer failing in any respect to comply with this section shall forfeit one hundred dollars.

(F) Any personal representative, devisee or person to whom the estate may descend by operation of law, failing to pay such tax before the estate on which it is chargeable is paid or delivered over (whether he be applied to for the tax or not) shall be liable to damages thereon at the rate of ten per centum per annum for the time such estate is paid or delivered over until the tax is paid, which damages may be recovered with the tax, on motion of the attorney for the commonwealth and in the name of the commonwealth against him, in the circuit court for the county or in the corporation or hustings court of the city wherein such tax is assessed, except that in the city of Richmond the motion shall be in the chancery court. Such estate shall be deemed paid or delivered at the end of a year from the decedent's death, unless and except so far as it may appear that the legatee or distributee has neither received such estate nor is entitled then to demand it. All taxes upon said inheritance paid into the state treasury shall be placed to the credit of the public school fund of the commonwealth and shall be apportioned according to school population and be used for the primary and grammar grades.

and nothing in the statute to justify imposing such higher rates upon the preferred beneficiaries.

We conclude, then, that the first clause determines the subject of the tax, and that subject is stated to be "any estate \* \* \* of any decedent" which passes under the will or by statute "to any person, or to or for the use of any person," and provides that "the estate so passing shall be subject to a tax." The subject of the tax is thus clearly indicated to be, not the entire estate of the decedent, but the estate or such part of it as passes to any person, whether he be devisee, heir at law, legatee, or distributee.

The word "estate," as used in the first sentence, refers, not to the entire estate of the decedent, but to the specific estate or property which passes to the several beneficiaries, and the words "property or interest" and "estate" are used interchangeably, to convey the same meaning, and refer to such proportion of the estate of the decedent as passes to the particular beneficiary.

The trial court rightly determined that the inheritance tax upon this property was correctly assessed by the clerk of the court in the first instance. Each of them is entitled to an exemption of \$15,000, then the primary rate of 1 per cent. was properly applied to the excess up to \$50,000, or on \$35,000, and the higher rates thereafter on such excess above \$50,000, as clearly indicated in the statute. The tax should be computed upon the market value of each share of the property after such deduction of \$15,000 is made.

This construction accords with the legislative policy as clearly expressed in the 1918 amendment.

**Affirmed.**

**SIMS, J. (dissenting).** For the reasons stated in my dissenting opinion in the case of Withers et al. v. Jones' Executrix, 102 S. E. 68, this day decided, I am constrained to dissent from the majority opinion above on the subject of the constitutionality of the statute. I concur, however, in the holding with regard to the deductions which should be made from the gross value of the estate and the exemptions to which the appellees are entitled.

(126 Va. 493)

### HEATH v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia.  
Jan. 22, 1920.)

#### 1. TAXATION $\S$ 861—INHERITANCE TAX GOVERNED BY LAW IN FORCE AT TIME OF DECEDENT'S DEATH.

The amount of inheritance tax was governed by Tax Bill, section 44, as amended by Acts

1916, c. 484, in force at time of decedent's death, though the tax was not reported or assessed until such statute was further amended by Acts 1918, c. 238.

#### 2. TAXATION $\S$ 861—REMEDY FOR ERRONEOUS INHERITANCE TAX ASSESSMENT GOVERNED BY LAW IN FORCE WHEN PROCEEDING IS INSTITUTED.

Proceeding for redress against erroneous inheritance tax assessment was governed by tax bill, section 44, as amended by Acts 1916, c. 484, and Acts 1918, c. 238, subds. 11-13, the law in force at time proceeding was instituted, though decedent died before amendment of 1918 took effect and while amendment of 1916 was in force, and though amount of tax was governed by amendment of 1916, in view of Code 1919, § 2385 et seq.

#### 3. CONSTITUTIONAL LAW $\S$ 43(2)—ONE USING STATUTORY REMEDY FOR ERRONEOUS ASSESSMENT CANNOT COMPLAIN OF WANT OF ADEQUATE REMEDY.

Heir after having instituted proceeding for redress against erroneous inheritance tax assessment under Tax Bill, section 44, as amended by Acts 1916, c. 484, and Acts 1918, c. 238, cannot be heard to complain that he has not had an adequate remedy.

#### 4. TAXATION $\S$ 900(5)—COURT WILL CORRECT ASSESSMENT AND DETERMINE TRUE AMOUNT.

Where relief is sought under the statutes from alleged erroneous tax, the court, if statute under which tax is imposed is valid, should correct any improper assessment, determine the true amount of the tax, and enter judgment therefor.

**Sims, J., dissenting.**

**Error to Circuit Court, Montgomery County.**

Petition by Stockton Heth, Jr., against the Commonwealth, for redress against alleged erroneous inheritance tax assessment. Judgment affirming assessment and dismissing petition, and petitioner brings error. **Affirmed.**

**H. C. Tyler, of Radford, for plaintiff in error.**

**The Attorney General, for the Commonwealth.**

**PRENTIS, J.** The petitioner complains of the assessment of an omitted inheritance tax imposed under section 44 of the tax bill, as amended in 1916 (Acts 1916, p. 812). He is the sole heir at law of his deceased son, Stockton Heth, Jr., who died intestate March 17, 1917.

The validity of the act is attacked upon the same grounds as those referred to in the case of Commonwealth v. Carter, 102 S. E. 58, this day decided. We have there announced our conclusion that the statute is valid and does not deny due process of

law and it is not deemed either necessary or appropriate to repeat here the reasons therefor.

[1] There is an additional reason in this case which did not exist in that, which sustains the judgment of the trial court. Although at the time of decedent's death the act of 1916 was in force and therefore fixed the amount of the tax, it was not reported or assessed until after section 44 of the tax bill had been again amended at the 1918 session (Acts 1918, p. 416). That act made changes in the rates and exemptions, as well as in the method of assessment; and in subsection 11 provided that, if the amount of the tax was determined by a court, the person charged should have the right of appeal to the Supreme Court of Appeals as in other cases; in subsection 12, that any person aggrieved by the order of any clerk of court in determining such tax might within one year after the day on which the order was entered apply for relief to the court of which such clerk is an officer; and subsection 13 provided that the court should have full power to exonerate the applicant from the payment of such taxes as was erroneously charged, if not already paid, and if paid that the amount should be refunded. The procedure is somewhat similar to that afforded by the general statutes affording relief from erroneous assessments of property by commissioners of the revenue. Code 1919, § 2385 et seq. Then at the same session of the Legislature (Acts 1918, p. 432), the Code was amended as to omitted taxes. The first subsection of the amendment, so far as pertinent to this case, reads thus:

"If the commissioner of the revenue, examiner of records or other assessing officer, commission or board designated by law to assess persons, property (real, personal and mixed), taxes, levies, et cetera, ascertain that any person, or any real or personal property, or income, or salary, or license tax, or inheritance tax has not been assessed, for any year of the three years next preceding that in which such ascertainment is made, by the state, county, district, city or town, or that the same has been assessed at less than the law required for any one or more of such years, or that the taxes, levies, et cetera, thereon, for any cause, have not been realized, it shall be the duty of the commissioner of the revenue, examiner of records, or other assessing officer, to list the same and assess persons, property (real, personal and mixed), and levies at the rate prescribed for that year, adding thereto interest at the rate of six per centum per annum from the time such taxes should have been paid, and any treasurer collecting such taxes and levies shall also collect the penalty thereon prescribed by section six hundred and three of the Code."

By authority of that statute the examiner of records reported against the petitioner the inheritance tax here involved, it having been

up to that time omitted, and the clerk of the court thereupon, on the 24th day of October, 1918, assessed such omitted tax; whereupon, the petitioner, strictly following subsection 12 of section 44 of the tax bill, as amended in 1918, made application to the trial court for relief from such assessment, alleging the invalidity of the 1916 statute and claiming that the valuation placed upon the real estate by the clerk is excessive and should be reduced.

When the case was heard, the commonwealth introduced evidence tending to show that the valuation of the property by the clerk is fair and just, while the applicant introduced no testimony whatever with reference thereto, and the court gave judgment for the amount of the tax which had been assessed.

The facts of the case in judgment bear some resemblance to those shown in *Bell v. City of Lexington*, 85 S. W. 1081, 27 Ky. Law Rep. 591, and *Security Trust & Safety Vault Co. v. Same*, 203 U. S. 323, 27 Sup. Ct. 87, 51 L. Ed. 204, and it is there held that the failure of the Kentucky statute to require notice to be given of a special assessment for back taxes on omitted property made after the time provided by law for making the regular assessments does not deprive a taxpayer of his property without due process of law, where the state court has afforded him full opportunity to be heard on the question of the validity and the amount of the tax. *Gallop v. Schmidt*, 183 U. S. 300, 22 Sup. Ct. 162, 46 L. Ed. 212, sustains the same proposition.

[2, 3] The generally accepted rule applicable to this case is well illustrated by two New York cases. In the *Matter of Davis*, 149 N. Y. 539, 44 N. E. 185, it is held that the method of procedure in a proceeding for the ascertainment and determining of a transfer or inheritance tax is controlled by the statute which was in force on the subject at the time of the institution of the proceeding, although the tax itself and the rights of the parties are controlled by an earlier statute. And the same conclusion is restated in the *Matter of Sloane*, 154 N. Y. 113, 47 N. E. 978. A similar situation existed there as existed in Virginia after the adoption of the 1918 amendment, as is shown by the circumstances of this case, namely, an inheritance tax was assessed by authority of an earlier statute, but in the meantime the remedy of the taxpayer for redress against such an erroneous assessment had been changed by a later statute. While the Legislature could not change the rights of this petitioner, which were fixed by the law in force at the time when he inherited the property (*Commonwealth v. Wellford*, 114 Va. 372, 76 S. E. 917), it nevertheless had the authority, which it exercised in 1918 and before this assessment was made, to change his legal remedy

for relief against any overvaluation of the property or for any other invasion of his rights relating thereto. This seems to have been the view of counsel when this proceeding was instituted, for he instituted it, thereby taking advantage of the remedy which was so clearly provided by the 1918 statute, and having had the benefit of the fair hearing which it affords, he will not now be heard to claim that he had no adequate remedy. To use the sententious and comprehensive expression of the Scotch law, "A man shall not be allowed to approbate and reprobate."

[4] As to the suggestion that the original assessment was irregular, it is only necessary to say that, when one seeks relief under the Virginia statutes from a tax alleged to be erroneous, the regularity of the original assessment is of little consequence if it appears that the statute under which the tax is imposed is valid. If no tax is justly due, the court should correct the injustice and relieve the complaining citizen therefrom. If, however, the whole or any part thereof is justly due, the court should correct any improper assessment, determine the true amount of such tax, and enter judgment therefor. *Commonwealth v. Schmelz*, 114 Va. 364, 76 S. E. 905; *Rixey's Ex'rs v. Commonwealth*, 101 S. E. 404.

The judgment is without error.  
Affirmed.

SIMS, J. (dissenting). If the commissioner of the revenue (under section 508 of the Code as amended by Acts 1918, p. 432) had assessed the omitted tax involved in this case, or had the clerk who assessed the tax given the notice required by section 8 of the act of 1918 (Acts 1918, p. 420), I am disposed to think it could have been held that section 508, as amended as aforesaid, when construed along with the other statute law of the state on the subject, provided for, and that the taxpayer was in fact and in accordance with the statute law of the state afforded due process of law. But as I understand the record the examiner of records first acted in the matter, but his action consisted merely of a report of the tax to the clerk (for which action there is no authority of law known to me), and the clerk thereupon did not proceed under the 1918 inheritance statute at all, but assessed the tax by entering his order so doing without previous notice to the taxpayer. Such assessment was not required by statute to be (and was not in fact) entered on the current annual personal property tax book, which under the decisions would have furnished the "notice" to the taxpayer required by the constitutional provision as to due process of law, and would also (in view of the existence of sections 567-569 of the Code, providing for relief of the taxpayer by motion in court) have afforded the opportunity for a hearing

which is required by the constitutional provision aforesaid. And I do not think that the right of appeal mentioned in section 12 of the 1918 inheritance tax statute is meant thereby to be given in a case where the assessment was not made by the clerk in accordance with such statute. I think, therefore that the circumstance that the taxpayer (the plaintiff in error), in the case in judgment, instituted his proceedings for appeal under such statute and did in fact take his appeal under such statute, is immaterial, since he was not given by such statute, or any other statute, such right of appeal. The statute law of the state must have given such right of appeal in order that it may be considered as affording the due process of law touching a hearing which is required by the federal constitutional requirement on the subject.

Hence, for the reasons stated in my dissenting opinion in the case of *Withers et al. v. Jones' Executrix*, 102 S. E. 68, this day decided, I am constrained to dissent from the majority opinion.

(126 Va. 500)

WITHERS et al. v. JONES' EX'X et al.

(Supreme Court of Appeals of Virginia.  
Jan. 22, 1920.)

1. TAXATION §800(1)—CORRECTION OF INHERITANCE TAX ASSESSMENT WITHIN JURISDICTION OF CIRCUIT COURT.

Circuit court of city of Richmond had jurisdiction to entertain bill for correction of inheritance tax assessed under Acts 1918, c. 484.

2. TAXATION §895(6)—EXPENSES OF ADMINISTRATION, DEBTS, AND EXEMPTIONS TO BE DEDUCTED BEFORE INHERITANCE TAX IS COMPLETED.

Widow and children to whom testator has devised and bequeathed his estate are entitled, prior to assessment of inheritance tax, under Acts 1918, c. 484, to have the expenses of administration and debts, if any, deducted from the gross value of the estate, and from net amount remaining each are entitled to an exemption of \$15,000, and the tax is to be computed on the residue of the property devised and bequeathed to them severally at the rates prescribed by the statute.

Sims, J., dissenting.

Appeal from Circuit Court of City of Richmond.

Bill by Withers and others against William H. Jones, Jr.'s, executrix and others. Decree of dismissal, and plaintiffs appeal. Reversed and remanded, with instructions.

This is a suit in equity having for its purpose the restraining of the collection of an inheritance tax of \$17,504.79, assessed by the



clerk of the circuit court of the city of Suffolk against the real and personal estate of a testator, Wm. H. Jones, Jr., deceased, which passed by the will of such testator, of which \$16,934.79 was assessed as such tax on the personal estate, and \$570 was assessed as such tax on the real estate which the executrix was not authorized by the will to sell and from which she was not authorized by the will to receive the rents and profits.

The assessment was made by the clerk under the inheritance tax statute of the state of 1916 (Acts 1916, p. 812).

By the will aforesaid the testator directed that all of his just debts should be paid, and then provided that he give the residue of his estate in equal shares to his wife and children. The wife was nominated in the will as executrix thereof and qualified as such. There were only three children. The latter were the plaintiffs in the suit in the court below and are the appellants here. The executrix, the auditor of public accounts, the clerk of said circuit court, and the treasurer of the city of Suffolk were defendants to the bill and are the appellees here.

The bill alleges the probate of the will and qualification of the executrix before the said clerk on August 9, 1916; the appointment of appraisers of the estate as required by law by the clerk on the same date; the return of the inventory and report of the appraisers on January 15, 1917, from which it appeared that the estate of the testator consisted of real and personal estate of the following aggregate valuation:

Personality of the appraised value of.....	\$639,493 00
Real estate of the appraised value of.....	19,000 00

Aggregating the sum of.....	\$633,493 00
-----------------------------	--------------

The bill then alleges that the assessment aforesaid was made by the said clerk on January 17, 1917, two days after the filing of said inventory and appraisal, and sets forth the order entered by the clerk making the assessment aforesaid of the tax aforesaid. The tax on the personal estate was assessed to be paid by the executrix therefrom, and the tax on the real estate was assessed to be paid by the said widow and children; such taxes being as follows:

#### On the Personal Estate

One per cent. on \$35,000.00 in excess of \$15,000.00 .....	\$ 350 00
Two per cent. on \$200,000.00 in excess of \$50,000.00 .....	4,000 00
Three per cent. on \$419,493.00 in excess of \$250,000.00 .....	12,584 79

#### On the Real Estate

Three per cent. on \$19,000.00.....	\$570 00
-------------------------------------	----------

The bill contains the further allegations that the action of the clerk in making said assessment was "without notice either to your complainants or to said executrix."

The auditor of public accounts, by counsel, demurred to the bill on two grounds, which are as follows: Because—

"(1) That the complainants have a plain, adequate, and complete remedy at law.

"(2) That a court of equity is without jurisdiction to hear and determine the cause."

The learned judge of the court below entered a decree sustaining the demurrer and dismissed the bill, on the ground, as stated in such decree, that the court was "without jurisdiction to entertain said bill." The said children have appealed from the decree, and thus it is now before us for review.

Daniel Grinnan and R. E. Scott, both of Richmond, for appellants.

The Attorney General and O. L. Shewmake, of Richmond, for appellees.

SIMS, J., after making the foregoing statement, delivered the following dissenting opinion:

The questions raised by the assignments of error and the positions taken by the commonwealth thereon will be considered and passed upon in their order as stated below, in so far as may be necessary for the decision in my view of the case.

1. Had the appellants a remedy to obtain relief from the assessment of the inheritance tax complained of, if erroneous, by motion under sections 567, 568, and 569 of the Code?

This question has not heretofore been presented for decision, nor has it been passed upon by this court.

There was a construction of some of the provisions of the charter of the city of Lynchburg imposing a collateral inheritance tax in the case of *Peters v. Lynchburg*, 76 Va. 927, of some of the provisions of the collateral inheritance tax statute of 1896 (Acts 1895-96, pp. 367, 368) in the case of *Commonwealth v. Wellford*, 114 Va. 372, 76 S. E. 917, and of some of the provisions of the direct and collateral inheritance tax statute of 1916 (Acts 1916, p. 812) in the case of *Posey v. Commonwealth*, 123 Va. 551, 96 S. E. 771; but in none of these cases was the question we have now under consideration raised or considered.

The argument of the learned counsel on both sides of the cause has taken a wide range, the nature of an inheritance tax has been drawn into consideration, and the leading authorities in America on that subject have been cited in argument. The following are some of the authorities so cited: Gleason and Otis on Inheritance Taxation, see pages 2-38; Blakemore and Bancroft on Inheritance Taxes, see pages 2-16, 22-31; Ross on Inheritance Taxation, see pages 2-37; *Magoon v. Illinois Trust & Savings Bank*, 170 U. S. 283, 18 Sup. Ct. 594, 42 L. Ed. 1067;

*Eyre v. Jacob*, 55 Va. (14 Grat.) 422, 73 Am. Dec. 367; *Peters v. Lynchburg*, supra, 76 Va. 927; *Union Trust Co. v. Probate Judge*, 125 Mich. 487, 494, 84 N. W. 1101; *In re Dows*, 167 N. Y. 227, 60 N. E. 439, 52 L. R. A. 433, 88 Am. St. Rep. 508, 510; *Neilson v. Russell*, 76 N. J. Law, 27, 69 Atl. 476; *Id.*, 76 N. J. Law, 655, 71 Atl. 286, 19 L. R. A. (N. S.) 887, 131 Am. St. Rep. 673; *U. S. v. Perkins*, 163 U. S. 625, 16 Sup. Ct. 1073, 41 L. Ed. 287; *Booth's Ex'r v. Commonwealth*, 130 Ky. 88, 113 S. W. 61, 83 L. R. A. (N. S.) 592.

As appears from the authorities, inheritance taxes had their origin in very ancient times, the earliest mention of them known to us being of such taxes in Egypt. They were first imposed under the Roman law by the Emperor Augustus. This method of taxation has been long in use in European countries and is now generally in force there. In the United States, Pennsylvania was the first to enact an inheritance tax statute in 1826. Subsequently such statutes have been enacted in other states of the Union and by the federal government. They existed in 1917, as shown by the later works on this subject which are cited in argument, under United States statute and in all of the states except Alabama, Florida, South Carolina, Mississippi, and New Mexico. *Blakemore and Bancroft on Inheritance Taxes*, p. 13; *Gleason and Otis on Inheritance Taxation*, p. 464; *Eyre v. Jacob*, 55 Va. (14 Grat.) 422, 73 Am. Dec. 367; *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 18 Sup. Ct. 594, 42 L. Ed. 1037. As could but be expected, therefore, the authorities on the subject of the nature of this tax are almost innumerable as are the sands of the seashore. But notwithstanding their great number they are, as stated by the text-writers treating of them, almost unanimous in their holding of what is the true nature of such a tax. As summarized and stated in the learned work above cited of *Gleason and Otis on Inheritance Taxation*, p. 2, such holding is as follows:

"(a) That the tax is not a property tax; but an excise or impost tax upon the right to transmit property at death; or upon the right to succeed to it from the dead."

Whether the tax is a transmission or succession tax, or both, depends, of course, upon the form of the taxing statute. The Virginia Statute of 1916 (Acts 1916, p. 812), involved in the cause before us, imposes the tax upon the right to succeed, and the tax is a succession tax. *Gleason and Otis on Inheritance Taxation*, pp. 11 and 12.

There has been some difference in the authorities as to the principle on which the holding above stated is based. That principle, as stated by many of the authorities, is as follows:

"The right to take property by devise or descent is the creature of the law, and not a natural right—a privilege, and therefore the authority which confers it may impose conditions upon it." *Magoun v. Illinois Trust & Savings Bank*, supra, 170 U. S. 283, 18 Sup. Ct. 594, 42 L. Ed. 1037.

Some authorities, however, hold that there is a natural right in children to inherit by descent. *Id.* See, also, *U. S. v. Perkins*, supra, 163 U. S. 625, 16 Sup. Ct. 1073, 41 L. Ed. 287. But all the authorities on the subject agree that the Legislature, if deemed by it conducive to the public good, may limit, impose any conditions it chooses upon, or take away altogether the right of testamentary disposition of property. *U. S. v. Perkins*, supra. And such authorities also agree (with the exception of those in Minnesota, where there is a peculiar constitutional provision) upon the proposition that acquisition of property by descent, as well as by testamentary disposition, is subject to regulation by the Legislature to the extent of imposing taxation thereon in excess of the rate imposed in the same taxing jurisdiction upon other property, notwithstanding the existence of provisions in the state and federal Constitutions requiring uniformity and equality in taxation. *Magoun v. Illinois Trust & Savings Bank*, supra. See, also, 7 Am. & Eng. Encyl' Law (1st Ed.) p. 346 et seq., and authorities cited.

But the conclusion that an inheritance tax is not a property tax, but only a tax imposed on, or as incidental to the regulation of, the right to transmit or to succeed to property from the dead, is reached by the authorities in their consideration of the principle on which the legislative right to impose the tax is based. See authorities first above cited. Such consideration and conclusion do not embrace the subject of the administration of an inheritance tax statute. As said in *U. S. v. Perkins*, supra, 163 U. S. 625, 16 Sup. Ct. 1073, 41 L. Ed. 287, of a legacy to the United States which was subject to an inheritance tax under the laws of New York:

"\* \* \* The tax is imposed upon the legacy before it reaches the hands of the government. The legacy becomes the property of the United States only after it has suffered a diminution to the amount of the tax, and it is only upon this condition that the legislature assents to a bequest of it."

Hence, where the Legislature does not by the statute go to the extent of making the state the heir to the whole of the estate of the decedent, merely prescribes a certain percentage of it which the state shall take, and assents to the passing of the residue of the property by devise or descent to the devisee or heir at law, it is manifest that such residue is the property of the devisee or heir under the law. *Ferry v. Campbell*, 110 Iowa,

290, 81 N. W. 604, 5 L. R. A. 92. That is to say, the tax rate, which is fixed by the Legislature, is one thing; and the amount of the tax, which is ascertained by the administration of the tax statute, is another and different thing. And we see that if, in the administration of the inheritance tax statute, the devisee or heir is required to pay a tax in excess of the percentage imposed by the statute, or upon a valuation in excess of the true valuation of the estate intended to be taxed by the latter, or a tax otherwise in excess of its true amount, then, to the extent of such excess, the property of the devisee or heir is taken under the statute.

Such a taking is, in truth, not a taxation of property or taxation at all, although usually spoken of as such. It is a taking of property under the guise of taxation, which it may be the statute imposing the tax never intended to impose, but which it results, or may result, in imposing. And the same is true, indeed, of all erroneous assessments of property for taxation. Hence if sections 567, 568, and 569 of the Code were so phrased as to give the relief thereby afforded in all cases of assessments of "property" for taxation, there would be no difficulty in holding, under the rule of liberal construction which is applicable to such statute law, that such remedy would embrace erroneous assessments of inheritance taxes and that the appellants had such remedy in the cause before us. But we see from reading section 573a of Pollard's Code 1904 that such has not been the legislative construction of sections 567, 568, and 569. Said section 573a was enacted subsequently to the three sections of the Code just mentioned, and gives the remedy by motion for relief from erroneous assessments of real or personal property in certain cases "not already provided for"; but those are cases of assessments "by a commissioner of revenue," or "by the State Corporation Commission." And from a reading of sections 567, 568, and 569 of the Code, we see that they apply only to cases of assessment made or extended by commissioners of the revenue.

Under the collateral inheritance tax statute of 1844 (Acts Assem. 1843-44, p. 9; Code 1849, pp. 214, 215), the commissioner of revenue assessed the inheritance tax (see Code 1849, § 10, pp. 179, 180, section 42, p. 184, sections 58, 59, p. 187, section 65, pp. 188, 189). And a day in court to obtain relief from such an erroneous or illegal assessment was expressly provided by statute (see Code 1849, §§ 97-100, p. 194). And the same is true of all the inheritance tax statutes of the state until such statute of 1910, which departed from the prior long-followed method of having the commissioners of revenue assess such tax; and the statute of 1916 under consideration

likewise made such departure in method of assessment.

The case of an assessment of taxes by a probate court or a clerk thereof, which is not required by the statute to be extended by a commissioner of the revenue, seems clearly to be a *casus omissus* of the statute law of the state giving a remedy by motion for relief from erroneous assessments for taxation, and hence, as I think, the appellants do not have such remedy.

2. Did the court below have jurisdiction of this cause on its equity side for the purpose of restraining the collection of the tax aforesaid?

The act of February 24, 1916 (Acts 1916, p. 89), which provides "that no suit for the purpose of restraining the \* \* \* collection of any tax, state or local, shall be maintained in any court of this commonwealth, except when the party has no adequate remedy at law," is relied on by the commonwealth.

But, of course, in view of the conclusion above reached, it follows that the appellants had no remedy at law whatever, in the premises. Hence the statute has no application to the cause before us, and, the constitutional question next to be stated being involved, under the long-established rule on the subject, the court below had jurisdiction of the cause on its equity side for the purpose of restraining the collection of the tax.

Such being the case, it is our duty to take jurisdiction of the cause and to enter such decree therein as the court below should have entered in the exercise of its jurisdiction. Coming to the discharge of that duty, the following question is presented for our decision by the assignments of error, namely:

3. Is the inheritance tax statute aforesaid (Acts 1916, p. 812) unconstitutional and void because of its being in conflict with the provisions of the fourteenth amendment to the Constitution of the United States forbidding any person to be deprived of his property without due process of law (article 1, § 11, of the Virginia Constitution, being to the same effect), in that the statute does not provide for the giving to the persons (such as were the appellants), assessed with the inheritance tax, any notice of the proceeding or any opportunity to be heard before the assessment became binding and enforceable?

The consideration of this question is approached bearing fully in mind the principles by which this court is governed in considering the constitutionality of a statute. Those principles have been so frequently stated, however, that it is deemed unnecessary to set them forth here. See *Ex parte Settle*, 114 Va. 715, 716, 77 S. E. 496; *Whitlock v. Hawkins*, 105 Va. 242, 248, 53 S. E. 401.

As above adverted to, the tax in the cause before us is not a tax which the Legislature

intended, in fixing the tax rate, to impose upon the property which passed to the devisees, but is a tax upon their right of succession thereto; yet, by the manner in which the statute provides that the law shall be administered, such property may be taken, as aforesaid, to the extent that such tax is in excess of the true amount, as, for example, where the valuation placed on the property subjected to the tax is above its true value. Therefore, in the administration of the statute under consideration, the rights of property of taxpayers are involved. And as said in the opinion of this court in *Violett v. Alexandria*, 92 Va. at page 568, 23 S. E. at page 911, 31 L. R. A. 382, 53 Am. St. Rep. 825:

"In every instance where the rights of property are involved, before the liability of the taxpayer is finally determined, he must have some kind of notice of the proceedings, and an opportunity to be heard with reference to the value of his property."

The case last cited contains an extended review of the leading authorities on the subject under consideration, which renders such a review here unnecessary.

See, also, to the same effect *Heth v. Radford*, 96 Va. 272, 274, 31 S. E. 8; *Norfolk v. Young*, 97 Va. 728, 729, 732, 34 S. E. 886, 47 L. R. A. 574.

Notice to the taxpayer prior to or at the time of the assessment of his property for taxation is not, nor is a judicial hearing essential to afford him, due process of law, provided such process of law be afforded him by means of subsequent proceedings required by statute before the tax obligation becomes enforceable, as, for example, by statute requiring a suit to enforce the obligation (*Hagar v. Reclamation Dist.*, etc., 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569, and many other later cases which might be cited); or by statute allowing an appeal or other proceeding giving the taxpayer a right to be heard. Such a right of hearing, however, at some time before the tax obligation becomes enforceable is absolutely essential in order to afford him due process of law.

Such is the requirement of due process of law, and that requirement is not confined to cases which, strictly speaking, involve taxation of property. It extends certainly to all cases where one may be deprived of property by an assessment based upon value. As said in *Ferry v. Campbell*, 110 Iowa, 290, at page 297, 81 N. W. 604, at page 607, 50 L. R. A. 92, quoting with approval from *Cooley on Taxation*:

"It is not to be presumed that constitutional provisions carefully framed for the protection of property were intended or could be construed to sanction legislation under which officers might strictly assess one for any amount in their discretion without giving an opportunity to con-

test the justice of the assessment. When the assessment is based upon value or benefits, whether it be a tax on property or *succession tax*, and that value is to be ascertained by appraisalment, assessors, or other tribunal, which involves inquiry, notice and an opportunity for hearing are essential to the validity of the proceedings." *Hagar v. Reclamation Dist.*, 111 U. S. 701 (4 Sup. Ct. Rep. 663, 28 L. Ed. 569); *Stuart v. Palmer*, 74 N. Y. 183 [30 Am. Rep. 289]." (Italics supplied.)

Accordingly, all of the text-writers on inheritance taxation which have been cited before us are found to agree in the position that the prevailing view of the American decisions is that, to comply with the due process of law constitutional requirement, the statute imposing an inheritance tax must provide for some notice of the proceeding to the persons taxed and opportunity to them to be heard before the assessment becomes binding and enforceable by collection of the tax, except that it is held that, if the statute provides for an appeal and a rehearing before the court, notice of the initial assessment is not necessary. *Ross on Inheritance Taxation*, § 254; *Blakemore and Bancroft on Inheritance Taxes*, pp. 66, 67; *Gleason and Otis on Inheritance Taxation*, p. 383.

In fact, there seems to be only one decision which is cited by the text-writers as containing a contrary holding to that just stated, and that is the case of *Union Trust Co. v. Durfee*, 125 Mich. 487, 494, 84 N. W. 1101. And this is the only inheritance tax authority cited for the commonwealth on this point. That case, however, in truth, holds merely that the statute it had under construction, namely, Act No. 188 of the Michigan Pub. Acts 1899, was not in conflict with the due process of law constitutional requirement, in that it did not require notice to the taxpayer prior to the appraisalment by the appraiser or assessment by the probate judge. For section 13 of the act provided that, immediately upon the determination by the probate judge "as to the value of any estate which is taxable under this act and of the tax to which it is liable," he should give notice "to all parties known to be interested therein," and it was further provided in such section that—

"Any person dissatisfied with the appraisalment or assessment and determination of tax, may appeal \* \* \*" (as prescribed in the statute) " \* \* \* from the fixing, assessing and determination of the tax by the judge of probate as herein provided. \* \* \*"

Such notice and opportunity to be heard afforded due process of law upon the principle and under the other authorities above referred to.

This decision is, then, after all in accord with the other American authorities on the subject under consideration, and makes the

holding of these authorities stated by the text-writers aforesaid as containing the "prevailing view," in truth the "unanimous holding" of such authorities.

Said section 13 of the Michigan Statute of 1899 aforesaid was taken substantially from the New York statute of 1892 (Blakemore and Bancroft on Inheritance Taxes, p. 609), and was construed in the case of *In re McPherson*, 104 N. Y. at pages 321, 322, 10 N. E. 685, 58 Am. Rep. 502, to require the notice therein provided for to be given, not only to the persons known to the probate officer to be interested, but to all persons interested. Hence the statute was in the latter case held to be constitutional.

On the subject of the necessity of notice and hearing or an opportunity to be heard aforesaid, the following is said in the *McPherson Case*, just cited:

"This tax is imposed according to the value of the legacy and collateral inheritance liable to be taxed, and hence there must be some mode of ascertaining that value; and for that purpose judicial action is requisite at some stage of the proceeding before the liability of the taxpayer becomes finally fixed. He must have some kind of notice of the proceeding against him, and a hearing or an opportunity to be heard in reference to the value of his property and the amount of the tax which is thus imposed. Unless he has these, his constitutional right to due process of law has been invaded. *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289; *County of San Mateo v. S. Pacific R. Co.* [13 Fed. 722], 8 Sawyer, 238; *Hagar v. Dist.*, 111 U. S. 701 [4 Sup. Ct. 663, 28 L. Ed. 569]."

The inheritance statute of Virginia of 1916 under consideration contains no provision for any notice to or for any opportunity for the taxpayer to be heard before his liability becomes finally fixed, nor is such provision contained in any other statute in Virginia under which such inheritance tax statute may be administered, in so far as has been pointed out in argument or as I have been able to find.

The proceeding by motion against the personal representative provided for in section F of the statute under consideration is for the purpose of enabling the commonwealth to obtain a judgment against such representative for the penalty therein named and for the amount of the tax, in the event that the personal representative, devisee, or person to whom the estate may descend by operation of law fails to pay the tax before the estate on which the tax is chargeable is paid over or delivered. This gives no day in court or other hearing to the devisee or person to whom the estate may pass under the will or by operation of law before the liability upon such persons to pay the tax becomes fixed by the order of the court or clerk provided for in the act. That personal liability is fixed by such order and is enforceable, in-

dependently of the express provisions in the statute as to distress warrant not applicable to the case before us, as any other tax obligation by distress warrant (sections 603 and 622 of the Code) without any further proceeding in court.

In connection with the subject under consideration, the commonwealth takes the following positions, which will be considered and passed upon in their order as stated below:

4. It is urged on the part of the commonwealth that section 2639a of Pollard's Code 1904 gives a right of appeal from the action of the clerk in appointing appraisers.

This is true, but such statute gives a right of appeal only from orders of the clerk entered in the exercise of the power and duties conferred and imposed upon clerks by such statute, which do not include the assessment of an inheritance tax under the 1916 inheritance tax statute aforesaid. Hence no right of hearing on the subject of such an assessment is afforded the taxpayer by such an appeal.

5. It is suggested on the part of the commonwealth that the statute law of the state providing for the assessment of (a) license taxes and of (b) taxes upon the recordation of deeds, etc., is analogous to the inheritance tax statute under consideration.

(a) As to license taxes: They are specific taxes and, upon grounds too well settled to need restatement here, are universally recognized as not falling under the constitutional requirements of notice and hearing aforesaid. *Hagar v. District*, supra, 111 U. S. 701 [4 Sup. Ct. 663], 28 L. Ed. 569, at page 572.

(b) As to taxes upon the recordation of deeds, etc.:

The party to the deed or other instrument of writing, who is taxed upon the property conveyed thereby or which is the subject thereof, is required to present the writing to the clerk for recordation, and is thereby and then and there given a hearing before the clerk upon the subject of the valuation of the property; and by the fixing by the clerk of the assessment and the amount of the tax, prior to the recordation of the writing, the payer of such tax is given notice of the assessment before there is any obligation upon him to pay it. And the tax must be paid to the clerk, or its payment to the state assumed by him, before the writing can be recorded. Section 590, Pollard's Code of Va., and cases there cited. Hence the assessment by the clerk cannot be made at a later time and so without notice to the parties affected. Thus, upon well-settled principles, aside from other considerations, is the requirement of due process of law with respect to notice and a hearing satisfied in such case. As we have seen above, the right

to a judicial hearing is not essential to due process of law. But, under the provisions of the 1916 inheritance tax statute under consideration, there is no requirement that the tax shall be paid or assessed before a will is probated, or before there is a qualification on the estate, or at the time of such probate or qualification. The later statute provides merely that—

The court or clerk, " \* \* \* before whom a will is probated or administration is granted, shall determine the inheritance tax, if any, to be paid on the estate passing by will or administration, and shall enter of record in the order book of the court or clerk, as the case may be, by whom such tax shall be paid and the amount to be paid."

This statute merely designates what court or what clerk shall act in the premises. It does not prescribe at what time they shall act. Under this statute, the court or clerk designated may make the assessment after the will has been probated, and at the time when the parties who were before the court, or clerk, in that proceeding are no longer present, and of which such parties may have no notice. And, in the case before us, the assessment of the tax and the order of the clerk imposing it were made and entered, respectively, over six months after the will was probated, and without notice either to the executrix or to any of the other parties assessed with the tax. It is therefore obvious that the provisions of statute in this state with regard to taxes upon the recordation of deeds, etc., furnish no analogy to the inheritance tax statute aforesaid.

6. As to proceedings, with respect to the administration of the estate, by which may be ascertained what are the expenses of administration and other charges against the estate including debts, if any, and what are the actual net balances of the estate passing to the legatees or devisees under a will—which alone constitute the amounts of the estate which should be taxed under the statute law under consideration: Such proceedings cannot supply the requisite due process of law to such legatees or devisees for the reason that, even if they are taken, they may not occur, as is true of the case before us, until after the amount of the tax has become fixed by and enforceable under the order of the clerk (or court), without making any deduction whatsoever from the gross amount of the estate.

7. In the case of *People's National Bank v. Marye* (C. C.) 107 Fed. 570, and *Id.*, 191 U. S. 272, 24 Sup. Ct. 68, 48 L. Ed. 180, is cited and relied on for the commonwealth on the question of notice above considered. That case involved the assessment of bank stock which under the statute law involved was reported for assessment by the bank and subsequently assessed or extended on

the books by the commissioner of revenue, without notice to the stockholders. Judge Waddill in the court below placed his holding that due process of law did not require notice to the stockholders on the ground that the assessor (the commissioner of the revenue) performed no judicial act in making such assessment, the assessment being made by him upon the market value of the stock as reported to him by the bank, and that the act itself fixed the amount of the tax. Moreover, as we may here remark, sections 567, 568, and 569 afford the remedy of relief to bank stockholders from erroneous assessments in such cases, and the periodic annual assessments being of record afford the notice, and the periodic assessments and such statute law afford the opportunity to be heard, which are requisite. The Supreme Court decided the case upon a ground which did not involve the questions of notice or hearing. Hence there is nothing in that case in conflict with the conclusion reached above.

8. It is urged on behalf of the commonwealth that, as the appellants have the right under the jurisdiction of courts of equity, independently of statutory authority, to maintain a suit for injunction against the collection of the tax in question, that remedy affords them due process of law; and the cases of *McMillen v. Anderson*, 95 U. S. 37, 24 L. Ed. 335, and *Oskamp v. Lewis* (C. C.) 103 Fed. 906, are cited as sustaining such position.

If this position were tenable, no tax statute could ever be held to be unconstitutional because of its failure to afford due process of law.

The error in principle in this position of the commonwealth, as I think, is this: It loses sight of the plenary power of the Legislature in the absence of constitutional limitation upon its action. But for the constitutional provision under consideration, a statute would be valid which authorized an assessment such as that made in the case before us, although it afforded no notice or opportunity of hearing whatsoever to the taxpayer; and it would furnish unquestionable authority for any assessment which might be made by the assessing officer under it, so long as he complied with the terms of the statute. Those terms having been complied with, the authority of law for the assessment would be complete, its source being the sovereign power of the state, and no court, in a suit for injunction, or in any other suit, could hold the action of the assessing officer to be unauthorized by the law or invalid, in whole or in part, and the assessment would have to stand as made, without any authority in the court to alter it upon any hearing it could give the taxpayer. The action of the assessing officer would be final and conclusive upon the taxpayer, and no court would, independently of statute or of constitutional

(101 S.M.)

guaranty, have jurisdiction of a suit for injunction against the collection of taxes so assessed.

Where an assessing officer has not acted in accordance with the terms of a tax statute, his action is without warrant of law and is pro tanto invalid. In such case, indeed, at common law, courts of equity, in suits for injunction to restrain the collection of the tax, have jurisdiction to review the action of the assessing officer and correct errors in the assessment; but, where the assessing officer has strictly followed his statutory authority, no power resides in any court in any suit in the absence of a statute conferring the jurisdiction to disturb that action save upon the single ground that the statute law itself is invalid because it is in conflict with the state or federal Constitution.

Now in the case before us the clerk, the assessing officer, strictly followed his statutory authority in making the assessment complained of. The court therefore had jurisdiction of the case solely on the ground that it involved the question of whether the statute law of the state under which the clerk acted affords the due process of law which the federal Constitution (and also the state Constitution as aforesaid) requires, and hence is valid; or whether it is invalid for lack of affording such due process. To say that a court of equity, independently of statute, has jurisdiction of such constitutional question and hence of such suit, and that such remedy itself affords the due process of law which the Constitution requires to save the statute law from invalidity, and that therefore the court must hold the statute law valid and may go on to inquire into and pass upon the correct amount of the assessment, is to mistake the case before the court for one in which the validity of the statute law is not involved, but only some question concerning the action of the assessing officer being or not being in accordance with the authority of the statute. Where the validity of the statute law itself is involved, that of necessity must be first passed upon, and only in the event that the statute law is found to be constitutional has the court jurisdiction to go on to decree upon other matters by way of giving full relief. Where the statute law itself is invalid, the court must so decree and can have no jurisdiction to go on to administer such a law.

As we know, the constitutional provision as to due process of law, as applicable to tax legislation, is a limitation upon the legislative power of the states in order to provide a guaranty against any encroachment upon rights of property by statute law of the states which does not provide for due process of law. 9 Fed. Stat. Anno. pp. 424, 425, 510, citing, among other authorities, *Munn v. Illinois*, 94 U. S. 123, 24 L. Ed. 77, 83, and *Slaughter House Cases*, 83 U. S. (16 Wall.) 36, 21 L. Ed. 394. The object of

such constitutional provision is to nullify all state statute law which otherwise, by its authority, might deprive any person of property without due process of law. This is indeed apparent from the language of the constitutional provision under consideration, which, in the federal Constitution, so far as material, is as follows: "No state shall \* \* \* deprive any person of \* \* \* property, without due process of law." The statute law of the state under which authority of assessment for taxation is claimed must therefore, to be valid, pass the test which is put to every such law by the constitutional provision under consideration. By it, where the provisions of the statute are vouched as the authority of the assessing officer, the citizen, but for the Constitution, might be deprived of his property without due process of law, unless such due process is provided for in the statute law, and hence the necessity for such provision in the statute law itself. And such is the unanimous holding of the decisions on the subject.

As said by this court in *Violett v. Alexandria*, supra (92 Va. at page 574, 23 S. E. at page 913, 31 L. R. A. 382, 53 Am. St. Rep. 825):

"The law must require notice \* \* \* and give them a right to a hearing and an opportunity to be heard. It matters not, upon the question of the constitutionality of such a law, that the assessment has, in fact, been fairly apportioned. The constitutional validity of the law is to be tested, not by what has been done under it, but by what may, by its authority, be done."

See, to same effect, *San Mateo Case*, 13 Fed. 147, 722; *County of Santa Clara v. Southern Pac. R. Co.*, 18 Fed. 410; *Cooley on Taxation* (1st Ed.) pp. 265, 266; *Dillon on Mun. Corp.* § 760, pp. 930-932; *Stuart v. Palmer*, 74 N. Y. 191, 30 Am. Rep. 289; and other authorities cited in the opinion of this court delivered by Judge Cardwell in the *Virginia* case last cited.

And further: If a suit in equity would lie on the ground that a statute is invalid for failure to afford due process of law, notwithstanding it be true that no statute could be invalid for that reason—which would be a solecism in the law of procedure and plainly untenable as a legal proposition—while theoretically all taxpayers might, by suit for injunction, have the right to obtain a hearing on the subject of the amount of the assessment, in fact, as a rule, the amount involved in the individual case, as compared with the expense of the suit, would be prohibitive of the remedy, and, in general, if that were the sole remedy, taxpayers would have to submit to any assessment made in accordance with the statute law however unjust, without a hearing and, in fact, without any remedy whatsoever to correct the amount of the assessment.

Accordingly, we find that the two cases

above named as cited for the commonwealth (*McMillen v. Anderson*, 95 U. S. 37, 24 L. Ed. 335, and *Oskamp v. Lewis* [C. C.] 103 Fed. 906) are not in conflict with the views above expressed. In those cases the statute law involved expressly provided for the remedy by suit for injunction which was resorted to by the taxpayers in such cases. But the tax involved in the former case was a license tax, to which, as we have seen above, the due process of law constitutional provision is not applicable. And the statute involved in the latter case did expressly provide for notice to the taxpayer and an opportunity for him to be heard before the assessor before the tax obligation became enforceable and the court so held. The opinion does go further and holds that, if it were conceded that section 2781 of the Ohio statute as to the assessment of omitted taxes did not require notice to the taxpayer, "nevertheless" due process "is provided by the laws of Ohio for the collection of taxes." The opinion then refers, not alone to the statute of Ohio (section 5848 of the Revised Statutes) which expressly provides the remedies of suit "to enjoin the illegal levy of taxes and assessments or the collection of either, and of actions to recover back such taxes or assessments as have been collected, without regard to the amount thereof," but also to other statutory provisions in that state on the subject, among which are the provisions making it the duty of the taxpayer himself annually to list or make a return of his property for taxation. And the provisions of statute are referred to which make a public record of the actual assessment prior to the time when the taxes become due and payable as prescribed by statute. The court then refers to the provisions of said section 5848 of the Revised Statutes as affording the taxpayer the ultimate remedies therein specified, but does not consider them as the taxpayer's only remedies. Indeed, the opinion says:

"The tax laws of Ohio afford the taxpayer many opportunities to be heard for the correction of mistakes, errors, irregularities, and wrongs in the assessment and levying of taxes before boards of equalization, the county auditor, and the state board of remission, with the ultimate right to resort to the courts to enjoin the collection of any tax not legally assessed or levied."

The case therefore is one in which the statute law of the state, other than the statute giving the remedy by suit for injunction, fully provided for due process of law, and where the remedy by injunction was but superadded to other ample statutory provisions for such due process. And it is not a case in which the statute law prescribed the remedy by injunction as the sole provision therein for due process of law.

Therefore, as I think, neither of these cases is in point and neither of them sustains

the position of the commonwealth aforesaid, which is, in effect, that the statute law, in a case such as that before us, need not provide for any notice or hearing whatsoever.

There is another single case, namely, *Security Trust, etc., Co. v. Lexington*, 203 U. S. 323, 27 Sup. Ct. 87, 51 L. Ed. 204 (which is referred to in *Comth v. Carter*, 102 S. E. 58, this day decided, made the basis of the majority opinion), which on the face of one sentence in the opinion would seem to sustain the position of the commonwealth which we have now under consideration. It is said in the opinion of the court:

"Whether the opportunity to be heard which has been afforded to the plaintiff has been pursuant to the provision of some statute, as in *McMillen v. Anderson*, 95 U. S. 37, 24 L. Ed. 335, and *Hagar v. Reclamation District No. 108*, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569, or by the holding of the court that the plaintiff has such right in the trial of a suit to enjoin the collection of the tax, is not material."

But the statute law involved in that case afforded due process of law. The illegality of the assessment in that case consisted, not in the invalidity of the statute law which authorized, but in the failure of the assessor to make the assessment and the entry of it on the tax books until after the time required by the statute law. It was this action of the assessor which was invalid and not the law. What was done was not done by the authority of the law. It was not a case where the statute law was inadequate in general, or at all, to afford due process of law in its administration. The case before the court was an isolated one in which the state relied on action of an officer which had no warrant of law. In that class of cases a suit for injunction to prevent irreparable injury, where the damages have not as yet been suffered, is, as above adverted to, the proper remedy at common law. The plaintiff pursued that remedy, and the state court, in a suit for injunction against the collection of the tax, gave the taxpayer a hearing on the question of the correct amount thereof and reduced it below the amount of the assessment. The Supreme Court held that such a hearing was all the hearing the taxpayer was entitled to in such a case under the constitutional guaranty of due process of law. That case is a very different one from the case before us. It did not involve the question of the invalidity of statute law for lack of provision therein for due process of law, and is therefore not in point. And it is apparent from the authorities cited and considered in the opinion that that case did not intend to change the well-established doctrine which we have above adverted to on the subject of the necessity in statute law of a certain character for provision therein for due process of law in order to save it from invalidity.



## MARTIN'S EX'RS v. COMMONWEALTH.\*

(Supreme Court of Appeals of Virginia. Jan. 22, 1920.)

It may be added that the fact that the Legislature, in the inheritance tax statute of 1918 (Acts 1918, p. 416), has made express provisions for the notice and hearing aforesaid, and for ascertaining the amount of the expenses of administration of and other charges against the estate, including debts, if any, all of which are to be deducted, before the tax is levied, is indicative that the legislative view of the need therefor in the statute law is the same as that which is taken above.

I am forced to the conclusion, therefore, that the inheritance tax statute of Virginia of 1916 is in direct conflict with the provisions of the federal and state Constitutions aforesaid, and is therefore void and unenforceable; and hence am constrained to dissent from the majority opinion on this question.

I concur with the majority opinion on the subject of the tax being a succession tax and in the holding therein as to the deductions and exemptions to which appellants are entitled.

**PER CURIAM.** [1] This case involves the inheritance tax upon the estate of William H. Jones, Jr., deceased. The questions raised are substantially identical with those raised in the cases of *Commonwealth v. Carter*, 102 S. E. 58, and *Heth v. Commonwealth*, 102 S. E. 66, this day decided, and no further discussion is deemed necessary. In our view of the controversy, the circuit court of the city of Richmond had jurisdiction to entertain the bill for the correction of the inheritance tax involved, and therefore erred in sustaining the demurrer of the auditor of public accounts, acting for the commonwealth.

[2] It appears, however, that the clerk simply accepted the appraised value of the estate of William H. Jones, Jr., made one deduction of \$15,000 therefrom, and computed the tax on the residue of that gross amount. The estate was devised and bequeathed to the testator's widow and three children. In our view, they were entitled to have the expenses of administration and debts, if any, deducted from the gross value of the estate, and then out of the net amount remaining they were each entitled to an exemption of \$15,000, and the tax should then be computed on the residue of the property devised and bequeathed to them severally at the rates prescribed by the statute.

The decree will therefore be reversed and the cause remanded to the trial court, with instructions to make proper inquiries for the ascertainment of the value of the several shares of the beneficiaries, the proper tax computed thereon, and the erroneous assessment made by the clerk corrected, and proper relief granted.

Reversed and remanded.

## 1. CONSTITUTIONAL LAW §45—COURTS MUST CONDEMN PLAINLY INVALID STATUTE.

Though the courts should approach constitutional questions with caution, they must not, merely for convenience or expediency, hesitate to condemn an act which plainly violates the fundamental law.

## 2. CONSTITUTIONAL LAW §48 — ACT NOT SHOWING EXCLUSIVE OR DISCRIMINATIVE PURPOSE PRIMA FACIE VALID AS NOT A SPECIAL ACT.

If a statute bears on its face no evidence of an exclusive or discriminative purpose, it is prima facie valid as general and not special legislation.

## 3. STATUTES §73(2) — CLASSIFICATION BY GENERAL LAW NOT PROHIBITED AS SPECIAL LEGISLATION.

Constitutional prohibitions against special legislation do not prohibit classification, but the classification must not be purely arbitrary rather than natural, reasonable, and appropriate to the occasion.

## 4. STATUTES §71—ACT GENERAL IN FORM, BUT SPECIAL IN EFFECT, VIOLATIVE OF PROHIBITION OF SPECIAL LEGISLATION.

Though an act is general in form, if it is special in purpose and effect, it violates the spirit of the constitutional prohibition of special legislation.

## 5. CONSTITUTIONAL LAW §48 — ASSUMPTION OF FACTS IN FAVOR OF LAW AS GENERAL RATHER THAN SPECIAL.

The necessity for and reasonableness of classification by a statute are primarily questions for the Legislature, and if any state of facts can be reasonably conceived that would sustain the act as general rather than special, such facts must be assumed as existing at the time the law was enacted.

## 6. CONSTITUTIONAL LAW §48 — BURDEN TO SHOW SPECIAL CHARACTER OF ACT GENERAL ON FACE.

In any attack upon a statute which is general on its face, the burden is on the assailing party to show that it does not rest upon a reasonable basis and is essentially arbitrary as excluding persons or localities naturally belonging to its operation, and so is special.

## 7. STATUTES §93(10)—WEST FEE BILL GENERAL, AND NOT SPECIAL, LAW.

The West Fee Bill (Acts 1914, c. 352), creating a commission to investigate the compensation of court clerks, examiners of records, treasurers, commissioners of revenue, sheriffs, etc., and, as a basis for fixing maximum compensation until action on report of the commission, dividing all cities and counties into classes according to their population by the federal census of 1910 alone, not each recurring federal census, held "general" and not "special," legislation, a law arbitrarily separating some persons, places, or things from

\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

\*For opinion on petition for rehearing, see 102 S. E. 724.

those on which it would otherwise operate (citing Words and Phrases, First and Second Series, Special Law).

**Error to Circuit Court of City of Richmond.**

Motion in the name of the Commonwealth against Alvah Martin, wherein, on death of defendant, the case was revived against his executors. To review judgment for the Commonwealth, the executors bring error. Affirmed.

Frank L. Crocker, of Portsmouth, and Loyall, Taylor & White and Williams & Tunstall, all of Norfolk, for plaintiffs in error.

The Attorney General, for the Commonwealth.

**KELLY, P.** This is a proceeding by motion in the name of the commonwealth to recover excess compensation collected by Alvah Martin, clerk of the circuit court of Norfolk county, over and above the maximum amount allowed by an act of the General Assembly, approved March 27, 1914, commonly known as the "West Fee Bill" (Acts 1914, p. 707). After the motion was instituted Alvah Martin died, and the case was revived against his executors. The only defense offered was that the act violated sections 51 and 63 of the Virginia Constitution, and was therefore null and void. There was a judgment for the commonwealth, and thereupon the executors obtained this writ of error.

The title of the act is as follows:

"An act to create a commission to consider the compensation of court clerks, examiners of records, treasurers, commissioners of the revenue, sheriffs, high constables, and city sergeants, and until action upon the report of said commission to fix the maximum amount of the compensation of said officers."

In keeping with this title, the provisions of the act show that the Legislature intended it to be tentative and experimental. Whether in a strict and accurate legal sense it was temporary or permanent is a question which has been raised by counsel, but which, as will hereinafter appear, we need not decide. It created a commission, consisting of the Governor, auditor of public accounts, and state accountant, to investigate the compensation of the officers named therein and to "report at the next session of the General Assembly whether said offices are economically administered, what compensation should thereafter be paid to said officers, \* \* \* and all other matters deemed pertinent by any member of said commission." Section 5. The act did not become effective until January 1, 1916. It was amended in 1916 (Acts 1916, cc. 470, 490) and again in 1918 (Acts 1918, c. 110), and the commission made a report in 1916 and again in 1918;

but neither in the amendments to the act nor in the reports by the commission was there any change or suggestion in regard to the "classification" now to be discussed.

As a basis for fixing the maximum compensation of the officers named therein, the act divides all the cities and counties of the state into classes according to their population. Norfolk county, having a population of over 50,000, falls within the first of the three divisions into which the counties are divided. This classification rests upon the federal census of 1910; the exact language of the enactment in this respect being as follows:

"For the purposes of this act the population of each county and city shall be as shown in the United States census report of nineteen hundred and ten." Section 1.

The contention of the plaintiffs in error is that this provision converts the act into a special law. If this contention is sound, the statute is unconstitutional, because the agreed facts in the case show: (1) That the act was not referred to the standing committee on special, private, and local legislation, as required by section 51 of the Constitution of Virginia; and (2) that it was passed during the term for which the defendant had been elected, and therefore violated clause 14 of section 63, forbidding the passage of any special act increasing or decreasing salaries, fees, compensation, or allowances of public officers during the term for which they are elected or appointed.

The sole question for decision, therefore, is whether the statute under review was special or general. If special, it was void; if general, it was valid.

We are admonished in the outset by counsel on both sides, of the far-reaching consequences dependent upon our decision. It is said, upon the one hand, that an affirmation of the judgment will necessarily determine adversely to public officers of the state many similar cases now pending in the commonwealth; and, on the other hand, that the aggregate amount of excess compensation claimed in these other cases is of such magnitude that a reversal will affect in a material degree the current revenue of the state.

[1] Independent of these suggested considerations peculiar to this case, it is well known that the courts approach constitutional questions with great caution, and regard the interpretation and application of constitutional provisions as among the most important as well as delicate and difficult duties which they have to perform. They must endeavor to hold up the hands of the lawmaking body, but, to do so effectively and in such way as to command public respect and confidence, they must not, for mere reasons of convenience or expediency, hesitate to condemn an act which plainly violates the fundamental law.

Is the "West Fee Bill" a general or a special act? The evils of special legislation, and the consequent inhibitions and restrictions upon it, have so often been the subject of litigation that we might naturally and reasonably hope to find the books full of cases definitely settling the principles and tests to be applied to the question in hand. Such a hope, however, is vain. A clear demonstration of this regrettable fact can be found in the excellent and elaborate briefs of the distinguished counsel who represent the opposing contentions in this case and to whom we are indebted for a notably diligent and discriminating compilation and analysis of the authorities in this and other jurisdictions bearing upon the question. With this veritable library of the law on the subject at hand, we emerge from a careful consideration of it with the unsatisfied state of mind expressed by Judge Dillon in his work on Municipal Corporations (volume 1 [5th Ed.] § 141, p. 244), as follows:

"What is a 'general act' and what is a 'special act' \* \* \* might have appeared to the framers of the Constitution to be questions easy of solution. But, if so, the result has proved otherwise, and these questions (with which the present chapter deals) are among the most difficult and perplexing which the courts have had to meet. Their number and variety are almost infinite, and the results in many respects are very unsatisfactory and inharmonious, as the present chapter abundantly proves. They present a veritable judicial labyrinth with no certain clue to guide the public or the profession in the intended applications of these constitutional provisions constantly arising. The professional adviser is often compelled to confess that he does not know whether a given act is special \* \* \* or not, and that the questions are of such nicety that they can be settled only by a decision in many cases of the court of last resort in the state."

And again, at section 142, p. 256, Judge Dillon says:

"Under the constitutional prohibition of special legislation many attempts have been made to define general and special laws, and to lay down some specific rule for the guidance of the Legislature and the courts, but is not too much to say that no satisfactory rule has yet been obtained. It is, of course, apparent that a statute applicable to the whole state, and to all persons, bodies corporate, and property within the state, is general, but as a practical matter such statutes are relatively few in number."

In *Ferguson v. Ross*, 123 N. Y. 459, 464, 27 N. E. 954, 955, it was said by Andrews, J.:

"It seems impossible to fix any definite rule by which to solve the question whether a law is local or general, and it has been found expedient to leave the matter to a considerable extent open, to be determined upon the special circumstances of each case."

And so say many of the courts.

A number of abstract definitions of a "special law" are collected in 7 Words and Phrases, p. 8577, and in the Second Series of the same work, p. 635, from a bare inspection of which it will readily appear that they amount to little more than broad generalizations, and are not calculated to be of much use in their application to concrete cases.

Perhaps the most satisfactory short definition to be found anywhere is the following, appearing in the collection last cited, taken from *Budd v. Hancock*, 66 N. J. Law, 133, 48 Atl. 1023, and repeated in *Van Cleve v. Passaic Valley Sewerage Commissioners*, 71 N. J. Law, 183, 184, 58 Atl. 571, 578:

"A law is special in a constitutional sense when by force of an inherent limitation it arbitrarily separates some persons, places, or things from those upon which, but for such separation, it would operate."

This definition undoubtedly strikes at the foundation of the subject; for an arbitrary separation of persons, places, or things of the same general class, so that some of them will and others of them will not be affected by the law, is of the essence of special legislation. But what does it take to constitute "an arbitrary separation"? Manifestly no definition could answer this question, because it must in the nature of things depend upon the purpose and subject of the particular act and the circumstances and conditions surrounding its passage. The courts may look to such circumstances and conditions in passing on the validity of an act. 1 McQuillin on Municipal Corporations, § 202.

Hence it is that in practically every case the decision must rest upon general principles of law and general rules of statutory construction rather than upon definitions or precedents.

In *Ex parte Settle*, 114 Va. 715, 719, 77 S. E. 496, 497, Judge Keith, in sustaining a legislative classification of counties, very pertinently said:

"The principles by which this court is governed in considering the constitutionality of a law have been too frequently the subject of judicial decision to require the citation of authority. Every presumption is made in favor of the constitutionality of an act of the Legislature. A reasonable doubt as to its constitutionality must be solved in favor of the validity of the law, and the courts have nothing to do with the question whether or not the legislation is wise and proper, as the Legislature has plenary power, except where the Constitution of the state, or of the United States, forbids, and it is only in cases where the statute in question is plainly repugnant to some provision of the Constitution that the courts can declare it to be null and void."

As showing that these principles apply with peculiar appropriateness to legislative

classifications of persons, places, and things, see, also, *State v. Scullin-Gallagher Iron & Steel Co.*, 268 Mo. 178, 186 S. W. 1007, Ann. Cas. 1918E, 620; *Harmon v. Madison County*, 153 Ind. 68, 54 N. E. 105, 107, 108; 26 Am. & Eng. Ency. L. (2d Ed.) 688; 12 C. J. 1129, 1130; 6 R. C. L. § 376, p. 385.

[2] In doubtful cases a most useful guide in determining whether a statute is general or special within the meaning of constitutional limitations like those involved in this case is to be found in the underlying reasons for such limitations. They are intended primarily as a check upon the intentional exercise of legislative power conferring special privileges and immunities, or special restrictions and burdens, upon particular persons or localities to the exclusion of other persons or localities similarly situated. Plain legislative violations, whether expressly intended as such or not, must of course be condemned; but these limitations in the fundamental law had their genesis in a purpose to remedy the mischief of intentionally arbitrary and exclusive legislation. 1 Dill. Mun. Corp., supra, § 141. It follows, therefore, that if a law bears on its face no evidence of an exclusive or discriminative purpose, it is *prima facie* valid. As was said in *Budd v. Hancock*, supra:

"The test of a special law is the appropriateness of its provisions to the objects that it excludes. It is not, therefore, what a law includes that makes it special, but what it excludes. If nothing be excluded that should be contained, the law is general. Within this distinction between a special and a general law, the question in every case is whether any appropriate object is excluded to which the law, but for its limitations, would apply. If the only limitation contained in a law is a legitimate classification of its objects, it is a general law."

[3-5] Constitutional prohibitions against special legislation do not prohibit classification. A general law in its simplest form embraces all persons and places within the state, but varying circumstances often render it impossible to apply the same rule everywhere and to everybody. But the classification must not be purely arbitrary. It must be natural and reasonable, and appropriate to the occasion. There must be some such difference in the situation of the subjects of the different classes as to reasonably justify some variety of rule in respect thereto. Though an act be general in form, if it be special in purpose and effect, it violates the spirit of the constitutional prohibition. An evasion of the prohibition "by dressing up special laws in the garb and guise of general statutes" will not be permitted. 1 Dill. on Mun. Corp. (5th Ed.) § 147 et seq.; 1 Lewis' Sutherland on Stat. Construction (2d Ed.) § 200. But the necessity for and the reasonableness of classifica-

tion are primarily questions for the Legislature. If any state of facts can be reasonably conceived that would sustain it, that state of facts at the time the law was enacted must be assumed. 1 Dill. Mun. Corp. (5th Ed.) § 146; *Polglaise v. Commonwealth*, 114 Va. 850, 865, 76 S. E. 897.

With the foregoing principles in mind, let us look to the characteristics of the act in question. As appears from its title and provisions, it is a comprehensive, but tentative and experimental, scheme for controlling the compensation of certain specified state officers in every city and county in the state by fixing a maximum salary to be received by each of them. This maximum is made to depend upon and to vary with the population, and cities and counties are classified accordingly. There are no counties or cities excluded, and there is here no contention, and no reason to contend, that the Legislature intended any discrimination or class legislation. It was dealing with a tremendously important question, one which addressed itself peculiarly to the Legislature and had been the subject of public agitation and discussion for some time prior to the passage of the statute. There is every indication that that purpose was to proceed cautiously and deal fairly with the officers themselves, and to simply take the initial step in the establishment of a system of salaries for public officers, which would, on the one hand, afford a just compensation for services rendered, and, on the other, promote reasonable economy in the administration of certain branches of the state government.

[6, 7] The plaintiffs in error concede that, as a general proposition, the classification of cities and counties according to population for the purpose of fixing the salaries of public officers does not offend against a constitutional interdict upon special legislation. They claim, however, and this raises the final and decisive question before us, that the classification here is fatally defective because it is made to depend upon the single census of 1910, with no provision for any change in the future by reason of increase or decrease in population. There is no other criticism of the act. It is conceded to be in every other respect clearly general and free from constitutional objection.

It is manifest that by limiting the classification to the census of 1910 the Legislature has in effect fixed the maximum salaries in each county and city in the state as definitely as if the act had called each city and county by name. We are not prepared, however, to say that such an act is special within the meaning of the Constitution. A similar one is to be found in section 3528, Code 1904 (section 3505, Code 1919), fixing the salary of the commonwealth's attorney in each of the counties and cities. We are not informed, and have not deemed it material to in-

quire, whether this act in its present form was passed as a general or special law, but, for the purpose of illustration, if it were attacked as a special act, we would have no hesitancy in saying, in the absence of anything to show that the salaries therein named were classified and fixed arbitrarily and without due regard to some proper basis, that it should be classed as a general law. It necessarily implies a classification, but it excludes no person or locality naturally belonging to its operation, and the presumption that the Legislature acted in good faith and graded the salaries upon reasonable grounds would support it as general legislation. In any attack upon it the burden would be upon the assailing party to show that it did not rest upon a reasonable basis, and was essentially arbitrary. *Ex parte Settle, supra*; *Polglaise v. Commonwealth, supra*.

A diligent consideration of the authorities leads us to the conclusion that a classification which is territorially complete at the time of the passage of the act establishing it, and which is based upon natural and reasonable grounds, ought not to be held unconstitutional for the bare reason that it does not provide for future changes dependent upon an uncertain variation of existing conditions.

We have no desire to evade or minimize the strength of the argument against this view. The effect of fixing for counties of the first class a larger maximum of compensation for their officers than is allowed in counties of the second and third classes, when the basis of the classification is made to depend upon a single census, as effectively excludes the latter counties from the first class as if they had not been provided for at all in the act. Conversely, it is also true that, if there should hereafter be a decrease in the population of any counties in the first class sufficient to bring them properly within the second or third class, they will be as effectively and specially favored by the higher classification as if they had been designated by name for that purpose.

Undoubtedly there is much apparent authority for the proposition that a classification having the characteristic here pointed out is invalid. The case would, of course, be entirely free from difficulty, from the standpoint of authority and precedent, if the act had simply referred to the federal census without limiting it to the one immediately preceding its passage. 1 Dill. Mun. Corp. (5th Ed.) § 152, p. 284, and cases cited in note 1. A detailed review of the cases bearing upon this point, the more pertinent of which are discussed in the briefs in this case, would not be feasible in an opinion of reasonable length. It must suffice to say that, when we examine these authorities closely, it becomes manifest that the rule re-

quiring provision for future members of a class has most generally been applied to statutes which at the time of their enactment did not embrace all of the counties or cities in the state, and were thus necessarily exclusive and discriminative. The rule is often stated in such form as to indicate that this is true. Thus in a note to *Kraus v. Lehman*, 170 Ind. 408, 83 N. E. 714, 84 N. E. 769, 15 Ann. Cas. 857, it is said:

"A statute classifying municipalities on a basis of population is not invalid because at the time of its enactment there is only one municipality within one of the classes which it creates, provided the statute is so framed that other places may come within the classification and operation of the statute on acquiring the necessary population"—citing many cases.

And again on page 858 of 15 Ann. Cas. it is said:

"Conversely a classification by population is invalid if it is confined in its operation to a state of facts existing at the date of its adoption or any other particular time, and *excludes municipalities other than those affected at the time of the enactment from coming within its purview, especially when such classification, as is usually the case, has relation to a single locality only*"—citing many cases. (The italics are supplied.)

The contention of the plaintiffs in error, as we understand it, is that a classification of municipalities according to population, to be valid as the basis of a general law, must meet a dual test, and must be: (1) Reasonable and germane to the subject; and (2) so framed as to adjust itself automatically to future changes in population. We do not think this dual test can be applied to all cases, or to any cases like the one in hand. When all the counties in the state are classified according to their population, if the classification is germane to the purpose of the law, is fair and just, and at the time of its enactment operates uniformly and extends in its operation to each of the counties, it should be held a general law. In such cases the Legislature may leave future changes of condition to be met by future legislation upon the reasonable assumption that its successors will be equally just and fair. It may well be that this is what the Legislature in this case had in mind in providing that "for the purposes of this act," as an initial step to what it regarded as a needed reform, the census of 1910 should control.

The true principle would seem in all cases to be that the classification by population must not be merely a circuitous and disingenuous means of designating and legislating for particular localities. As stated by Judge Dillon (volume 1, *supra*, § 152):

"The principle involved is what it must appear from the terms of the statute that the classification is formed in good faith, and that there is such a substantial difference in popu-

lation between cities included within the operation of the statute and cities not included that the court can fairly say that classification is intended, and not merely designation of a particular locality. If it appears from an examination of the statute that the classification is intended to operate merely as a designation of the locality, the statute is not saved from condemnation merely by the fact that it is framed in general form."

We have here an act which is admittedly constitutional in its present effect, and, if it is invalid at all, it is so simply because of future conditions depending upon the uncertain increases or decreases of population in different counties. It is passed in an effort to launch a general and comprehensive scheme of salaries for the entire state, and is absolutely devoid of any semblance of bad faith or discriminative purpose. Judge Dillon says in a note to the text last above cited (page 285):

"The proposition \* \* \* that a law otherwise constitutional is invalid simply because it does not provide for a future contingency which may never occur does not seem to the author to be well-considered or sound. See Mr. Hubbard's article in *Harvard Law Rev.* vol. XVIII, pp. 592-594, June, 1905."

The general purpose of Mr. Hubbard's article, cited by Judge Dillon, is to show that constitutional limitations upon special legislation for municipal corporations are ill-advised and fall short of their purpose, and it assails practically all of the tests which the courts have resorted to in passing upon the validity of legislative classification. Mr. Hubbard's discussion, however, supports the proposition for which Judge Dillon cites it; and, moreover, the general result of that discussion and the notes thereto tend very strongly, as we think, to uphold the conclusion that the "West Fee Bill" is a general act according to the best tests which can be applied to legislation of that character.

There are no decisions in Virginia directly in point. The case of *Ex parte Settle*, supra, was one in which the act under review provided that—

"In all counties in this state having a population greater than 300 inhabitants per square mile, as shown by the United States census, there shall be appointed \* \* \* a trial justice for such counties."

The court, in upholding the classification thus created, said:

"It is true that the act applies only to the county of Alexandria, that being the only county in the state which has a population of 300 or more to the square mile. But the fact that a law applies only to certain territorial districts does not render it unconstitutional, provided it applies to all districts and all persons who are similarly situated, and to all parts of the state where like conditions exist. Laws may be made to apply to a class only, and that class may be in point of fact a small one,

provided the classification itself be a reasonable, and not an arbitrary, one, and the law be made to apply to all persons belonging to the class without distinction."

It is contended on behalf of the commonwealth that the reference to the "United States census" in the act involved in the *Settle* Case meant the census of 1910, being the census last preceding that act. The opinion does not settle this question, and it does not anywhere say that the act is to be construed as providing for the admission of counties which in the future may attain a population of 300 or more to the square mile. It is fair to assume, however, that the court understood the act to refer not only to the last census preceding the act, but to each succeeding census, and therefore to impliedly provide for the admission of future members of the class. Otherwise the act, being in point of fact territorially incomplete at the time of its passage and lacking the elasticity necessary to become so at any future time, would have been essentially a special act. The decision therefore cannot be regarded as authority for the contention of the commonwealth. It falls in that large class of cases in which the courts, in their proper desire to sustain legislation designed to promote efficiency and economy in the administration of the affairs of the state, have held statutes which were really special and local to be general in purpose and effect by applying the test of flexibility. Resort to this test is unnecessary where the act in question applies to and operates upon the whole state at the time of its enactment and rests upon a reasonable classification. It is clear, therefore, that while the case of *Ex parte Settle* is not authority for the contention of the commonwealth, it is not in conflict therewith.

The case of *Poiglaize v. Commonwealth*, supra, is one in which there was a classification of wagons by haulers of lumber for the purpose of requiring the use of tires of specified widths. The classification was upheld, and the opinion by Judge Cardwell quoted the following passage from *Sutton v. State*, 96 Tenn. 696, 38 S. W. 697, 33 L. R. A. 589:

"Legislation intended to affect a particular class, and not the public at large, must extend to and embrace equally all persons who are or may be in the like situation and circumstances, and the classification must be natural \* \* \* not arbitrary and capricious."

Counsel for plaintiffs in error invoke this citation and quotation from *Sutton v. State* as decisive of the instant case. They point out that the statute in the *Sutton* Case classified the counties in the state of Tennessee according to the census of 1890, and was held invalid for that reason; and they take the position that the Virginia court committed itself to that decision by relying upon it and

indorsing it as authority in the Polglaise Case. We think a sufficient answer to this argument is that the Tennessee statute was so framed as that at the time of its enactment, while purporting to embrace all the counties in the state, it necessarily excluded a number of them from its operation. It was general in form, but special and local in effect, and, having adopted a fixed census as the basis of its classification, the court could not save it by applying what we have for convenience called the test of flexibility.

The Polglaise Case does not sustain the position of the plaintiffs in error, and while its facts are not such as to make it available as direct authority for the commonwealth, the following extract from the opinion seems to us very clearly in accord with the general principles which we have attempted to set out as the basis of our decision in this case:

"The rules by which classification for the purpose of legislation must be tested are stated concisely and clearly in the opinion of the United States Supreme Court in *Lindsley v. National Carbonic Gas Co.*, 220 U. S. 61, 31 Sup. Ct. 337, 65 L. Ed. 369, Ann. Cas. 1912C, 160, as follows: '(1) The equal protection clause of the Fourteenth Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary. (2) A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. (3) When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. (4) One who assails the classification of such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.'"

We are unwilling to condemn the "West Fee Bill" as special legislation within the meaning of the Virginia Constitution merely because as it now stands, unaided by any additional legislation, future increases or decreases of population in localities which cannot at this time be designated may cause it to lack the equality and uniformity which it must now be conceded to possess. If there be any authority in conflict with this conclusion, the question is certainly open in Virginia, and we are free to adopt the construction which seems to us most reasonable and just.

In this view, it becomes unnecessary to decide whether the act is in a technical and legal sense permanent or merely temporary. There is satisfactory authority for the general proposition that a classification which would render a permanent act unconstitu-

tional does not violate the spirit of the Constitution if it is only intended for a temporary purpose. The circuit court sustained the act under review as a general act, and was further of opinion that, even if it were to be regarded as special, it was so temporary in its purpose as not to be violative of the constitutional provisions invoked by the plaintiffs in error. As already stated, we do not deem it necessary to pass upon this latter question. We have no hesitancy in saying, however, that in our opinion the act shows on its face that the Legislature did not intend it to do more than serve a temporary purpose. It may be quite true that one Legislature cannot effectively entertain intentions for its successors, but the fact that the Legislature of 1914 evidently did undertake to rely upon future legislation for the completion of the work which it began is a significant fact in determining the good faith with which the act under consideration was passed.

We are of opinion that the decision of the circuit court was right, and its judgment must be affirmed.

Affirmed.

(126 Va. 626)

SHELTON et al. v. SYDNOR, Commonwealth's Atty.

(Supreme Court of Appeals of Virginia. Jan. 22, 1920.)

# 1. COURTS §1—DEFINITION OF "JURISDICTION."

"Jurisdiction" is the power to adjudicate a case upon the merits, and dispose of it as justice may require, involving jurisdiction of the subject-matter of the litigation, and also of the parties.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Jurisdiction.]

# 2. COURTS §17, 24, 37(1)—JURISDICTION OF SUBJECT-MATTER CAN BE ACQUIRED ONLY UNDER CONSTITUTION OR STATUTE, AND RIGHT TO OBJECT FOR LACK OF IT CANNOT BE LOST.

Jurisdiction of the subject-matter of litigation can be acquired only by virtue of the Constitution or statute; neither the consent of the parties, nor waiver, nor acquiescence can confer it, and the right to object for want of it cannot be lost by acquiescence, neglect, estoppel, or in any other manner.

# 3. JUDGMENT §16—JUDGMENT WITHOUT JURISDICTION OF SUBJECT-MATTER A NULLITY.

A judgment rendered by a court which had no jurisdiction of the subject-matter is a nullity, and may be so treated by all persons anywhere, at any time, and in any manner, having no existence as a valid judgment.

**4. COURTS ⇨32—JURISDICTION OF SUBJECT-MATTER MUST APPEAR ON FACE OF RECORD.**

Jurisdiction of the subject-matter of the litigation must affirmatively appear on the face of the record; i. e., the record must show that the case is one of a class of which the court rendering the judgment was given cognizance.

**5. APPEAL AND ERROR ⇨23—WANT OF JURISDICTION OF SUBJECT-MATTER NOTICED BY SUPREME COURT.**

Want of jurisdiction of the subject-matter in the trial court will be noticed by the Supreme Court *ex mero motu*.

**6. CONSTITUTIONAL LAW ⇨43(1), 309(1)—WANT OF JURISDICTION OVER PERSONS OF LITIGANTS MAY BE WAIVED.**

The due process clauses of the federal and state Constitutions require notice and an opportunity to be heard to complete jurisdiction of the persons of litigants, but, if litigants waive such rights in a case in which they have the right so to waive, the judgment nevertheless will be held valid.

**7. COURTS ⇨32—FAILURE OF RECORD TO SHOW TIME AND MANNER OF SERVICE DOES NOT DEFEAT JUDGMENT.**

Failure of the record to show affirmatively by a return on the process the time and manner of service is not sufficient to defeat a judgment based on such service when there is anything in the record from which the court can gather that the process was in fact served.

**8. APPEAL AND ERROR ⇨1091(8)—JURISDICTION OF CIRCUIT COURT HEARING APPEAL GIVEN BY SEPARATE STATUTE PRESUMED.**

Though the appeal in a certain class of cases is given by a separate statute from that conferring most of its jurisdiction on the circuit court of a county, there is the same presumption in favor of the correctness of the appeal in the one case as in the others; there being a legal presumption, in absence of contrary evidence, in favor of the jurisdiction of courts of record of general jurisdiction.

**9. APPEAL AND ERROR ⇨1091(3)—SUPREME COURT, IN ABSENCE OF CONTRARY EVIDENCE, PRESUMES THAT APPEAL WAS DULY TAKEN TO CIRCUIT COURT.**

In the absence of any evidence in the record before the Supreme Court to the contrary, it must hold that statement in the record that appeal from decision of the board of supervisors to the circuit court of the county was taken on a certain day means that the appeal was duly taken in the manner and within the time prescribed by the statute giving appeal to the circuit court in the particular case; every presumption being indulged in favor of the correctness of the judgment of the circuit court.

**10. APPEAL AND ERROR ⇨1032(1)—BURDEN ON APPELLANTS TO ALLEGE AND PROVE ERROR.**

Parties who come into the Supreme Court seeking relief from judgments of the trial court must both allege and prove error to their prejudice.

**11. STATUTES ⇨102(2)—SPECIAL AND LOCAL LAW INCREASING COMPENSATION OF SUPERVISORS OF COUNTY DURING TERM INVALID.**

Code 1904, § 848, as amended by Acts 1916, c. 286, allowing the county supervisors increased compensation for supervising the construction, repair, and upkeep of public roads and bridges, held a special and local law in its exception from general classification and provision of a different compensation for each member of the board of supervisors in 15 named counties during their terms; therefore as to such counties violative of Const. 1902, § 63, cl. 14.

**12. EVIDENCE ⇨12—JUDICIAL NOTICE BY SUPREME COURT OF CENSUS POPULATION OF COUNTY.**

The Supreme Court will take judicial notice of the fact that, according to the last United States census, Hanover county had a population of 17,200 inhabitants, in determining to what compensation its supervisors are entitled for days employed in supervising the construction, repair, and upkeep of roads and bridges.

**Error to Circuit Court, Hanover County.**

W. R. Shelton and C. S. Luck, members of the Board of Supervisors of Hanover County, were allowed certain compensation for services rendered in the supervision of the opening and repairing of public roads and the construction of bridges, and from the order of the Board of Supervisors allowing their claims, and directing warrants to be issued, Walter Sydnor, Attorney for the Commonwealth for the County, appealed to the circuit court, which set aside the order, and the Supervisors bring error. Judgment affirmed, without prejudice to the Supervisors to receive legal compensation.

Haw & Haw, of Richmond, for plaintiffs in error.

Walter Sydnor, of Richmond, for defendant in error.

BURKS, J. The plaintiffs in error are members of the board of supervisors of Hanover county. At a meeting of the board held on December 1, 1917, the board allowed to each of them an account against the county as compensation, at the rate of \$3 a day, for services rendered in the supervision of the opening and repairing the public roads, and the construction of bridges of said county. The allowance was made under the provisions of an act of assembly approved March 18, 1916, amending section 848 of the Code of 1904. Acts 1916, p. 505. From the order of the board allowing these claims and directing warrants to be issued therefor, an appeal was taken by Walter Sydnor, attorney for the commonwealth for said county, pursuant to section 836 of the Code. Upon the hearing of the appeal, the circuit court of Hanover county "set aside, revoked, and annulled" the



order of the board allowing said accounts, on the ground that the act aforesaid of March 18, 1916, was in violation of paragraph 14 of section 63 of the Constitution, forbidding the passage of any local, special, or private act increasing the salaries, fees, percentages, or allowances of public officers during the term for which they were elected or appointed. To that order of the circuit court this writ of error was awarded. The case appears to have been heard in the circuit court without evidence, but upon the admissions of the parties. Some of these admissions appear in the final order appealed from, but the record does not state that those were all that were made. It simply states that the court considered the record in the cause and "the admissions of fact of the case." The final order appealed from does, however, state expressly that the appeal was "taken December 1, 1917," which was the very day that the supervisors met and made the order allowing the accounts. The appeal was taken under section 836 of the Code (1904), which provides, amongst other things, that—

"When any claim has been allowed by said board against the county, which, in the opinion of said attorney [for the commonwealth] is improper or unjust \* \* \* the said attorney shall appeal from the decision of said board to the circuit court of the county, causing a written notice of such appeal to be served on the clerk of such board, and upon the party in whose favor the said claim is allowed within thirty (30) days after the making of such decision."

It was earnestly insisted both in the petition for the appeal and in the oral argument before us that the perfection of the appeal by the notice required by statute was essential to the jurisdiction of the circuit court, and that the record fails to disclose that the notice was given in the time required by law, and that a voluntary appearance to the appeal after the lapse of 30 days could not cure the defect and confer jurisdiction on the court.

[1-5] Jurisdiction, it is said, is the power to adjudicate a case upon the merits and dispose of it as justice may require. The *Resolute*, 168 U. S. 437, 18 Sup. Ct. 112, 42 L. Ed. 533. This necessarily involves the idea that there must be jurisdiction of the subject-matter of the litigation and also over the parties thereto. If either is wanting the resulting judgment is void. But the rights and powers of the parties and of third persons with reference to the mode of acquiring the two kinds of jurisdiction are not the same. Jurisdiction of the subject-matter can only be acquired by virtue of the Constitution or of some statute. Neither the consent of the parties, nor waiver, nor acquiescence can confer it. Nor can the right to object for a want of it be lost by acquiescence, neglect, estoppel, or in any other manner. *School Trustees v.*

*Stocker*, 42 N. J. Law, 116; *Springer v. Shavender*, 118 N. C. 33, 23 S. E. 976, 54 Am. St. Rep. 708; *O'Brien v. People*, 216 Ill. 354, 75 N. E. 108, 108 Am. St. Rep. 219, 3 Ann. Cas. 966. It is the right of the state to say of what classes of cases its courts shall have jurisdiction, and to exclude all others, and it is the duty of litigants who invoke the jurisdiction of a court to bring themselves within some class of the cases of which the court is given jurisdiction. *O'Brien v. People*, supra. A judgment rendered by a court which had no jurisdiction of the subject-matter is a nullity, and may be so treated by all persons anywhere at any time and in any manner. It has no existence as a valid judgment. 1 Black on Judgments, § 278, and cases cited; *Building Ass'n v. Haden*, 92 Va. 201, 23 S. E. 285. Jurisdiction of the subject-matter of the litigation must affirmatively appear on the face of the record; that is, the record must show affirmatively that the case is one of a class of which the court rendering the judgment was given cognizance (*Ritter Lumber Co. v. Coal Co.*, 115 Va. 370, 79 S. E. 322; *Jones v. Buckingham Coal Co.*, 116 Va. 120, 81 S. E. 28), and the want of such jurisdiction of the trial court will be noticed by this court *ex mero motu* (*South. & W. R. Co. v. Commonwealth*, 104 Va. 314, 51 S. E. 824; *Hanger v. Commonwealth*, 107 Va. 872, 60 S. E. 67).

[6] The rule with reference to jurisdiction over the persons of the litigants is not quite so strict. The "due process" clauses of the federal and state Constitutions require notice and an opportunity to be heard, but the litigants have rights which they may waive, if they choose, and, if waived in a case in which they have the right to waive, the judgment will be held valid. In this class of cases the question of the jurisdiction of the court usually resolves itself into one of whether or not there has been "due process," whether the process has been served in the time and manner required by law, or service has been waived. Of course, the defendant must be properly brought before the court, else there will be no jurisdiction over him, and a judgment against him will be void (*Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565); but, where the record does not expressly show service of process, the court will scrutinize the record to ascertain if there is anything in it to show service, and, if there is, it will not declare the judgment void. In *Hill v. Woodward*, 78 Va. 765, a suit to sell land in which the widow was entitled to dower, the record did not affirmatively show service of process on the widow, who was a necessary party to the suit. Her name did not appear in the process which was returned executed. The suit was brought to October rules, 1878. After various proceedings had in the cause, and the sale of the land at which she was present and a bidder, she, in June, 1881, filed

her petition stating that she had never been served with process, and asking to be made a party defendant, and that the proceedings in the cause be vacated and the case heard *de novo*. Judge Richardson, after a discussion of numerous authorities, arrives at the conclusion that, where the want of authority to render a decree does not plainly appear on the face of the record, every presumption will be indulged in favor of judgments of courts of general jurisdiction, and the entire record will be inspected to ascertain if process had been served, that the onus of showing a want of service was upon the widow, who sought to impeach the decree, and that the mere failure of the record to show affirmatively that process was served was not sufficient to impeach the decrees previously rendered in the cause. In that case the court made various surmises as to the issuance and service of process, and concluded there must have been service from the statement in one of the decrees that the cause came on to be heard on the bill taken for confessed as to all of the defendants.

In *Ferguson v. Teel*, 82 Va. 690, the objection made in this court was that the case was prematurely heard in the court below, because process against a married woman, who was one of the principal defendants, had not been served on her, but on her husband, and yet the record shows that the case was heard on the bill taken for confessed as to all of the defendants. Replying to this assignment, the court said:

"When a court of general jurisdiction has pronounced judgment, its adjudication should be as conclusive on the question whether a party was duly notified as on any other point necessary to a proper determination of the cause."

These words are quoted with approval by *Lewis, P.*, in *Moore v. Green*, 90 Va. at page 183, 17 S. E. 873, where the record did not affirmatively show service of process, but the decree stated that all of the defendants had been duly served with process. See, also, dissenting opinion of *Lewis, P.*, in *Gresham v. Ewell*, 85 Va. at page 6, 6 S. E. 702, where it is said:

"And it is equally well settled that a judgment of a court of competent jurisdiction is always presumed to be right until the contrary is shown, even when directly assailed in an appellate court. *Harman v. City of Lynchburg*, 33 Grat. [74 Va.] 37; *Hill v. Woodward*, 78 Va. 765. Every intendment is made to support the judgment, and the rule is that nothing shall be intended to be out of the jurisdiction of a superior court—that is, a court of general jurisdiction—but that which specially appears to be so. *Broom's Leg. Max.* 952; 1 *Smith's Leading Cases*, notes to *Crepps v. Durdén*."

[7] In all of the cases cited above the attack on the judgment was direct, and not collateral. We have cited them, not for the

purpose of approving all that is said therein, but to show that the failure of the record to show affirmatively by a return on the process the time and manner of the service thereof is not sufficient to defeat a judgment when there is anything in the record from which the court can gather that the process was in fact served.

[8-10] In the case at bar the record does not affirmatively show the want of service of the notice required by the statute. There is copied into the record a notice bearing date December 12, 1917, upon which there is no return. It does not appear that no other notice was given. It is admitted in the petition that the clerk of the board accepted service of the notice, though that fact does not appear in the record. It appears that the plaintiffs in error appeared at the hearing and defended the case on its merits, without objection of any kind, but when that appearance was first entered does not appear. It further affirmatively appears that the appeal was "taken December 1, 1917." The circuit court of Hanover county is a court of general jurisdiction, and, although the appeal in this class of cases is given by a separate statute from that conferring most of its jurisdiction, there is the same presumption in favor of its correctness in the one case as the other. *Mortgage Trust Co. v. Redd*, 38 Colo. 458, 88 Pac. 473, 8 L. R. A. (N. S.) 215, 120 Am. St. Rep. 132. See, also, cases cited in 10 R. C. L. 833. There is a legal presumption, in the absence of evidence to the contrary, in favor of the jurisdiction of courts of record of general jurisdiction. The appeal from the decision of the board of supervisors to the circuit court could only be taken in the manner and at the time prescribed by the statute, and, in the absence of any evidence in the record before us to the contrary, we must hold that the statement in the record that the appeal was taken December 1, 1917, means that the appeal was duly taken in the manner and within the time prescribed by the statute. The statement was a finding of fact, not impeached by anything in the record, and not sought to be impeached by extrinsic evidence, if such was admissible, and it is not now claimed that notice was not duly served or appearance duly entered, but simply that the record does not on its face show such service or appearance. Under such circumstances every presumption will be indulged in favor of the correctness of the judgment of the circuit court. In *Voorhees v. Bank*, 10 Pet. 472, 9 L. Ed. 490, it is said:

"There is no principle of law better settled than that every act of a court of competent jurisdiction shall be presumed to have been rightly done till the contrary appears; this rule applies as well to every judgment or decree rendered in the various stages of their proceedings from the initiation to their comple-

tion as to their adjudication that the plaintiff has a right of action. Every matter adjudicated becomes a part of their record, which thenceforth proves itself, without referring to the evidence on which it has been adjudged."

Parties who come into this court seeking relief from judgments of the trial court must both allege and prove error to their prejudice. *Ritter Lumber Co. v. Coal Co.*, supra. Upon the record presented, we cannot say that the circuit court of Hanover county was without jurisdiction of the appeal.

In the view we have taken of the case it is unnecessary to determine whether or not the perfecting of an appeal within the time prescribed by law is jurisdictional, and we express no opinion on the subject. It is a question upon which the cases are not altogether in harmony. *Edmonson v. Bloomshire*, 7 Wall. 306, 19 L. Ed. 91; *Wynn v. Tallapoosa County Bank*, 168 Ala. 469, 53 South. 228; *In re Brewer's Estate*, 156 Cal. 89, 103 Pac. 486; *Niles v. Gonzalez*, 152 Cal. 90, 92 Pac. 74; *Perkins v. Perkins*, 173 Mich. 690, 140 N. W. 161; *King v. Penn*, 43 Ohio St. 57, 1 N. E. 84; *Wedd v. Gates*, 15 Okl. 602, 82 Pac. 808; *Peterson v. Manhattan Life Ins. Co.*, 244 Ill. 329, 91 N. E. 466, 18 Ann. Cas. 96; *Parker v. Johnson*, 47 Miss. 632; *Morrison v. Craven*, 120 N. C. 327, 26 S. E. 940; 3 *Corpus Juris*, 389; 2 *Cyc.* 536, 537, 804; 13 *Enc. Pl. & Pr.* 187.

In addition to this the case appears to have been tried in the circuit court without any controversy as to the facts, and without an intimation or suggestion that the appeal had not been duly taken and perfected, and without an objection or exception on that account. If the notice was not given or appearance entered within the time required by law, that fact could have been readily determined if the question had been raised in the trial court. In *Louisa County v. Yancey*, 109 Va. 229, 63 S. E. 452, it was held, as appears by paragraph 2 of the syllabus:

"Whether a writ of error from a circuit court to a county court was perfected within the time prescribed by law depends, among other things, upon the time which had elapsed between the presentation of the petition for the writ and the delivery of the record and petition to the clerk of the appellate court, which time is to be deducted. If the case was argued in the circuit court, made a vacation case by consent, and submitted to the court for decision, without making the objection that the writ of error was not perfected within the time prescribed by law, and the record is silent as to the time to be deducted as above mentioned, the objection that the writ of error from the circuit court to the county court was not perfected in due time cannot be raised for the first time in this court."

[11,12] The next error assigned is the holding of the trial court that section 848 of the Code (1904), as amended by the act of March 18, 1916 (Acts 1916, p. 505), is a local

and special act, and is unconstitutional and void because prohibited by clause 14 of section 63 of the Constitution of this state. The distinction between general and special acts is elaborately discussed by Judge Kelly, with his usual ability, in an opinion in *Martin v. Commonwealth*, 102 S. E. 77, handed down to-day, to which reference only is necessary.

Each of the appellants was a member of the board of supervisors of Hanover county, and the claims allowed them were "for services other than regular meeting days." It is admitted that the services consisted of the supervision of the opening and repairing of public roads, and that the charge of \$3 per day was in pursuance of the act of March 18, 1916 (Acts 1916, p. 505), amending section 848 of the Code (1904). It is also admitted that the terms of office of the appellants began on January 1, 1916, and ended December 31, 1919, and that the special road law for Hanover county does not allow appellants any compensation other than that provided by the general law of the state.

Section 63, cl. 14, of the Constitution declares that—

"The General Assembly shall not enact any local, special or private law \* \* \* creating, increasing, or decreasing, or authorizing to be created, increased, or decreased, the salaries, fees, percentages, or allowances of public officers during the term for which they are elected or appointed."

At the time appellants were elected and entered into office their compensation was fixed at \$4 a day, but not exceeding a certain number of days, for attending the meetings of the board and discharging such other duties as might be imposed upon them by law. Acts 1914, p. 368, amending section 848 of the Code (1904). At the same time the special road law for Hanover county declared that—

"The board of supervisors of Hanover county shall have general charge of all of the public roads and bridges of Hanover county, shall cause the same to be constructed, repaired and kept in good condition," etc. Acts 1914, p. 379, § 2.

So that at the time appellants entered into office their compensation was fixed at \$4 a day for the requisite number of days, and mileage as declared by statute, not only for attending meetings of the board, but also for discharging such other duties as might be imposed upon them by law. Among such other duties there was included the supervision of the construction, repair, and upkeep of the public roads and bridges as declared by the special road law of the county. Section 848, as amended, imposed no duties upon the plaintiffs in error in addition to those imposed by the special law for Hanover county prior to their election. This

compensation could not be increased during their term of office by any local or special law. It remains, therefore, to inquire whether the act of 1916 amending section 848 of the Code of 1904 (Acts 1916, p. 505), allowing the supervisors of Hanover county increased compensation for supervising the construction, repair, and upkeep of the public roads and bridges, is a special and local law. Upon this subject we do not entertain any doubt.

"A law is special in a constitutional sense when, by force of an inherent limitation, it arbitrarily separates some persons, places, or things from others, upon which, but for such limitation, it would operate. \* \* \* If the only limitation contained \* \* \* is a legitimate classification of its objects, it is a general law. Hence, if the object of the law have characteristics so distinct as reasonably to form, for the purpose legislated upon, a class by itself, the law is general; for a law is not general because it operates upon every person in the state, but because every person that can be brought within its predicament becomes subject to its operation." *Budd v. Hancock*, 66 N. J. Law, 133, 48 Atl. 1023.

A clause or provision special in its character applying to particular individuals, particular places, or particular cases is none the less special because inserted in the most general of public acts. *Mitchell v. McCorkle*, 69 Ind. 184. See, also, *Polglaise Case*, 114 Va. 850, 76 S. E. 897; *Martin v. Commonwealth*, supra, and cases cited.

The act amends section 848 of the Code on the subject of compensation of supervisors generally, and classifies their compensation by the population of the counties, and in these respects the act is general and unobjectionable, but, among other provisions, it then proceeds to except from the general classification and to provide a different compensation for "each member of the board of supervisors" in 15 counties by name. It was just such legislation as this the Constitution sought to prohibit, and in so far as Acts 1916, p. 505, provides a rate of compensation for the supervisors in the 15 counties mentioned therein different from the general classification therein specified, it is null and void. *Martin v. Commonwealth*, supra. While the record does not disclose the population of Hanover county, this court will take judicial notice of the fact that, according to the last United States census, Hanover county had a population of 17,200 inhabitants, and, the classification by population being valid, the plaintiffs in error are entitled, under the act, to pay at the rate of

\$4 a day for the number of days actually employed, not exceeding 25 days, and to the mileage prescribed by law, but no more.

The courts seem to be generally agreed that judicial notice will be taken of the population of counties, cities, and towns as shown by United States census. *State v. Marion County Ct.*, 128 Mo. 427, 30 S. W. 103, 31 S. W. 23; *Parker v. State*, 133 Ind. 178, 32 N. E. 836, 33 N. E. 119, 18 L. R. A. 567. For collection of cases, see 16 Cyc. 870; 15 R. C. L. 1129; notes in 124 Am. St. Rep. 41, and 4 L. R. A. 39.

Counsel for the appellants rely upon *Ex parte Settle*, 114 Va. 715, 77 S. E. 496, as authority to support the validity of the special provisions for the 15 counties aforesaid, but in that case there was a classification by population. That case is reviewed, and the whole subject so fully discussed and elucidated, in the opinion of Judge Kelly in the *Martin Case*, above referred to, as to make any further discussion not only unnecessary, but undesirable. It is sufficient here to say that it is not applicable to the facts of this case.

Counsel for the appellants also seek to uphold the special provision for Hanover and the other 14 counties named on the ground that the amendatory act of 1916 (page 505) is in effect an amendment of the road laws, imposing new duties on supervisors for which additional compensation is allowed, and reliance is placed on *Wilburn v. Raines*, 111 Va. 334, 68 S. E. 993, holding that special road laws are not prohibited by the Constitution. But there is no force in the suggestion, as the act imposes no new duties of any kind on the supervisors, even if that would justify an increase of compensation. It simply fixes compensation for attending meetings of the board and discharging such other duties as may be imposed upon them by law. But it nowhere says what those duties are. They are fixed by other statutes. Whatever they are or may be, this statute simply fixes, by a per diem allowance, compensation therefor.

Upon the whole case, we are of opinion that the judgment of the circuit court of Hanover county should be affirmed, but without prejudice to the plaintiffs in error to demand and receive the mileage allowed by law and compensation at the rate of \$4 a day for the time actually employed, not exceeding 25 days in any one year for attending the meetings of the board and discharging such other duties as may be imposed upon them by law.

Affirmed.

(126 Va. 455)

(103 S.E.)

**COMMANDER v. PROVIDENT RELIEF ASS'N.**

(Supreme Court of Appeals of Virginia. Jan. 22, 1920.)

**1. APPEAL AND ERROR** ⇨1175(8)—ON DETERMINATION THAT SETTING ASIDE VERDICT WAS ERROR, APPELLATE COURT WILL RENDER JUDGMENT ON VERDICT.

Under Code 1904, § 3484, appellate court, in reviewing judgment upon retrial of case, after verdict on first trial was set aside by trial court, will first look to the evidence and proceedings upon the first trial, and, upon discovery that court erred in setting aside first verdict, must annul all proceedings subsequent thereto, and enter judgment thereon.

**2. APPEAL AND ERROR** ⇨997(8)—APPELLATE COURT WILL NOT PASS ON CONFLICTS IN EVIDENCE.

Appellate court will not pass upon conflicts in the evidence on review of directed verdict.

**3. MALICIOUS PROSECUTION** ⇨71(1)—MALICE AND WANT OF PROBABLE CAUSE QUESTIONS FOR JURY.

Malice and want of probable cause in actions for malicious prosecution are usually questions for the jury.

**4. MALICIOUS PROSECUTION** ⇨21(2)—ADVICE OF COUNSEL ON FULL DISCLOSURE COMPLETE DEFENSE.

The advice of counsel, sought with an honest purpose of being informed as to the law, and procured upon a full, correct, and honest disclosure of all material facts within the knowledge of the party seeking such advice, or which should have been within his knowledge, if he had made a reasonable, careful investigation, constitutes a complete defense to an action for malicious prosecution.

**5. MALICIOUS PROSECUTION** ⇨56 — BURDEN OF PROVING ADVICE OF COUNSEL UPON DEFENDANT.

In an action for malicious prosecution, defendant has burden of proving that advice of counsel was sought and obtained with the honest purpose of being informed as to the law, and upon a full, correct, and honest disclosure of all material facts within his knowledge.

**6. MALICIOUS PROSECUTION** ⇨71(4)—ADVICE OF COUNSEL QUESTION FOR JURY.

In an action for malicious prosecution, question of whether advice of counsel was sought with an honest purpose of being informed as to the law, and was obtained upon a full, correct, and honest disclosure of all material facts, is for the jury.

**7. MALICIOUS PROSECUTION** ⇨23—WANT OF PROBABLE CAUSE NOT INFERRED FROM MALICE.

Want of probable cause cannot be inferred from malice.

**8. MALICIOUS PROSECUTION** ⇨21(2) — REQUIREMENTS AS TO DISCLOSURE OF FACTS TO COUNSEL STATED.

Disclosure of facts required in order that advice based thereon may constitute a defense,

in suit for malicious prosecution, must not only cover all the relevant facts within the knowledge of the prosecutor, but must include also material facts which would have been within his knowledge, if he had made a reasonable, careful investigation as to the guilt of the party accused.

**9. MALICIOUS PROSECUTION** ⇨72(8) — INSTRUCTION ON ADVICE OF COUNSEL PROPER UNDER EVIDENCE.

In suit for malicious prosecution, instruction that advice of counsel was no defense, if defendant had not made a full, correct, and honest disclosure of facts to counsel, but had instituted criminal prosecution from a fixed determination of his own rather than the opinion of counsel, *held* proper under the evidence.

**10. MALICIOUS PROSECUTION** ⇨64(1) — VERDICT FOR PLAINTIFF WARRANTED BY EVIDENCE.

In suit for malicious prosecution, evidence *held* to warrant a verdict for plaintiff.

Error to Circuit Court of City of Norfolk.

Action by J. M. Commander against the Provident Relief Association. Judgment for defendant, and plaintiff brings error. Reversed and rendered.

J. E. Cole and Fred. C. Abbott, both of Norfolk, for plaintiff in error.

S. L. Kelley and John J. Blake, both of Richmond, for defendant in error.

KELLY, P. On the 14th day of October, 1914, the Provident Relief Association procured a warrant for the arrest of J. M. Commander, charging him with the larceny of \$72.96. He was arrested, imprisoned until he could obtain bail, and was subsequently in due course indicted, tried, and acquitted in the corporation court of the city of Norfolk. Thereupon he brought an action against the Provident Relief Association, charging it with having instigated his arrest and prosecution maliciously and without probable cause.

This action was tried, and the jury rendered a verdict in favor of Commander for the sum of \$3,500, which the trial court set aside as being contrary to the law and the evidence. The plaintiff by bill of exceptions preserved the record and proceedings on that trial. Subsequently the case was again tried and the jury, upon a peremptory instruction from the court, rendered a verdict for the defendant. The plaintiff brings the case here for review.

[1] Under the familiar statutory rule of practice we must look first to the evidence and proceedings upon the first trial, and if we discover that the court erred in setting aside the first verdict, we must annul all proceedings subsequent thereto and enter judgment thereon. Code 1904, § 3484.

The evidence was conflicting, but in sup-

port of the verdict it tended materially to establish the following facts: The Provident Relief Association was an industrial insurance company, and Commander had been in its employment for about 14 years. Within a few months after entering the service of that company he was made superintendent of its Norfolk district. The business prospered under his management, and increased largely in volume. He handled in the aggregate large sums of money, which were paid to him every week by the solicitors working under him. With the knowledge and acquiescence of the executive officers he had always kept these funds in his own name in a Norfolk bank, making weekly remittances to the home office in Washington, D. C., and the charge involved in this case was the only one of a criminal nature or semblance ever made against him.

Among the solicitors or collectors in Commander's district was a man named R. B. Cornick. In February, 1911, this man appeared to be delinquent in his accounts. About that time the president of the company was in Norfolk to attend a sort of booster meeting for the encouragement and stimulation of the local collectors. Cornick's accounts were audited, his deficiency disclosed, and the president, according to Commander's testimony, relieved him thereof, charged it off, and gave him a "clean sheet." The evidence on behalf of the company contradicts this latter statement of Commander, but shows that deficiencies of this kind were sometimes remitted, and the verdict of the jury settled the conflict in favor of his version.

Cornick remained with the company until June, 1911, when he was again in default, and Commander told him that he could not work for the company longer. Cornick thereupon began to work with a similar and rival insurance company. Commander reported these conditions to his own company, and after consultation with the president, and upon the latter's instructions and advice, the matter was brought to the attention of the commissioner of insurance by the following letter addressed to Col. Joseph Button, commissioner, at Richmond:

"Dear Sir: I hereby apply to have the license of R. B. Cornick revoked and charge that from his own account taken from his collecting book he was short in his account to the extent of \$93.00; that he afterwards showed me between \$3.00 and \$4.00 additional. He claims an offset of about \$10.00 on excess arrears.

"[Signed] J. M. Commander,

"Supt., Norfolk,

"For the Provident Relief Association of

"Washington, D. C."

By direction of the president, a Richmond lawyer of known standing and ability was employed by Commander to appear before the insurance commissioner on behalf of the

company. During the investigation, it developed that Cornick owed Commander, according to the latter's statement, on individual account, certain sums which he had from time to time advanced on Cornick's account in settlements with the company. Commander was making no point of his alleged indebtedness to him before the commissioner, but the latter decided that he would not permit a renewal of Cornick's license unless he settled with Commander for the advances above mentioned, as well as for the deficiency appearing on the books of the company. The amount which Commander agreed to accept in full for the company was \$90, being a few dollars short of the actual amount due; and the individual indebtedness claimed by Commander for advances on his account was \$72.96. Cornick paid both amounts, and Commander gave him a receipt in the following form:

"July 21, 1911.

"Received of R. B. Cornick the sum of \$162.96 in full settlement of his shortage to the Provident Relief Association, and in full settlement of his personal indebtedness to J. M. Commander.

[Signed] J. M. Commander,

"Supt. Provident Relief Association.

"This settlement is entirely satisfactory to me.

"[Signed] J. M. Commander, Supt."

The foregoing receipt in the form as herein set out appears to have been given and submitted to the insurance commissioner to satisfy him that Cornick had complied with the commissioner's requirements.

In September, 1911, Commander was in Washington at the home office of the company in connection with another matter, but in the course of the conversation there he went over Cornick's affairs with the vice president, and fully explained to him all about the settlement which he had made with Cornick, including the details of the hearing before the insurance commissioner.

Commander remained with the company for about 3 years longer. In the summer of 1914, some friction developed between him and the general officers of the company in Washington, and he was finally discharged in October, 1914, under circumstances indicating a very decided ill temper on the part of the president and vice president of the company. Up to about the month of August, 1914, there seems never to have been any trouble between Commander and the company, but about that time the executive officers decided to make some changes in the affairs of the company, and incidentally desired to reduce the salary of Commander, not because of any alleged inefficiency on his part, but presumably to save money for the company. There is reason to infer that these officers invited trouble with Commander, and sought for some grounds upon which to either reduce his pay or get rid of him; and there was also evidence to the effect that the de-

defendant wished to discredit him for fear he might, after his discharge, enter the service of some competing company, and divert to it some of the defendant's business, and that the vice president said to him in that regard, "Well, we will see that you don't do business any way," or words to that effect.

At the time of his discharge he had a substantial amount of money in his hands belonging to the company, and claimed that the company owed him a considerable sum which should be credited upon that amount. In the settlement of this matter, he was represented by Baker & Eggleston, a law firm in Norfolk, and the company was represented by Jeffries & Jeffries of that city. At no time from June, 1911, to the time of his arrest did the representatives of the company ever intimate to him that they thought he had taken money belonging to it. When the proposed settlement of accounts had reached the point for an exchange of receipts, the company demanded a receipt in full from him, but declined to give to him a like receipt. He and his attorneys insisted upon an explanation for this attitude on the part of the company, but none was forthcoming. It developed afterwards that shortly before Commander's discharge, the vice president of the company had interviewed Cornick, and had been informed by him that the receipt given by Commander in connection with the investigation before the insurance commissioner represented exclusively money which was due to the company, and that he did not owe Commander anything individually. Subsequently Cornick gave the following affidavit, after an interview with the attorneys of the insurance company, to wit:

"This day personally appeared before me, the undersigned, a notary public in and for the city of Norfolk, state of Virginia, R. B. Cornick, who made oath that on the 21st day of July, 1911, he paid to J. M. Commander, agent for the Provident Relief Association, the sum of one hundred and sixty-two dollars and ninety-six cents (\$162.96) in full settlement of his indebtedness to the Provident Relief Association. In the receipt which was given there is added these words, 'and in full settlement of his personal indebtedness to J. M. Commander.' Affiant here states that he was not indebted personally to J. M. Commander, and that the whole sum of one hundred and sixty-two dollars and ninety-six cents (\$162.96) was the balance due by him to the Provident Relief Association."

The conclusion which the company attempted to draw from this affidavit, and which Cornick's testimony as a witness in this case supports, is that the \$72.96 collected from Cornick by Commander on individual account represented the February, 1911, deficiency with which Cornick was charged on the books at the home office. Commander denies this, and insists that the February,

1911, deficiency had been remitted, and that the \$72.96 represented an aggregate of smaller sums, which from time to time he had advanced for Cornick to enable him to settle his weekly accounts. Cornick's statement is at variance with the receipt which he signed, and this variance is not satisfactorily explained by him. The circumstances strongly corroborate Commander, and his version of the matter is entirely consistent with what the attorney who represented the company before the commissioner says Commander stated at that time as to Cornick's personal indebtedness to him.

Commander had not heard of the above-mentioned affidavit, nor was the matter of his alleged larceny three years prior thereto mentioned to him in any way, until after his arrest. He made an explanation, substantially as above shown, which was satisfactory to the jury, both in the criminal prosecution and in the trial of the instant case, and it is not too much to say that the jury in the latter case had the right to believe from the evidence that if the officers of the insurance company had been acting in perfect good faith, and with an honest desire to get at the true facts about his guilt or innocence, they would have sought his explanation, or at least given him an opportunity to explain before bringing about his arrest.

[2, 3] There was much testimony on the part of the defendant to controvert or explain the damaging features of the plaintiff's testimony as above set out. There was however to say the least of it, sufficient support for the plaintiff's version, and we are not to pass upon the conflicts in the evidence. Malice and want of probable cause in actions for malicious prosecution are usually questions for the jury, and in this case there was evidence upon which the jury might have found the existence of both of these essential elements to the right of recovery. The instructions of the court set out with entire fairness to defendant the propositions of law involved in the case, and the only question before us is whether the court erred in setting aside the verdict as contrary to the evidence.

Enough has been said to show that the verdict ought not to have been disturbed for lack of evidence on the part of the plaintiff to sustain it. It only remains to consider whether the action of the trial court was warranted by the defendant's claim that in bringing about the arrest and prosecution of the plaintiff it acted upon the advice of counsel. This is the ground upon which the court gave a peremptory instruction for defendant on the second trial, and is doubtless the one upon which the verdict on the first trial was set aside. It is also, as we understand counsel, the point chiefly relied upon for an affirmance of the judgment under review.

[4-6] It may be considered settled that advice of counsel, sought with an honest purpose of being informed as to the law, and procured upon a full, correct, and honest disclosure of all material facts within the knowledge of the party seeking such advice, or which should have been within his knowledge if he had made a reasonably careful investigation, constitutes a complete defense to an action for malicious prosecution; but the burden is on the defendant to prove that such advice was sought and obtained with the purpose and upon the disclosures here described, and whether such advice was thus sought and obtained is usually a question for the jury. 1 Cooley on Torts (3d Ed.) p. 333; Burks' Pl. & Pr. p. 237; Evans v. Atlantic Coast Line Ry. Co., 105 Va. 72, 76, 80, 53 S. E. 3.

The senior member of the firm of Jeffries & Jeffries was principally in charge of the criminal branch of the litigation between Commander and the company. He and the officers of the company undertook to testify that there was a full disclosure to him of all the facts and circumstances in connection with the alleged larceny; that he laid the same before the commonwealth's attorney, and that thereupon both he and the commonwealth's attorney advised the company that the case was one for prosecution.

[7, 8] Notwithstanding this positive testimony, however, the facts of the case bring it within the general rule that the defense based on advice of counsel is one which should be passed upon by the jury. There were circumstances tending materially to show, not only a lack of good faith and honest purpose on the part of the company in seeking and acting upon the advice of counsel, but also to show failure to make the requisite disclosure. Want of probable cause cannot be inferred from malice, but the ill will of the officials of the company, coupled with their desire and threat to disarm the plaintiff as a competitor, are circumstances which the jury had the right to consider in determining whether the advice of counsel was sought in good faith and with an honest purpose to be informed as to the law, or merely as a sham and subterfuge, and as a part of a general scheme of severing his connection with the company in such a way as that he would not be able to take with him to some rival company any of the business which he had built up. Aside from this, however, the jury might well have found that the disclosure made to counsel did not measure up to the requirements of the law. There is a conflict of authority upon the question, but the rule in Virginia is that the disclosure required in order that the advice based upon it may constitute a shield against a suit for malicious prosecution must not only cover all the relevant facts within the knowledge of the prosecutor, but must include also material facts which would have been within his knowl-

edge if he had made a reasonably careful investigation as to the guilt of the party accused. Burks' Pl. & Pr. p. 237; Evans v. A. C. L. Ry. Co., 105 Va. 72, 80, 53 S. E. 3. It does not appear that the officers of the company inquired of the attorney who represented them before the insurance commissioner, nor of the commissioner himself, as to the statements at that time made by Commander. The jury thought, and we think, and perhaps counsel would have thought, that Commander's explanation of what took place before the commissioner was probably true. It is difficult to see how counsel of the learning and ability of the gentlemen who are said to have advised the criminal prosecution could have given such advice with full knowledge of the facts disclosed in the record before us, and yet there appears no reason why the company could not, at any time after September, 1911, have ascertained all the facts both for and against Commander's view of the case as fully as they were developed upon the trial.

Furthermore, the jury might very well have thought that some of the statements which the executive officers made to counsel were not true. For example, they told their counsel that Cornick owed a February, 1911, deficiency, and yet Commander testified positively that this deficiency had been remitted and charged off, thus no longer constituting an indebtedness against Cornick. This was one of the important facts in the case and, if Commander is right, then the vice president of the company, now the president, did not tell the truth to his counsel about this fact, nor to the jury on the stand. The jury accepted Commander's statement and rejected the conflicting testimony, and we must do the same. In reaching this conclusion the jury was doubtless influenced by the further fact that Cornick had been taken back into the employment of the company, and had been with the company for some time before Commander was discharged, and neither Commander nor the representatives of the company at the home office had ever asked Cornick to account for the alleged February, 1911, deficiency. The jury may have been further influenced by the testimony of the commonwealth's attorney, who said that, although he advised the prosecution, he did so without having been told anything about the investigation before the insurance commissioner, and that he would have at least hesitated if he had known that the receipt given by Commander had been executed as a result of a hearing before the commissioner, and with the knowledge of counsel representing the company. Finally, and by no means least important, it appears in the evidence that the junior member of the firm of Jeffries & Jeffries, after the arrest of Commander, made the following statement to Mr. Eggleston, who had been counsel for Commander in



the above-mentioned settlement of accounts, but who was not counsel in the criminal prosecution, to wit:

"We told those people that if they went after him [Commander] they were liable to get soaked, but they did it anyhow."

This testimony of Mr. Eggleston, after some controversy, finally went to the jury without objection. It is true that young Mr. Jeffries denied having made this statement, but admitted that he had a jocular conversation with Mr. Eggleston which the latter had misinterpreted, and in which he claimed to have simply said that he was not surprised at the suit, or something to that effect. The testimony of Mr. Eggleston, however, is direct and positive, and it was for the jury to decide what the conversation was and what it meant.

It has been urged upon us in the oral argument and in the brief that Mr. John L. Jeffries, the late lamented senior member of the firm of Jeffries & Jeffries, was an upright and distinguished lawyer, and a gentleman of veracity and integrity. This insistence is in accord with the view which the members of this court entertain of the character of Mr. Jeffries. This, however, does not take the case out of the general rule. He and his partner testified in the case, and therefore fall within the ordinary category of witnesses.

The law upon this branch of the case was stated to the jury by an instruction, which was certainly fair to the defendant, because it omitted any reference to such facts as the defendant might, upon reasonable inquiry, have ascertained, and which was not in conflict with the other and ample instructions of the court. The instruction referred to was as follows:

"The court instructs the jury that the burden of proof is upon the defendant to prove that he sought counsel with an honest purpose to be informed as to the law, and that he was in good faith guided by such advice in causing the arrest of the plaintiff, and that whether or not the defendant did, before instituting the criminal proceeding, make a full, correct, and honest disclosure to his attorney or attorneys of all the material facts bearing upon the guilt of the plaintiff, of which he had knowledge, and whether, in commencing such proceedings, the defendant was acting in good faith, upon the advice of his counsel, are questions of fact to be determined by the jury, from all the evidence and circumstances proved in the case. And if the jury believe from the evidence that the defendant did not make a full, correct, and honest disclosure of all such facts to his counsel, but that he instituted criminal prosecution from a fixed determination of his own, rather than the opinion of counsel, then such advice can avail nothing in this suit."

[9, 10] The evidence in the case made it proper for the foregoing instruction to be

given, and we think the verdict of the jury ought not to have been interfered with.

For the reason stated, we are of opinion that the court erred in setting aside the verdict on the first trial, and we shall proceed, pursuant to the provisions of the statute, to enter an order in this court, annulling all subsequent proceedings and entering up a judgment in favor of the plaintiff for the amount of the damages fixed by the verdict of the jury.

Reversed.

(85 W. Va. 484)

ROBERTS et al. v. HUNTINGTON DEVELOPMENT & GAS CO. (No. 8381.)

(Supreme Court of Appeals of West Virginia. Feb. 3, 1920.)

(Syllabus by the Court.)

1. EQUITY §238—DEMURRER IS NOT WAIVED BY ANSWERING AND SUBMITTING CAUSE WITHOUT SETTING FOR ARGUMENT.

Failure of a defendant to cause his demurrer to a bill to be set down for argument and formally disposed of, his filing an answer and submission of the cause upon the bill, answer, and proof, do not work an abandonment or waiver of the demurrer, and he may rely upon it, on an appeal from a decree impliedly overruling it by an award of the relief sought by the bill.

2. EQUITY §231, 238 — DEMURRER THOUGH GENERAL REACHES ALL DEFECTS AND IS NOT WAIVED BY FAILURE TO SET FOR ARGUMENT.

In such case, his right is not varied nor limited by the fact that the demurrer is general in its terms, stating, as ground thereof, only insufficiency of the bill in law.

3. APPEAL AND ERROR §888(1), 889(2)—BILL DEMURRED TO CANNOT BE AMENDED OR TREATED AS AMENDED ON APPEAL.

Nor, to avoid the consequences of a demurrer well taken and so overruled, can the bill be amended in the appellate court or there treated as having been amended.

4. CANCELLATION OF INSTRUMENTS §37(1)—EQUITY §183, 142—BILL MUST SHOW DEFENDANT'S CLAIM OF TITLE OR INTEREST, AND NOT DOING SO IS INSUFFICIENT.

It is essential, in a bill in equity, to state the claim of title or interest of the defendant in the subject-matter of the bill, whether it be a claim of title to property, an obligation to the plaintiff, or any other essential element of a cause of action against him, and failure to do so constitutes a defect in the bill precluding right to relief thereon, in the absence of a waiver or an amendment curing it.

5. EQUITY §329 — DEFECTIVE BILL IS NOT AIDED BY ANSWER WHERE DEMURRER IS FILED, AND DECREE THEREON WILL BE REVERSED.

Though, in some instances, a defective bill may be aided by facts disclosed by an answer to it, if no demurrer thereto has been interposed, it is otherwise if the sufficiency of the bill has been challenged by a demurrer. In the latter case, a decree predicated on a fatally

defective bill will be reversed, notwithstanding disclosure by an answer of the essential facts omitted.

**6. CANCELLATION OF INSTRUMENTS ¶37(1)—  
DEFENDANT NAMED IN CAPTION AND SERVED,  
BUT AGAINST WHOM CAUSE OF ACTION IS NOT  
STATED, NEED NOT DEFEND.**

To make a person a party to a bill in such manner as to require him to answer and make defense thereto, it must allege a cause of action against him, in the body thereof. Naming him as a defendant in the caption of the bill and causing process to be served upon him do not suffice.

**7. EQUITY ¶183 — STATUTE PRESCRIBING  
FORM OF BILL DOES NOT DISPENSE WITH  
STATEMENT OF CAUSE OF ACTION.**

The relaxation of technical and formal requirements of a bill in equity, wrought by section 37 of chapter 125 of the Code 1913 (sec. 4791), prescribing a statutory form of bill, does not excuse omission of a sufficient statement of a cause of action against the defendant, in the body or narrative part of the bill.

**Appeal from Circuit Court, Putnam County.**

Suit by M. T. and J. N. Roberts against the Huntington Development & Gas Company. Decree for plaintiffs, and defendant appeals. Reversed, demurrer sustained, and cause remanded, with directions.

J. S. Clark and Henry A. McCarthy, both of Philadelphia, Pa., and Vinson, Thompson, Meek & Renshaw and Fitzpatrick, Campbell, Brown & Davis, all of Huntington, W. Va., for appellants.

Wilkinson & Wilkinson, of Hamlin, for appellees.

POFFENBARGER, J. The decree in this cause stands upon a bill that does not allege any right, title, interest, or claim thereof in its subject-matter, on the part of the defendant. In the caption thereof, the defendant is named as such, and service of process against it was accepted by its attorney in fact. It appeared and filed a demurrer and an answer, the former of which was not expressly disposed of by any order of the court, but was impliedly overruled by the entry of a final decree in favor of the plaintiffs. On the bill and answer, full proof was taken and the cause submitted as upon its merits. The demurrer was general in its terms, assigning no special grounds, and may not have been insisted upon in the court below, at any stage of the proceedings; but the implied disallowance thereof by the final decree is the ground of an assignment of error in the petition for the appeal and is now earnestly and seriously relied upon in argument.

The purpose of the bill was cancellation of a recorded instrument called a disclaimer and pertaining to the title to all of the minerals in two tracts of land in Putnam county,

described therein as containing, respectively, 55½ acres and 35 acres, but actually containing, as the bill alleges, 138 acres. These two tracts were once claimed and perhaps owned by one Dorothy D. S. Billups, who, with her husband and family, resided upon them, or one of them, for a number of years prior to February 24, 1906, on which date she conveyed them to one Geo. Sponaugle, from whom they passed mediately to the plaintiffs, M. T. and J. N. Roberts, subject to such right as the defendant may have in the minerals underlying them, if any, by virtue of the disclaimer assailed by the bill and therein treated as a mere cloud upon the title of the plaintiffs and so denominated.

That instrument bears date May 22, 1891, and purports to be a disclaimer of title to the minerals in said two tracts of land, in favor of the plaintiffs in five actions of ejectment, then pending in the District Court of the United States for the District of West Virginia, for recovery of a large tract of land conveyed by Henry McFarlan and others, trustees of the Guyandotte Land Company, to Gustavius A. Sacchi, which, it recites embraced these two tracts of land then occupied by Chas. M. and Dorothy D. S. Billups, under a claim of title. The disclaimer seems to have been intended as a compromise giving the plaintiffs in the ejectment actions the minerals and leaving the surface to the Billupses, who were only two of a great number of persons whose claims of title were brought into question by said actions. It was never filed in any of the actions, but it purports to have been acknowledged and was recorded, and seems to be relied upon by the defendant as an instrument of conveyance. Denying its efficacy as such, for several reasons, and also execution thereof by Dorothy D. S. Billups, and assailing her signature thereto and the certificate of acknowledgment, in so far as it affects her, on the ground of forgery, the bill prays cancellation thereof as aforesaid.

[4] But nowhere does it positively or expressly allege that the defendant claims any title to the minerals or any interest therein. The only reference to the defendant, found in the body of the bill, reads as follows:

"And that at the time of the recording of said paper writing and for a long time thereafter, there were no changes in the land charged to defendant or its predecessors in title, as regards the lands claimed by it in said county; that no additional minerals were charged to defendant or its predecessors in title at the time said disclaimer was recorded as aforesaid, nor for a long time thereafter upon said land books; and neither was there any deduction from the number of acres of land charged to the defendant's predecessor in title made at the time of said disclaimer, nor for many years thereafter."

This follows an allegation that the land mentioned in the disclaimer has been taxed

in its entirety and the taxes paid in the names of the plaintiffs and their predecessors in title, at all times since the formation of the county. In a preceding paragraph, it is charged that the plaintiffs in the ejectment suits had no title, at the date of the disclaimer, by reason of sale of the land as to them, for nonpayment of taxes, in the name of a company under which they claimed. The allegation above quoted pertains only to the taxation of the minerals in question. It does not assert or affirm that the defendant claims title thereto under or from the persons in whose favor the disclaimer was executed, though it may proceed upon the assumption of such a claim or constitute the basis of an inference thereof.

Lack of interest in the subject-matter of a suit at law or in equity, substantial or technical, on the part of any person, precludes right of action against him. He cannot be subjected to annoyance, trouble, expense, and hazard, unless he is interested, obligated, or liable in some way, and there is no presumption that he sustains any such relation to the plaintiff or the subject-matter. On the contrary, there is a presumption that he does not, which the plaintiff must overthrow by allegation and proof. *Story, Eq. Pl. § 262*; *Norris v. Lemen*, 28 W. Va. 336; *White v. Kennedy's Adm'r*, 23 W. Va. 221.

Other requisites are certainty, directness, and positiveness of allegation of every fact essential to the relief sought by the bill, including the interest of the defendant in the subject-matter. A mere recital or implication arising from terms used is not sufficient. *Zell Guano Co. v. Heatherly*, 38 W. Va. 409, 416, 18 S. E. 611; *Iron Co. v. Quesenberry*, 50 W. Va. 451, 40 S. E. 487; *Universal L. Ins. Co. v. Devore*, 83 Va. 267, 2 S. E. 433; *Story, Eq. Pl. 239, 242*. Manifestly the allegation quoted, the only one in the bill, making any reference to the defendant, does not comply with these requirements. It does not directly, positively, nor in words assert that the defendant claims any interest in the minerals or any other interest or right by virtue of the disclaimer.

[6] Omission of the defendant's claim of interest is not excused by the service of process upon it and insertion of its name in the caption of the bill. *Preston v. West*, 55 W. Va. 391, 47 S. E. 152; *Chapman v. Railroad Co.*, 18 W. Va. 184; *McCoy v. Allen*, 16 W. Va. 724; *Shaffer v. Fetty*, 30 W. Va. 248, 4 S. E. 278; *Bland v. Stewart*, 35 W. Va. 518, 14 S. E. 215; *Renick v. Ludington*, 20 W. Va. 511, 536; *Cook v. Dorsey*, 38 W. Va. 198, 18 S. E. 468; *McNutt v. Trogden*, 29 W. Va. 469, 2 S. E. 328; *Shinn v. Board of Education*, 39 W. Va. 497, 20 S. E. 604; *Moseley v. Cocke*, 7 Leigh (Va.) 226.

[7] Though this bill follows the form prescribed by section 37, c. 125, Code (sec. 4791), in respect of caption and prayer, it does not

comply with one of its essential requirements. It does not "state all the facts constituting a claim to relief," or such a state of facts as makes a good case for relief. Intent on the part of the Legislature to dispense with such a requirement in a bill is negatived by the direction in the form to insert it. This statute relieves from certain formal and technical requirements of general equity pleading, *Cook v. Dorsey*, cited; but it would be absurd to interpret it so as to relieve from duty to state a cause of action, in the face of a direction to insert it.

[8] If no demurrer had been interposed, the insufficiency or defect in the bill might possibly be cured or aided by the facts disclosed by the answer. *Salamone v. Kelley*, 80 Va. 86; *Green & Suttle v. Massie*, 21 Grat. (Va.) 356; *Ambler v. Warwick & Co.*, 1 Leigh (Va.) 196; *Graveley v. Graveley*, 84 Va. 151, 4 S. E. 218. In such cases, the defendant waives the question of sufficiency of the bill, by his failure to demur. He treats the bill as sufficient and his conduct makes it so, if the case as disclosed by the bill, answer, and proof is within the jurisdiction of the court. But no authority in this state or Virginia authorizes dispensation with sufficient allegations in the bill, on the theory of aid by the answer, when a demurrer has been interposed. There is a great array of authority to the contrary. *Elb v. Martin*, 5 Leigh (Va.) 132; *Pusey v. Gardner*, 21 W. Va. 469; *Currey v. Lawler*, 29 W. Va. 111, 11 S. E. 897; *Bierne v. Ray*, 37 W. Va. 571, 16 S. E. 804; *Bryant v. Groves*, 42 W. Va. 10, 24 S. E. 605; *Barr v. Clayton*, 29 W. Va. 256, 11 S. E. 899; *Story, Eq. Pl. 260, 271, 728*.

[1] The filing of an answer without having had the demurrer set down for argument and disposed of is not an abandonment or waiver of the demurrer. In some of the cases that have come to this court on questions of the sufficiency of the bills, the demurrers were only impliedly overruled by the decrees appealed from, and yet this court took cognizance of the questions raised by the demurrers so disposed of. *Fluharty v. Mills*, 49 W. Va. 446, 38 S. E. 521; *Hinchman v. Ballard*, 7 W. Va. 152; *Craig v. Craig*, 54 W. Va. 183, 46 S. E. 371. See, also, *Miller v. Miller*, 92 Va. 196, 23 S. E. 232; *Fugate v. Moore*, 86 Va. 1045, 11 S. E. 1063, 19 Am. St. Rep. 926; *Smith v. Proffitt*, 82 Va. 832, 1 S. E. 67. The cases cited from other jurisdictions, in the brief filed for appellees, are not in accord with our practice.

[2] Nor does the fact that the demurrer was general in its terms, stating only insufficiency in law, as the ground thereof, affect the question in any way. It is not necessary to assign any other ground in a demurrer to a pleading in equity, and, upon a demurrer so worded, all defects in the pleading to which it is interposed may be relied upon. *Depue v. Miller*, 65 W. Va. 120,

125, 64 S. E. 740, 23 L. R. A. (N. S.) 775; Cook v. Dorsey, 38 W. Va. 196, 18 S. E. 468; Hays v. Heatherly, 38 W. Va. 613, 619, 15 S. E. 223.

[3] To say the bill can be amended in this court or treated as having been amended would be inconsistent with all of the numerous authorities hereinbefore cited. In every instance in which the appellate court has found the demurrer to have been well taken, but overruled by the trial court, whether in express terms or by mere necessary implication, the decree has been reversed and the cause remanded with leave to amend in the court below. Long v. Pocahontas Con. Col. Co., 98 S. E. 289, does not sustain the position taken by counsel for the appellees. In that case, the amendment was tendered in the court below. Besides, no amendment was necessary, no motion to exclude the evidence having been made on the ground of a variance, and variance being the ground of a motion to set aside the verdict. Whatever its value as to right of amendment may be in cases of its class, it is clearly inapplicable here; no offer to amend this bill having been made in the court below, and the question here not being one of variance, but sufficiency of the bill taken in its entirety.

Upon the principles and conclusions stated, the decree will be reversed, the demurrer to the bill sustained, and the cause remanded, with direction to the court below to permit the plaintiffs to amend the bill, if they desire to do so.

(85 W. Va. 474)

ROBERTS et al. v. WARD et al. (No. 3749.)  
(Supreme Court of Appeals of West Virginia.  
Feb. 8, 1920.)

*(Syllabus by the Court.)*

1. JUDGMENT  $\S$  693, 707—NOT CONCLUSIVE AS TO PERSONS NOT PARTIES.

A decree against a husband and stepfather, in litigation concerning the real property of the wife and children, to which they are not parties, does not conclude them, or any of them.

2. EASEMENTS  $\S$  36(1) — USER OF PRIVATE WAY UNOBJECTED TO PRESUMPTIVELY ADVERSE.

Open, continuous, and notorious use by an owner of land of a private way over an adjoining tract owned by another person, known, acquiesced in, unobjected to, and unprotected by the latter, is presumptively adverse to him, and enjoyed under a bona fide claim of right.

3. EASEMENTS  $\S$  7(2)—PRIVATE WAY BY PRESCRIPTION.

Such use for a period of 10 years, in the absence of proof of any circumstance altering its character, ripens into perfect title to an

easement over the adjoining or neighboring land, by prescription.

4. EASEMENTS  $\S$  36(1)—RIGHT TO MAINTAIN PRIVATE WAY.

A way through inclosed lands, burdened or obstructed by gates or bars and so used for such period, is presumptively a private way, notwithstanding its use to some extent by the general public, and the claimant of the way, as a private one appurtenant to his land, is not required to prove some act indicative of an independent assertion of right, beyond that shown by his open, notorious, and known user, in order to establish or maintain the easement.

5. EASEMENTS  $\S$  61(8)—DESCRIPTION OF PRIVATE WAY IN SUIT TO ENFORCE.

In describing or defining such a way in a bill filed for vindication of the title and right of the owner of the easement, it suffices to use such terms as would enable a person going upon the land to find and identify the way by reference to them.

Appeal from Circuit Court, Cabell County.

Suit for injunction by Alice Roberts and others against Lindsey Ward and others. From a decree dissolving an injunction against obstruction of a private way, and dismissing a bill for a perpetual injunction against such obstruction, plaintiffs appeal. Reversed, and decree entered against defendants.

Meek & Renshaw, of Huntington, and J. M. Rigg, of Wayne, for appellants.

E. J. Wilcox, of Wayne, and O. S. Welch, of Huntington, for appellees.

POFFENBARGER, J. The principal grounds of the argument submitted to sustain this decree dissolving an injunction against obstruction of a private way and dismissing a bill for a perpetual injunction against such obstruction are: (1) A previous decree denying the right, relied upon as a former adjudication; (2) permissive exercise of the long user admitted; (3) lack of claim of right in the use of the way; (4) use of it in common with others, relied upon as being inconsistent with, and negating, the theory of an exclusive and adverse right; and (5) insufficiency of the bill by reason of uncertainty of description of the alleged way.

[1] The former suit was brought against Sam Ward, the grantor of the defendant Lindsey Ward, by Claude Roberts only, the husband of the plaintiff Alice Roberts, and stepfather of her children, the infant plaintiffs here. He had no title whatsoever to the land to which the way in question is alleged to be appurtenant. The decree in that cause dissolved the temporary injunction awarded therein and dismissed the bill in general terms. The argument submitted to show conclusiveness of the decree is based upon the doctrine of privity, which may or may not obtain between the husband, on the one

hand, and his wife and stepchildren, on the other. It probably has no application in instances in which persons having vested interests are omitted from the litigation, or do not appear in it. The wife and children are the only persons who had any actual title to the alleged dominant estate, and none of them were parties. Whether the doctrine of privity applies for any purpose, under such circumstances, it is unnecessary to take the time to inquire. By way of reply to the argument, it suffices to cite the cases directly and emphatically holding a judgment or decree against a husband to which the wife is not a party does not conclude her, even though her property is involved. *Blakey v. Newby*, 6 Munf. (Va.) 64; *Durst v. Amyx*, 13 S. W. 1087; *Jacobs v. Case*, 1 S. W. (Ky.) 6; *Hamilton v. Wright*, 30 Iowa, 480; *Rogers v. Roberts*, 58 Md. 519; *Michan v. Wyatt*, 21 Ala. 813; *Read v. Allen*, 56 Tex. 182; *Jeffus v. Allen*, 56 Tex. 195; *Van Fleet*, Form. Adj. p. 1020. If the husband had professed to act as guardian of the two children, in the litigation, the decree would not conclude them. *Este & Longworth v. Strong*, 2 Ohio, 478. It has been held that ordinarily a judgment or decree against a guardian, respecting the property of his ward, is only prima facie binding upon the latter. *Serapurn v. La Croix*, 1 La. 373; *Temple v. Williams*, 91 N. C. 82; *Van Fleet*, Form. Adj. p. 1017. Whether this doctrine is sound it is unnecessary to inquire, for Claude Roberts was not guardian, and did not profess to act as such in the preceding suit by him against one of the defendants.

The user of the plaintiff and their predecessors in title, without objection from any person, covered a period of 15 or 20 years, at least. The former successive owners of the greater part of the servient estate, W. J. Napier and I. M. Langdon, say they neither gave nor withheld permission to use the way. When asked whether it was used by his sufferance Napier said: "They just went over it; I never gave them any permission." When asked if he knew of anybody having or claiming a right to use it, he said: "Only through the courtesy of the landowners." When asked whether he thought he could have stopped them he said: "I did not care, and I thought I had as good a right as they, and they had as good a right as I had. I had to go, and they had to go." When asked whether he thought those using the way had acquired the right, Langdon said: "I don't know as I could say just why, only Mr. Napier gave me the impression that it had always been an open road, and had been used so long that it could not be shut up." He had purchased the property indirectly from Napier. Napier owned the servient estate before the present owners of the dominant estate obtained their title. The latter was then owned by J. F. Mayo or some person under whom he subsequently claimed and

held. While Napier owned the servient estate, the former owners of the dominant estate used the road. O. O. Perdue, the former husband of Alice Roberts, one of the plaintiffs, obtained title to it from Mayo, in 1897, and used the road until the date of his death, 1903. From that date until 1907, when she married Claude Roberts, his widow used it. Thereafter she and her husband and children used it without objection, until about 1912, when the husband was arrested as for a trespass, at the instance of Sam Ward who then owned the servient estate, and he brought the former suit against Sam Ward, to enjoin him from interfering with the exercise of the right he claimed.

At the date of that litigation, Sam Ward owned only that part of the land over which the road in question passed, that had been previously owned by Napier and Langdon. After its termination, he purchased from Melchisedek Ward, his father, known by his neighbors as Deck Ward, about 3 acres of additional land over which the road runs. By a deed dated May 1, 1915, he conveyed both tracts, the Napier land and the three acres he purchased from his father, to Lindsey Ward, subject to certain reservations or exceptions, one of which was a strip 20 feet wide, covering the location of the road in question. He reserved the title in fee simple to this strip, and, by a stipulation in the deed, inhibited the grantee from selling or giving a road or passway through the land to any person, without his written consent. In this way, there comes into this suit a different piece of land from that involved in the previous suit between Claude Roberts and Sam Ward, the 3 acres formerly owned by Deck Ward. When he acquired his title to the principal part of the servient estate, the road from the Perdue tract ran across the Napier land and then over Deck Ward's land to a public road, and Napier was using it from his place over Ward's land to said road. If Napier used it for 4 years before Perdue purchased, the use thereof over Ward's land, the 3-acre parcel, by Napier and Perdue's predecessors in title, began as early as 1893, and Napier's use of it and that of his successors in title continued without objection, until 1911 or 1912, when Sam Ward, who succeeded Langdon in ownership of the Napier farm, obstructed the road and objected to further use of it, and Deck Ward refused to permit Langdon to remove his crop over his land without payment for the privilege. As to the Napier land, it is manifest that the use was not under any express permission and that it was never forbidden, questioned or subjected to any protest of any kind. Perdue, his predecessors in title and the Robertses all used it freely as of right.

In December, 1904, there was a transaction between Deck Ward and Napier, which is relied upon as proof that the use of the road over the 3-acre parcel of land, by the latter,

the plaintiffs and others, was merely permissive and not under a claim of right. That was an effort on the part of Napier, acting for himself and others similarly situated along the road, to obtain either a public road out through Ward's land, or an open and unobstructed way, instead of one burdened by gates, there being several gates across the road, one or two on the Napier tract and three or four on the Ward tract. The plan was never consummated, but it progressed to the extent of the preparation of an agreement which was signed by Alice Perdue, now Alice Roberts, and some other parties, but not by Napier or Ward. Inconsistency and conflict in the oral testimony, as to the purpose of the enterprise, justify resort to the paper prepared for effectuation thereof. It was intended to be a transaction among the owners of all the land through which the road passed, Deck Ward, Fisher Brumfield, then owner of the Napier tract, Alice Perdue, and John Haney whose land lay beyond that of Alice Perdue. It was to grant "a right of way to the public and roadbed \* \* \* solely to the use of the public"; and the road was "to be kept open for consideration that Fisher Brumfield, John Haney and Alice Perdue" were "to furnish wire to run" a "line of fence on one side of the road for and in consideration of the right of way through Deck Ward." Napier, Haney, and Mrs. Roberts all testify that the purpose of the parties was to get rid of the gates across the road, and, if possible, to have the road established as a public highway. The paper was signed by Brumfield, Mrs. Perdue, and John Haney and his wife. For some reason, likely his sale of his land to Brumfield, Napier, the intermediary of the others, or promoter of the enterprise, did not sign it, nor did Ward. He says Ward declined to carry out the arrangement and to sign the agreement, because he was not tendered the amount of money he understood he was to receive. Mrs. Perdue furnished her part of the wire for the fencing, and it was used by Ward. Whatever the purpose may have been, its failure did not interrupt the use of the road. Haney, Mrs. Perdue, Napier, and his successors, Brumfield and Langdon, used the road until after Sam Ward got the Napier tract from Langdon's son, to whom he had sold. Sam Ward seems to have bought the Napier tract some time in 1912, for Langdon had a crop on it in that year, which Deck Ward would not allow him access to over the road until he was paid a consideration of \$10 for a brief privilege. On or about August 27, 1913, Sam Ward built a barbed-wire fence across the road at the line between his land and the Perdue farm, and obstructed it at other points. The reasons for this act, assigned by him in his testimony, were that he did not want any road there and that he was retaliating for what he deemed to be an un-

neighborly act on the part of Mrs. Roberts, her refusal to let him take some lumber across the line and her attempt to force him, by such refusal, to make a deed for the road through his land. Mrs. Roberts did not use the road, after 1904, under any right conferred by the abortive agreement. And her continued use of it for 8 years thereafter, without objection, argues strongly the existence of the right she claims, as well as the correctness of her version of the purpose of the effort to agree in 1904.

Deck Ward, in his testimony, claims there was no use of the road across the three acres he conveyed to Sam Ward, except by his consent. He says O. C. Perdue obtained his consent and had no right other than that so obtained; and that he believed Napier, while he owned the place between his land and the Perdue tract, asked him several times if he could use the road, and was told he might do so, "if he would furnish the wire on one side of the road, and that he got the wire." He does not say in what manner he granted Perdue permission to use the road. Perdue found the road there when he bought of Mayo, and, as the evidence indicates, began to use it, or continued the use of it. Ward does not state the time, nor, in detail, the manner, of his verbal consent to such use. The only specific thing he says on the subject is that he told Perdue he could use the road as long as he kept the gates shut. As Perdue is dead, this part of his evidence is likely inadmissible, as coming from an incompetent witness, but, as it proves nothing, we enter upon no inquiry as to his competency. All he says about having given consent may mean no more than that, after Perdue bought the Mayo farm, he used the road as his grantor had used it and that Ward made no objection to his going through the 3 acres and his other land lying near the county road. If he told Perdue he could use it as long as he kept the gates shut, that does not necessarily mean anything more than that Perdue was cautioned that the road he had was subject to the burden of gates and that he could not use it as an open way. Perdue did use it until 1903, the date of his death, a period of 6 years. One year later, Napier undertook by negotiations with Ward to get the road made a public highway, or an open road free from gates, with the view of ultimately making it a public road. Ward defeated that enterprise, but, for 8 years thereafter, he interposed no objection to the use of the road by the owners of the Napier tract and the Perdue or Roberts tract. If, as he contends, the negotiations by Napier were for a right of way and not for a change of the character of the right of way they had—to make it an open and unobstructed way instead of a way obstructed by gates—it is hardly likely that he would have permitted the use of the road thereafter in the same manner in which, and

to the same extent to which, it had been previously used. If the negotiation grew out of, or was based upon, any objection interposed by him to the use of the road, it would have been most natural for him, after the failure thereof, to forbid further use of the road. His testimony as to a grant of permission to Perdue is very short, indefinite, and inconclusive, and what he says about Napier's application to him for a permit is referable to, and explained by, the negotiation conducted by Napier. Obviously, it was an effort to obtain an open and unobstructed way and nothing more. Deck Ward's testimony must be read and interpreted in the light of his conduct. Actions speak louder than words, and his words can be made to harmonize perfectly with his acts, as has been shown.

[2, 3] Our conclusion as to this phase of the case is that there was no express grant of permission, nor any protest against the use of the road, until recently, and that what are relied upon as grants of permission, amounted to no more than mere acquiescence on the part of Ward, Napier, Brumfield, and Langdon in the use of the right of way, by the owners of the Perdue tract. Under principles declared in *Walton v. Knight*, 62 W. Va. 223, 58 S. E. 1025, and numerous other cases therein cited, such use and acquiescence, for the long period of time above indicated, conferred upon the owners of the Perdue tract a right of way by prescription, if the road was used under a bona fide claim of right and the quality of the user was not impaired or limited by the enjoyment thereof in common with the general public.

For proof of lack of a bona fide claim of right, as the basis of the user by Perdue, and, after him, by his widow and children, certain admissions made by Mrs. Roberts, her husband and her father-in-law, J. H. Roberts, are relied upon. Mrs. Roberts said in her testimony, in response to questions as to whether she claimed the right to use the road, "I never heard anything about any right at all," and, further, that she had never heard her first husband speak of it. J. H. Roberts said he never knew whether O. C. Perdue claimed any right, nor whether his daughter, Mrs. Roberts, claimed any right to the use of the road, before the attempt of 1904 to make a contract. Mrs. Roberts, however, in the same connection, insists that they had always claimed a right to use the road, and, in the admissions of lack of claim, she was evidently confused at first, as to what was meant by the expression. She evidently thought the questions propounded to her related to a claim of title by deed. Her husband also testified positively that she had always claimed right to use the road. J. H. Roberts' testimony as to this is purely negative in character. He said no more than that he did not know whether O. C. Perdue or his wife had claimed right of user. None of this

testimony carries any admission of a permissive use. As long as there was no objection, there was no occasion for any assertion of right. Perdue succeeded to the right of J. F. Mayo, respecting the roadway over the Napier farm, and he exercised that right without any objection, just as he used the right of way over Ward's farm, the one nearer the public road. No objection having been interposed, it was perfectly natural that he should exercise the right without an express declaration of its existence. Hence it was not remarkable that his wife never heard him say anything about it. For the same reason she exercised it after his death without any declaration of right. In the absence of proof to the contrary, every trip over the road was an assertion of right. The user itself, for the statutory period of time, 10 years, established *prima facie* a bona fide claim of right. *Walton v. Knight*, 62 W. Va. 223, 58 S. E. 1025; *Wooldridge v. Coughlin*, 46 W. Va. 345, 83 S. E. 233.

[4] The evidence of use by the plaintiffs in common with the public is slight. Some witnesses say they have traveled the road in question in going from one to the other of the two public roads it connects, when considered as a whole. Others say everybody used it that wanted to. The end of the road not involved here is poor, rough, and inconvenient. In view of its character it cannot be supposed to have been used extensively by the general public. Under some circumstances, it might conclude the plaintiffs from use of the right they claim as an exclusive one. But the conditions do not bring the case within the doctrine relied upon. Presumptively they did obtain in *Reid v. Garnett*, 101 Va. 47, 43 S. E. 182, and *Kent v. Dobyns*, 112 Va. 588, 72 S. E. 139. The doctrine is limited, in its origin in South Carolina and some of the New England states, by an element or factor not mentioned in those cases, but which no doubt appeared in them. That is the open and uninclosed character of the land on which a road commonly used is located, or the open character of the road through inclosed lands. *First Parish v. Beach*, 2 Pick. (Mass.) 60, note; *Kilburn v. Adams*, 7 Metc. (Mass.) 33, 39 Am. Dec. 754; *Plimpton v. Converse*, 44 Vt. 158; *O'Neil v. Blodgett*, 53 Vt. 213; *Strong v. Wales*, 50 Vt. 361; *Rowland v. Wolfe*, 1 Bailey (S. C.) 56, 19 Am. Dec. 651; *McKee v. Garrett*, 1 Bailey (S. C.) 341. In all of the cases just cited, the roads ran through uninclosed lands. In the following cases, open and unobstructed roads seem to have been involved: *Prince v. Wilbourn*, 1 Rich. (S. C.) 58; *Day v. Allender*, 22 Md. 511. Such may have been the character of the roads in question in the two Virginia cases relied upon by counsel for the appellees. The cases in which it has been held to be competent for the claimant to prove some act on his part indicating an independent assertion of right in the way peculiar to himself and exclusive, as

regards the public, and thus establish in himself a private easement in a way commonly used, have involved, as a general rule, either roads over unclosed lands or open roads through inclosed lands. *Fitchburg R. Co. v. Page*, 131 Mass. 391; *Webster v. City of Lowell*, 142 Mass. 324, 8 N. E. 54; *Ballard v. Demmon*, 156 Mass. 449, 31 N. E. 635; *McKenzie v. Elliott*, 134 Ill. 156, 24 N. E. 965; *Wanger v. Hipple* (Pa.) 13 Atl. 81. The difference between such roads and one running over inclosed lands and burdened with gates or bars is obvious. An open road is an apparent invitation or permit to the general public, and all who use it enter upon it presumptively as citizens, members of the general public, and not otherwise. The claimant of a private right in it must rebut the presumption against him arising from the apparent situation. On the other hand, a road through inclosed lands with gates across it is apparently a private road, established for the use of the owner of the land or some one else, or for himself and others. Presumptively, therefore, those who use it regularly, as adjoining or neighboring landowners, to the full enjoyment of whose properties it is necessary or manifestly conducive, are exercising private rights. The presumption takes its color and character from the apparent nature of the way, it being against the claimant when the way is apparently public, and for him when it is apparently private. The rule is one of evidence only, for there may be a private easement in a road or way commonly used. The only difference between it and one used only by the claimant, or by him and others similarly situated and apparently private, lies in the nature and amount of the evidence required to establish it.

[5] The remaining contention is obviously untenable. The bill and amended bill describe the road as being one well marked and continuously used, and the latter says it "follows the top of the ridge mainly and is the only right of way and roadway leading over the said Lindsey Ward tract of land from the plaintiff's said land to the said county road." It suffices to use such descriptive terms as would enable any person going upon the land to find and identify the road by reference to them. This need not be done according to any formula or in any particular manner. The allegations of these bills go far beyond those of the bill in *Crosier v. Brown*, 66 W. Va. 273, 66 S. E. 326, 25 L. R. A. (N. S.) 174.

Our conclusion is to reverse the decree complained of, reject the plea of former adjudication, overrule the demurrer to the amended bill, and enter a decree enjoining, restraining, and inhibiting the defendants agreeably to the prayer of the said amended bill.

(86 W. Va. 415)  
**PALMER v. MAGERS.** (No. 3629.)

(Supreme Court of Appeals of West Virginia.  
Jan. 27, 1920.)

(Syllabus by the Court.)

1. CONTINUANCE ⇐28(6)—MOTION BASED ON ABSENCE OF WITNESS IN DISTANT COUNTY ONLY SUMMONED A WEEK BEFORE TRIAL PROPERLY REFUSED.

A motion for a continuance based upon the absence of a witness for whom process went to a distant county only about a week before the date fixed for the trial, and without information to the officer, so far as the record shows, as to the place of residence or abode of the witness in such county, and unaccompanied by any showing of probability of procurement of his attendance at the next term of the court, may be properly overruled.

2. TRIAL ⇐253(8)—INSTRUCTIONS IGNORING ONE OF TWO THEORIES SUPPORTED BY EVIDENCE IN BOUNDARY LINE CONTEST ARE ERRONEOUS.

On the trial of an issue as to the location of a boundary line, instructions based upon only one of two theories of location, both of which are supported by some evidence in the case, and wholly ignoring the other, are erroneous and justify the award of a new trial; they being the only instructions given.

3. TRIAL ⇐244(3)—INSTRUCTIONS BASED ON PART OF EVIDENCE ONLY GIVES UNDUE PROMINENCE TO EVIDENCE.

An instruction founded upon only a part of the conflicting evidence in a case and ignoring the residue thereof, given in the absence of any others founded upon such residue unduly emphasizes the evidence on which it rests, and is erroneous for that reason.

4. FORCIBLE ENTRY AND DETAINER ⇐35—REFUSAL OF INSTRUCTION AS TO LAW OF PEACEABLE ENTRY ERRONEOUS IN BOUNDARY CASE NOTWITHSTANDING ABSENCE OF EVIDENCE OF FORCIBLE ENTRY.

On the trial of an action of unlawful detainer, the right in which is dependent upon the true location of a disputed boundary line, the refusal of an instruction requested by the defendant and enunciating the law of peaceable entry upon disputed premises under a claim of right is erroneous, even though there is a lack of evidence of forcible entry in the case.

5. TRIAL ⇐252(2)—INSTRUCTIONS AS TO IMMATERIAL FACTS INCIDENTALLY REVEALED ON TRIAL PROPERLY REFUSED.

A trial court may properly refuse instructions based upon immaterial and nonprobative facts incidentally revealed on the trial of an issue.

6. BOUNDARIES ⇐41—INSTRUCTION THAT AGREEMENT AS TO DISPUTED BOUNDARIES WAS ENTERED INTO UNDER MISTAKE MAY PROPERLY BE GIVEN.

On an issue as to the establishment of a disputed line by agreement, the court may properly instruct the jury that the agreement



is not binding, if entered into under a mistake, in the absence of proof of conduct making it absolute and conclusive, and should do so upon a proper request.

**7. TRIAL**  $\S$ 203(3)—INSTRUCTIONS LIMITING ISSUES TO EVIDENCE ARE PROPER.

When one party to a trial improperly predicates his case upon only a part of the evidence, the other may properly request instructions not ignoring any evidence favorable to his antagonist, but limited to the issue he has tendered, and, if requested, they should be given.

**8. NEW TRIAL**  $\S$ 72—MOTION TO SET ASIDE VERDICT BASED ON PREPONDERANCE OF EVIDENCE AGAINST IT SHOULD BE SUSTAINED.

A motion to set aside a verdict, based upon clear and decided weight and preponderance of the evidence against it, should be sustained.

**9. BOUNDARIES**  $\S$ 3(5) — CONTROLLING EFFECT OF FIXED TERMINUS OF BOUNDARY LINE STATED.

If one terminus of a disputed boundary line called for in a deed is clearly fixed and rendered certain by evidence and the other unidentified and uncertain, and a line run from such fixed corner agrees perfectly with the calls of the deed for course and distance, the former governs and controls the location of the other and the distance called for in another line running to it.

Error to Circuit Court, Marshall County.

Suit by Linzy Palmer against Everett E. Magers. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

J. Howard Holt, of Moundsville, for plaintiff in error.

D. B. Evans and Martin Brown, both of Moundsville, for defendant in error.

POFFENBARGER, J. [1] The first complaint on this writ of error to a judgment for the plaintiff, in an action of unlawful detainer, is based on the overruling of a motion for a continuance. The affidavit fails to show requisite diligence. The case was set for trial and tried in Marshall county October 17, 1918, and the process for the witness was sent to Kanawha county October 11, 1918, and came back with a return of "Not found" indorsed thereon. The meagerness of time allowed may have prevented diligent search for the witness, and the affidavit fails to show that the writ was accompanied by information to the officer as to the residence or location of the witness in Kanawha county, which might have enabled him to serve the subpoena. Three or four days is a very short period in which to locate a stranger in a large and populous county. A serious effort to obtain the attendance of the witness, under such circumstances, would have necessitated ascertainment of his place of residence and warning to him of intention to require his attendance. Wytheville

Ins. & B. Co. v. Teiger, 90 Va. 277, 233, 18 S. E. 195; R. & M. Railroad Co. v. Humphreys, 90 Va. 425, 18 S. E. 901. Another fatal defect in the case made for a continuance was failure to prove attendance of the absent witness at the next term could probably be secured, or his deposition taken. Since an allowance of a continuance on account of the absence of a witness whose evidence can never be obtained would be useless and idle, this fact should always be shown in support of the motion. Phillips v. Com., 90 Va. 401, 18 S. E. 841; State v. Brown, 62 W. Va. 546, 59 S. E. 508.

The land in controversy has an area of not more than 2 acres, and the controversy turns on the location of a division line. The parties derived their titles from a common source; their farms having once constituted a larger one owned by Miles Bonar, and containing 354 acres, as surveyed by W. V. Hukill, in March, 1902. By a deed dated October 17, 1904, Bonar conveyed it to W. B. Hicks, who had a division line run through it by S. Howe Bonar, an engineer, cutting it into two parts containing, respectively, as estimated by the surveyor, 159.8 acres and 196.5 acres, for conveyances to two or more persons named Woodruff. By a deed dated April 1, 1905, Hicks conveyed the larger part to Elias B. Woodruff, who conveyed it to the plaintiff by a deed dated June 21, 1906. Hicks conveyed the other part to Elias B. and Silas H. Woodruff by a deed dated April 1, 1905, and they reconveyed it to him in 1906. By a deed dated September 4, 1907, he conveyed it to Everett E. Magers, the defendant.

The original Bonar tract was very irregular in form and the division line has two angles in it breaking it into three parts. Treated as a whole, it begins on the S. L. Johnson line, which is also the southeast line of the Bonar tract, and runs across to the boundary line between the Bonar tract and the M. B. Pierce farm. The controversy involves only the location of the northern end of the division line running from the second angle to the Pierce line, a distance of 800 or 900 feet. The monument at that angle called for by the deed, is "a stake near a large sassafras," and its location is the principal bone of contention. As claimed by the plaintiff, it stood about 70 feet northwest of the sassafras, and, as claimed by the defendant, not over 6 feet northwest thereof.

Plaintiff predicates his case largely upon his deed, the relation in point of time between his deed and that of the defendant, and the testimony of the surveyor, Bonar. His deed antedates that of the defendant and the latter calls for a stake in the Pierce line as the "corner to Linzy Palmer," and his line runs thence "with Palmer's line S. 3° 30' W. 13.76 chains to a stake near a large sassafras," the call in that deed for

the distance between the monument last mentioned and the one at the other angle in the division line, a stake and large stone, 15.12 chains, going about 70 feet northwest of the large sassafras tree. Bonar swears he established the corner at that point. He also says he was directed to run the line so as to put 200 acres in the larger or eastern portion, and that he ran a trial line which placed the stake  $5\frac{1}{2}$  feet from said tree and then, by final survey, moved it 66 feet farther toward the northwest and removed the last line that distance in that direction, to enable him to change his first line, the one running from the Johnson line, some distance in the opposite direction, in order to leave a desirable building site in the smaller tract, and at the same time leave the areas of the two parcels nearly the same as they were fixed by the trial survey. His trial line began in the Johnson line west of a lynn tree and ran into the tract to be divided, and his final or established line began at the lynn tree. On his trial measurements, he had entered in his notebook a stake "near a large sassafras," and when he ran his final line going farther beyond the tree he altered the distance about one chain, but neglected to erase the words "near a large sassafras." If the tree is not the monument called for at that point, none has been found. None of the witnesses ever saw any stake at the tree or within 100 feet of it, between the dates of the survey and the trial.

The defendant relies upon a slight deficiency in the quantity of his tract of land, a corresponding excess in that of the plaintiff, evidence of discrepancies and errors in measurements, failure of the surveys to close with the distances called for in the deeds, lack of agreement of the terminus of the line run from the location of the stake, as fixed by Bonar's evidence, with the description thereof given in the two deeds, saying it is "a stake in run line of M. B. Pierce," 1.57 chains from a certain angle in it on one side and 1.56 chains from another angle in it on the other side, calls and measurements on the Pierce line showing that terminus to be at a point in that line from which a line run on the course and for the distance specified in the deed would stop at a point within 5 or 6 feet of the sassafras, and evidence tending to contradict Bonar's testimony to the effect that he ran the division line twice and that he merely calculated and did not actually measure the line from the stake near the sassafras to the Pierce line, which is 104 feet too short as he located it, and about right in length as the defendant locates it, the deed calling for 908.16 feet and the line measured on his location being only  $804\frac{1}{2}$  feet. S. H. Woodruff says he knows nothing of any such change of the survey as Bonar mentions, nor of any provision for a building site, but he was not on the ground

during the entire period of the survey. He says he was told 200 acres could not be put into the larger part without the making of bad lines, and that he replied that he and his brother could adjust that. J. L. Bonar swears the last part of the line was actually measured and that it ran from the sassafras tree to the Pierce line. S. Howe Bonar admits the Pierce line terminus of the disputed line as claimed by the defendant falls into the Pierce line agreeably to the description thereof in the deeds, and that as claimed by the plaintiff and located by him it does not, and also that the Pierce line cannot be run so as to make it do so. He attributes the discrepancies to alleged errors in the Hukill survey of the entire tract, the calls and measurements of which he had not verified at the date of his running of the division line.

By instruction No. 6 given for the plaintiff, the trial court seems to have virtually told the jury that, if the distance between the stake and stone at the first angle and the stake at the second called for in the deeds, went about 70 feet beyond the sassafras tree, they should find that the line runs from that point to the Pierce line. It does not mention nor take any notice of the evidence tending so strongly to fix the other terminus of that part of the division line. The substance of it reads as follows:

"If the jury believe from the evidence that Surveyor Bonar finally located the stake corner below the large sassafras 66 feet from the stake as originally set near the large sassafras, and located the division line finally from the stake set 66 feet below the stake originally set near the sassafras, running from the stake 66 feet from the stake set north  $3^{\circ} 30'$  east 13.76 chains to a stake in a run line of M. B. Pierce, and that the plaintiff's deed carries his line as so established by Surveyor Bonar, then they should find that the division line in question so runs from the stake 66 feet below the stake originally set by Bonar near the large sassafras to the Pierce line in the run."

[2, 3] This direction necessarily modifies plaintiff's instruction No. 4, submitting the location of the line to the jury in general terms. These are the only instructions the court gave that bear upon the location of the disputed line. The defendant requested the court to give seven instructions tendered by him, all of which were refused. Manifestly the instructions given attach too much importance to the testimony of S. Howe Bonar and the fact that the defendant's deed calls for the corners defined by the plaintiff's deed, the latter being prior in date. If it called for existing and identified monuments different from those contended for by the defendant, they would control. *Lewis v. Yates*, 72 W. Va. 841, 845, 79 S. E. 831. But both deeds call for the same monuments, and in the case of the one at the second angle of the line it has not been found and the

evidence conflicts as to its location. In other words, the evidence of a trial line fixing the corner at the tree and a final line fixing it beyond the tree is substantially contradicted, and the location of that monument has not been definitely and certainly established. On the other hand, the call for the other end of the line is pretty definitely fixed by the Pierce line as found by the surveyors, whether Mr. Bonar intended to fix it at that point or not. His intention cannot alter the effect of the terms of the deeds calling for a point other than the one he actually intended to adopt, if such is the case. As described and defined by the deeds, its identity and place upon the ground are made certain and clear by indisputable evidence. The deeds say it is about midway between two angles of the Pierce line and the witnesses have found and identified that point beyond dispute. Being called for by both deeds, it is necessarily fixed for both parties, even though the calls may have been inserted as they were by mistake. That corner taken in connection with the described course and distance of the line fixes the other corner agreeably to the contention of the defendant. A point very near the tree, within 3 or 4 feet of it, makes the disputed line correspond with the calls of the deeds exactly, as to both course and distance and the Pierce line corner. That corner has the same dignity in law as the other would have if it were definitely located. Obviously, therefore, said instruction No. 6 given for the plaintiff unduly narrowed the scope of the inquiry. It told the jury to inquire only as to the location of the stake by Mr. Bonar. If that point could be incontrovertibly fixed, it would not be conclusive. If what he did upon the ground was not put into the deeds, it would not control. But it was not so fixed, and there was very potent evidence tending to prove he did not fix it at the point at which he claims to have fixed it. The inconsistent, ascertained corner in the Pierce line should not have been ignored by the instructions. *Webb v. Big Kanawha Packet Co.*, 43 W. Va. 800, 29 S. E. 519; *Woodell v. W. Va. Imp. Co.*, 38 W. Va. 23, 17 S. E. 386.

[4] Defendant's instruction No. 1 propounding the law of peaceable entry of an owner upon his own land, should have been given. There was no controversy about the character of the defendant's entry upon the disputed land. It was peaceable within the meaning of the law, but its character was made hypothetical in the instruction. Defendant had clear right to have the jury advised as to its character and effect, as a means of avoidance of confusion.

[5-7] His instruction No. 2 applicable to the law of adverse possession, was properly refused, there being no such issue. His in-

structions Nos. 3 and 4, narrowing the issue to calls for a stake at the second angle, describing it as being within 3 or 4 feet of the tree and introducing the element of possession as evidence, would have been misleading, wherefore they were properly refused. His instruction No. 5, correctly enunciating the law of agreement upon a line under mistake, was improperly refused. His instruction No. 6, telling the jury neither party could go beyond the stake called for in the deeds if they should find it had stood within 3 or 4 feet of the tree, although the distance called for might place it farther away, was rather narrow in its scope, but it did not ignore any theory relied upon by the plaintiff and sustained by evidence. Read in connection with his instruction No. 7, stating the converse of the proposition hypothetically and telling the jury they should find for the defendant if the plaintiff had not proved by a preponderance of the evidence the stake had stood 66 feet beyond the tree, it directly responded to the narrow issue improperly chosen by the plaintiff. By these two instructions the defendant offered the plaintiff battle upon ground of the latter's own choice, but the court thwarted his purpose by refusal of the instructions. Both should have been given.

[8, 9] In view of the weighty and decided preponderance of the evidence in favor of the defendant, the motion to set aside the verdict should have been sustained. One of the two corners involved in the controversy was indubitably fixed and rendered certain by evidence, while the location of the other was doubtful and uncertain. The fixed corner and the course and distance called for and perfectly agreeing with it necessarily resolved the doubt as to the location of the other as determined by the deeds, which take precedence over the call for mere distance in the second part of the division line and the oral testimony of the surveyor. *Lewis v. Yates*, 62 W. Va. 575, 59 S. E. 1073; *Casto v. Baker*, 59 W. Va. 683, 53 S. E. 600; *Gwynn v. Schwartz*, 32 W. Va. 487, 9 S. E. 880. It is to be remembered the calls are for a point in the Pierce line, not in the Hukill survey thereof, which is mentioned only in connection with the quantity of land. The conflict in the calls for distance as to the second and third parts of the line is clearly resolved by the fixed Pierce line corner and the course and distance of the line back from that point. That fixed corner controls the call for distance in the description of the second part of the line, wherefore the case falls clearly within the well-settled rule.

For the errors noted, the judgment will be reversed, the verdict set aside, and the case remanded for a new trial.

(85 W. Va. 440)

**STATE ex rel. KINCAIDE v. BOARD OF CANVASSERS OF CITY OF MONTGOMERY et al. (Nos. 4032, 4041-4045.)**(Supreme Court of Appeals of West Virginia.  
Feb. 3, 1920.)*(Syllabus by the Court.)*

1. ELECTIONS  $\S$ 181—VOTERS AT MUNICIPAL ELECTION UNDER AUSTRALIAN SYSTEM MAY VOTE FOR PERSON WHOSE NAME DOES NOT APPEAR ON THE BALLOT.

An elector possessing the requisite qualifications to vote at an election held and conducted by a municipal corporation according to the Australian ballot system, as adopted by chapter 3 of the Code (Code 1913, secs. 16-138), for the purpose of electing the officers of the municipality, lawfully may prepare and cast his ballot for any person he may desire to elect, whether the name of such person is printed on the official ballot or not, provided that in so doing the elector uses for that purpose the ballot prepared as required by the statute.

2. ELECTIONS  $\S$ 181, 194(8)—ERASURE OF CANDIDATE'S NAME AND INSERTION OF OTHER NAME PROPER MANIFESTATION OF PREFERENCE.

The intention to exercise the right to vote for persons other than those whose names are printed on such official ballots the elector may manifest by obliterating or erasing the name of the candidate as it appears on the ballot for such office, and, in lieu thereof, writing the name of the candidate or person preferred by him, either immediately under the name erased, or on the margin opposite it, but not on the reverse side of the ballot.

3. ELECTIONS  $\S$ 259—OFFICERS MUST COUNT VOTE FOR PERSON SUBSTITUTED ON OFFICIAL BALLOT AND CERTIFY RESULT TO THEM.

It is the duty of the members of the council of a municipality convened as a canvassing board, as the election statute requires, to count such ballot for the person so voted for, and, when so counted, to certify the result thereof to each candidate voted for at such election for the same office.

4. MANDAMUS  $\S$ 13—BILL OF EXCEPTIONS IS NOT REQUIRED ON APPLICATION FOR MANDAMUS TO COMPEL ELECTION RECOUNT.

For the purpose of ascertaining whether a relator applying therefor may by mandamus compel members of a canvassing board to reassemble, count, and certify, as required by law, ballots cast by electors at an election held and conducted by a municipality for the selection of officers, he need not, as a condition precedent to the grant of such writ, file or exhibit with his petition, or otherwise, a bill of exceptions to the action of such board in refusing to count ballots cast for him as such candidate.

Original mandamus proceeding by the State, on the relation of A. J. Kincaide, against the Board of Canvassers of the City

of Montgomery and others, heard with proceedings entitled as follows: State ex rel. Hiram Sizemore v. A. J. Mullens, Mayor, etc., et al. State ex rel. S. M. Brock v. A. J. Mullens, Mayor, etc., et al. State ex rel. Perry C. Cook v. A. J. Mullens, Mayor, etc., et al. State ex rel. V. B. Stover v. A. J. Mullens, Mayor, etc., et al. State ex rel. D. V. Wilhelm v. A. J. Mullens, Mayor, etc., et al. Writ denied on the application of Kincaide and granted on the applications of the other relators.

**In Case No. 4032:**

George Love, of Fayetteville, for relator.

McClintic, Mathews & Campbell, of Charleston, for respondents.

**In Cases Nos. 4041-4045:**

Grover C. Worrell, of Mullens, and John M. Anderson, of Beckley, for relators.

Dillon & Nuckolls, of Fayetteville, for respondents.

LYNCH, J. Among the six persons whose names appeared on the official printed ballots to be used by the qualified electors of the city of Montgomery at the election of municipal officers for that city January 1, 1920, was the name of the relator A. J. Kincaide, a candidate for councilman, and on the official printed ballots to be used by the electors of the town of Mullens at the election of municipal officers for that town were the names of A. J. Mullens, a candidate for the office of mayor, Hiley Graham, a candidate for the office of recorder, and H. B. Porterfield, W. V. Tate, J. B. Frank, A. C. Early, and W. M. Lewis, candidates for the offices of councilmen; but some of the electors of the city of Montgomery and some of the electors of the town of Mullens, whose qualifications to exercise the right of franchise are unquestioned, met and decided (it is claimed by respondents secretly) upon persons other than those whose names appeared on such ballots for the different positions to be filled at each of the elections, and in the city of Montgomery cast more ballots for B. C. Cooper for councilman than A. J. Kincaide received for the same office, and in the town of Mullens apparently cast more votes for Hiram Sizemore for mayor than A. J. Mullens received for that office, and for S. M. Brock more votes for recorder than Hiley Graham received for the same office, and for Perry C. Cook, V. B. Stover, and D. V. Wilhelm more votes for councilmen than W. V. Tate, J. B. Frank, A. C. Early, and W. M. Lewis, or any of them, received for the same positions, provided the method adopted by the voters of the respective towns was not illegal and ineffectual, as respondents contend and relators deny. By this method the electors so voting struck out or obliterated the name of the candidate

printed on the ballot, and, in lieu thereof, wrote immediately under the printed names erased, or on the margin opposite such names, the names of those for whom they desired to vote in preference to the persons whose names originally appeared on the printed ballots.

The members of the council of the city of Montgomery whose terms of office were about to expire convened as required by law, sitting as a board of canvassers to canvass and count the ballots so cast for B. C. Cooper and A. J. Kincaide for the office of councilman, treated as legal and valid all the ballots so prepared and cast on the day of the election, and ascertained that more votes were cast for Cooper than Kincaide received; and of this action by the board Kincaide complains and prays for a writ of mandamus to compel the members of the board to reassemble and recount the votes, and in doing so not to consider and treat as legal and valid those so prepared and cast for Cooper.

Likewise the members of the council of the town of Mullens whose terms of office were also about to expire convened to canvass and count the ballots so prepared and used by the qualified electors voting in the election held in that town for the same purpose, but declined and refused to treat as legal and valid ballots other than those used and voted by the electors for the candidates whose names were printed thereon and not erased; and it is this action of which relators other than Kincaide complain and pray for writs of mandamus to compel the members of such board to reassemble and count for relators the ballots on which their names were written, and to ascertain and certify to each of them the result of such recount.

Thus there is presented for discussion and decision the vital question whether ballots so cast for Sizemore for mayor, Brock for recorder, Cook, Stover, and Wilhelm for the offices of councilmen, were or were not lawfully and properly cast and ought to be counted in favor of the relators by the canvassing board of the town of Mullens, as they in fact were for the respondent Cooper as a member of the council of the city of Montgomery, and also whether such board should have certified to them the number of votes so cast for all the candidates competing for the several offices.

The respondents deny the right of this court to award such writs to enforce the performance of such duties, because they say the method adopted is without legal sanction, circumvents the policy the Legislature intended to establish by enacting chapter 3 of the Code of 1918 (Code 1913, secs. 16-138), and makes easy the way for fraudulent practice by affording an opportunity to defeat the will of other electors by secretly withholding from them information as to the desirability and

fitness of candidates for public office without the necessary previous public notice or knowledge of their candidacy. As covering all these objections and as showing their falsity, the relators reply that there is nothing in the election law of this state forbidding or preventing an elector having the legal qualifications to vote for whom he pleases for any elective office, provided he uses for that purpose the regular ballot prescribed by law; and that, if the statute was intended to and does deprive him of that right, it violates that provision of the Constitution which guarantees to him the privilege of casting a free and open or secret ballot, as he may elect, without let or hindrance from any source other than his own untrammelled choice.

These propositions present the only grounds or points that need serious discussion in order to determine the merits of the controversy. Nor are any of the various criticisms directed against the exercise by the electors of the right to make such alterations in the printed ballot as will give effect to their intention and desire important or convincing, if it be true, as counsel for the relators argue, that nothing in the statute denies the elector the right to vote as he chooses and for whom he chooses, whether his name be printed on the official ballot or not, and that if it did so such a statute would be invalid because violative of the constitutional provision referred to.

[1, 2] We enter into no inquiry concerning the power of the Legislature under the Constitution to restrict an elector's choice in preparing his ballot to those candidates whose names are printed on the official ballot. No such restrictive statute exists in this state. If he is not satisfied with any of the candidates whose names appear on the ballot, he may, as those did who voted in the elections held in the city of Montgomery and town of Mullens, erase the name or names of any candidate on any ticket, and in lieu thereof vote for the person he desires, whether the name of such person be printed on the ballot or not. The Legislature has clearly manifested its intention in this regard by enacting section 34 of chapter 3 of the Code (Code 1913, § 56), which reads:

"If the voter desires to vote for any person whose name does not appear on the ticket [ballot] he can substitute the name by writing it with [a] black lead pencil in the proper place," etc.

As the same provision appeared in the same section of the Code of 1891, it read thus:

"A voter desiring to erase the name of any candidate from the ballot he intends to vote, or to vote for any other candidate or person in his stead, may strike," etc.

The omission of the word "candidate" and the use of the word "person" only, as the section now appears, certainly is not without some significance. It manifests a legislative intent to give the voter wide latitude in exercising the suffrage right, contrary to the contention of respondents. See *People v. Shaw*, 133 N. Y. 493, 31 N. E. 512, 16 L. R. A. 606; *Bowers v. Smith*, 111 Mo. 45, 20 S. W. 101, 16 L. R. A. 754, 33 Am. St. Rep. 491; *Sanner v. Patton*, 155 Ill. 553, 40 N. E. 290; *State ex rel. v. Dillon*, 32 Fla. 546, 14 South. 383, 22 L. R. A. 124; *McCrary on Elections*, § 700.

What has been said is amply sufficient to sustain the right exercised in the elections aforesaid, and eliminates from further consideration all the questions raised by respondents, except those concerning the necessity for bills of exception before this court can entertain jurisdiction to determine the issues raised by the pleadings, and except the further question raised by respondents that voting for the relators in the manner they did constituted such marking or identification of the ballots as chapter 3 of the Code forbids. *People v. Shaw*, 133 N. Y. 493, 31 N. E. 512, 16 L. R. A. 606, not only is authority for the proposition stated in the decisions heretofore cited in support of the right of an elector to vote for whom he pleases, but also for the additional proposition that the exercise of such right does not violate the provisions of a statute prohibiting such identification.

[4] We have examined all the cases cited by respondents to show the necessity for bills of exception to the action of the board of canvassers upon the recount of ballots cast at the election held in the town of Mullens, and find them to bear on and relate to such bills upon writs of error in actions at law, and hence have no application in cases of this character. Nor do we see any occasion for such a bill in mandamus proceedings now before us.

[3] For the reasons stated we refuse to grant the writ to Kincaide and grant writs to the relators Sizemore, Perry O. Cook, V. B. Stover, S. M. Brock, and D. V. Wilhelm, requiring the members of the town council of the town of Mullens whose terms of office expire January 31, 1920, to reconvene as a canvassing board and recanvass and count all the votes cast at the election held on January 1, 1920, for relators, as such votes appear on the face of the ballots, whether immediately under the printed names erased or on the margin opposite them, but not those on the back of the ballots, and issue to relators certificates showing the result of the election, prepared as required by law, and otherwise comply with the mandates of the alternative writs heretofore awarded and served on them; and such is the order of this court.

(85 W. Va. 405)

# KEYSTONE MFG. CO. v. HINES, Director General.

(Supreme Court of Appeals of West Virginia. Jan. 27, 1920.)

(Syllabus by the Court.)

## 1. RAILROADS ⚡469—CONTRACT WITH INDIVIDUAL ENFORCEABLE UNLESS IT CONTRAVENES PUBLIC RIGHT OR PUBLIC WELFARE.

Unless a contract between a railroad company and a private person clearly contravenes public right or public welfare, it should generally be enforced.

## 2. RAILROADS ⚡469—CONTRACT RELEASING LIABILITY FOR FIRE NOT INVALIDATED BY CODE.

A contract between a railroad company and a private corporation, whereby in consideration of the latter's release of the railroad company of all damages from fire that may be set out by it, the railroad company agrees to build and maintain a private sidetrack over its right of way and adjoining land, for the private use of such corporation, its successors, assigns, etc., is not invalidated by the provisions of section 54 of chapter 62 of the Code, imposing certain duties upon railroad companies in respect to removing dry grass and other inflammable materials from their rights of way, and putting out fires thereon and on adjoining lands.

## 3. RAILROADS ⚡469—RELEASE OF LIABILITY FOR FIRE BINDS LESSEE OF PARTY REGARDLESS OF NOTICE.

And any assignee, lessee or under tenant of such corporation entering the premises and using and operating such private sidetrack does so in subordination to the right of the railroad company under such contract and is bound by the provisions thereof releasing the railroad company from liability for fires set out by it, whether they had actual notice or not.

## 4. RAILROADS ⚡469—RELEASE OF LIABILITY FOR FIRE APPLICABLE TO LUMBER STORED ALONG EXTENSION.

And though such assignee or sublessee builds an extension to such private sidetrack on land owned or occupied by him, and along which he stores his lumber or other inflammable material, and such extension was built and is operated jointly by him and the railroad company pursuant to the original contract, the owner of such lumber is bound by the provisions of the contract releasing the railroad company from damages for fires set out by it.

## 5. RAILROADS ⚡469—CONTRACT RELEASING LIABILITY FOR FIRE NOT VOID FOR DURESS.

Such a contract between a railroad company and a private corporation entered into freely can not be said to have been done under duress rendering the contract void on that ground, and neither such corporation nor its assigns or sublessee can avoid the contract on the ground of duress in its execution.

## 6. RAILROADS ⚡469—RELEASE OF LIABILITY FOR FIRES DOES NOT COVER GROSS OR WILLFUL AND WANTON NEGLIGENCE.

But such a contract between a railroad company and a private corporation will not

absolve the railroad company from liability to the other party to the contract, or to its assigns or sub-tenants for gross or willful and wanton negligence in failing to extinguish fires negligently set out by it, when consistently with its other duties to the public in the operation of its trains, it or its trainmen may reasonably be called upon to do so.

Certified from Circuit Court, Randolph County.

Action by the Keystone Manufacturing Company against Walker D. Hines, Director General. A demurrer to the declaration was overruled. Defendant pleaded the general issue and filed special pleas over objection to which special replications were rejected. On certified questions based on such pleadings and rulings thereon. Affirmed in part, and reversed in part and certified back.

Samuel T. Spears, of Elkins, for plaintiff.

MILLER, J. Plaintiff has impleaded defendant in an action for damages for negligently setting out the fire which it is alleged originated on his right of way and was negligently allowed to be communicated to inflammable matter on the adjoining property occupied by plaintiff and to its lumber and other materials stored there, whereby said lumber and other materials were wholly destroyed and lost to plaintiff, to its damage twenty-five thousand dollars.

In the first count the plaintiff alleges that its said lumber and other property, at the time of its destruction, was situate at what was known as Todd Siding, on and along that portion of defendant's railroad extending from the city of Elkins to the town of Huttonsville, in Randolph County, and along said siding controlled by plaintiff, a portion of which was then under lease to plaintiff from J. C. McWhorter and E. B. Alkire, which lease also gave plaintiff the option to purchase the property so held under lease, and which said sidetrack plaintiff before said fire and before electing to purchase said leasehold had extended by an addition thereto built at its own expense, with the knowledge and consent of defendant, and along which extension its property so destroyed by fire was at the time situated. And in this count as well as in counts two and three it is averred not only that said fire was so negligently set out in the dry grass, weeds and other combustible material which defendant had negligently allowed to accumulate on its right of way, but that the communication of said fire was the result of the negligence of defendant to use a proper spark arrester on his engine, by reason whereof sparks and coals of fire were suffered to be emitted from the smokestack thereof and to fall upon the inflammable material on and along his said right of way and to set fire to said material thereon and to be communi-

cated as aforesaid to plaintiff's property destroying the same.

The fourth count, in addition to the negligent acts averred in the other counts and the resulting damages to plaintiff's property, further avers that after the fire was so negligently set out by defendant, his agents and servants, and said fire was extending to plaintiff's said property and was about to consume the same by his and their negligent acts as aforesaid, said defendant and his servants who had set out said fire, returning on the same train and seeing said fire and that it was about to destroy plaintiff's property, and that it could easily be put out by them or by the passengers on said train, volunteering and requesting said trainmen to be allowed to do so, refused to stop said train and refused and neglected to put out said fire or allow the passengers aforesaid to do so, and so negligently allowed plaintiff's property to be wholly destroyed and plaintiff damaged as aforesaid in the sum of twenty-five thousand dollars.

Defendant's demurrer to said four counts and each of them was overruled. Whereupon defendant pleaded the general issue, and over objection of plaintiff was allowed to file two special pleas, as applicable to and constituting a defense to each of the causes of action pleaded and to each of said several counts, and wherein it is averred that the sidetrack and the alleged extension thereof made by plaintiff was built and operated by plaintiff and defendant under and pursuant to a contract entered into September 1, 1913, between the Western Maryland Railway Company, defendant's predecessor in title, and the Limestone Railroad Company, the predecessor in title of J. C. McWhorter and E. B. Alkire, the immediate lessors of plaintiff, and wherein, in the second of said special pleas, the defendant traces the title of the said plaintiff from the said Limestone Railroad Company through one U. G. Young, trustee, to whom the said property was conveyed by said Limestone Railroad Company, and the said McWhorter and Alkire purchased at the trustee's sale thereof; and it is averred in each of said special pleas that in the said contract between the said railroad companies, which was then and at the time of said fire still in force, it was expressly stated and provided as follows:

"And said second party" (meaning said the Limestone Railroad Company) "hereby releases said first party" (meaning said the Western Maryland Railway Company) "from all claims of whatsoever character from damages resulting to the property of said second party" (meaning said the Limestone Railroad Company) "by reason of fire originating from the engines and locomotives of the first party" (meaning said the Western Maryland Railway Company) "and resulting in the burning or destruction of or injury to the property of the second party" (meaning said the Limestone

Railroad Company); "and covenants that it" (meaning said the Limestone Railroad Company) "will not assert any claims of such character against first party" (meaning said the Western Maryland Railway Company).

And it is also averred that the said contract also provides:

"And the said contract shall be binding upon the successors, heirs, executors, administrators and assigns of the respective parties hereto."

And it is further averred that by force of these provisions of said contract defendant as successors in right and title to the Western Maryland Railway Company has been and is wholly relieved and discharged of all demands set up in said several counts of the declaration, of all which plaintiff had notice by the deeds of record aforesaid under which it claims right and title as lessee or otherwise.

To these special pleas of defendant plaintiff tendered two special replications, which, upon objection thereto, were rejected by the court. The first of said replications denies notice of the contract and the special provisions thereof pleaded by defendant, avers that plaintiff's lumber was not stored along the original sidetrack built by defendant pursuant to said contract, but on and along the extension thereof which was built by plaintiff pursuant to no contract with defendant, the original siding being then controlled by plaintiff under a contract of lease, which property was subsequently to the fire conveyed to plaintiff by its said lessors, and that defendant had accepted freight from plaintiff off the siding so built by it.

By the second of said replications the plaintiff averred that the Limestone Railroad Company which had owned and operated said sidetrack under said original contract had been compelled by duress to enter into said contract and that the same was not binding on it, nor upon plaintiff.

On these pleadings and the rulings of the court thereon the circuit court has certified to us the following questions:

"1. Does the waiver against negligence set up by defendant's special pleas operate as a bar to plaintiff's claim for damages, even though plaintiff was not a party to the original contract containing said waiver and had no actual notice thereof?

"2. Is the plaintiff bound by the waiver set up by defendant's special pleas if as a matter of fact the property destroyed by fire was located along that part of the sidetrack which was constructed by plaintiff while it was operating, under lease only, that part of the sidetrack which was constructed under the original contract between the Western Maryland Railway Company and Limestone Railroad Company?

"3. Can the plaintiff (not being a party to the original contract) interpose the defense of duress to defendant's plea touching said waiver, and do the averments of plaintiff's special repli-

cations as to said waiver constitute in law, duress?

"4. Is the waiver set up in defendant's special pleas such as would relieve him from gross negligence, and do the facts set up by plaintiff in the fourth count of his declaration amount in law to gross negligence?"

The primary and fundamental inquiry involved in all four of the questions submitted is, can a railroad company by contracts like the one pleaded in the present case absolve itself from its common-law or statutory duties and liabilities and from damages resulting to others from its negligence pertaining thereto?

[1] The right of private contract is one of the highest importance, for nothing contributes more to the general welfare or to the liberties of the people than freedom of contract, and unless a contract clearly contravenes public right or public welfare it should generally be enforced. *Baltimore & Ohio Southwestern Railroad Co. v. Voigt*, 178 U. S. 498, 505, 20 Sup. Ct. 385, 44 L. Ed. 560. In the present case it is strenuously urged that the contract pleaded is void, (1) upon grounds of public policy (2) as an attempt by the railroad company to avoid liability and obligation imposed upon it by section 54 of chapter 62 of the Code (sec. 3518). But the contract relates to no duty or obligation of the railroad company as a public carrier towards the other party to the contract. The sole subject of the contract is a private siding in the country to accommodate the private business of the lessee company, whereby the burdens and liabilities of the railroad company but for the contract would be generally increased. In such contracts the public in general, as a general rule, is in no wise concerned. *Hartford Fire Ins. Co. v. Chicago, M. & St. P. Ry. Co.*, 175 U. S. 91, 20 Sup. Ct. 33, 44 L. Ed. 84, affirming the Circuit Court of Appeals, *Sanborn, J.*, 70 Fed. 201, 17 C. C. A. 62, 30 L. R. A. 193; *Baltimore & Ohio Southwestern Railroad Co. v. Voigt*, supra; *Quirk Milling Co. v. Minn. & St. L. R. Co.*, 98 Minn. 22, 107 N. W. 742, 116 Am. St. Rep. 336; 3 Elliott on Railroads (2d Ed.) p. 535, § 1236, and cases cited in notes; 33 Cyc. 1330. In harmony with these authorities we find our own cases of *West Virginia Pulp & Paper Co. v. Baltimore & Ohio Railroad Co.*, 75 W. Va. 549, 84 S. E. 334, and *Wilson Bros. v. Bush, Receiver*, 70 W. Va. 26, 78 S. E. 59.

[2] Our next inquiry is, does the provision of the contract exempting the lessor from liability to the lessee, its successors, etc., in any way relieve defendant from the burden and duties imposed by said section 54 of chapter 62 of the Code (sec. 3518), so as to invalidate the contract on that ground? The first paragraph of this section of the Code, corrected by reference to the original act as to a slight error in punctuation, is:



"Every railroad company shall, on such part of its road as passes through forest land or lands, subject to fire from any cause, cut and remove from its right of way along such lands, at least twice a year, all grass, brush and other inflammable materials, and employ in seasons of drought and before vegetation has revived in the spring, sufficient trackmen to promptly put out fires on its right of way; and every person, firm or corporation operating any locomotive steam engine in this state shall provide the same with netting of steel or iron wire so constructed, and at all such times maintained as to prevent the escape of fire and sparks from the smoke stacks thereof, and with adequate devices to prevent the escape of fire from ash pans and furnaces which shall be used on such locomotives."

And a subsequent provision of this section imposes a penalty on the railways for any violation of the provisions thereof. The contract involved here does not undertake to absolve the railway company from its duties and liabilities to the State or public in general arising out of this statute. Regardless of the contract it remained liable to others and subject to indictment and punishment for any failure on its part to obey the law; the general public was in no way concerned with the contract between the railway companies relied on by defendant. The same principles should obtain in its enforcement as in the case of any other contract. This is the law of the authorities cited.

[3] The contract then infringing no rule of public policy or positive law, the next question involved is, does it bind plaintiff as lessee in possession without notice thereof? The special pleas aver notice to plaintiff, and impute to it notice by recorded title from the railway company to plaintiff's immediate lessors, McWhorter and Alkira. As a general rule a mere sub-tenant is not liable to the lessor for the covenants of the lessee in a lease. Without accepting the sub-tenant the lessor can not as a general rule enforce against him the covenants of his immediate lessee; this because of want of privity of contract between lessor and sub-tenant, and because there is generally a reversionary right in the lessor of such sub-tenant. 1 Taylor on Landlord and Tenant (9th Ed.) p. 130, § 109. There is a wide distinction between such sub-tenant and an assignee of the original lease. Wood on Landlord and Tenant, p. 132, § 94; Goldman v. Daniel Feder & Co., 100 S. E. 400. And this rule respecting the rights of a sub-tenant was recognized and applied in the case of Wooldridge & Son v. Ft. W. & D. C. Ry. Co., 38 Tex. Civ. App. 551, 86 S. W. 942, which involved a contract somewhat similar to the one pleaded and relied on in this case, and where it was held that the railroad company was not thereby discharged from the claim of a sub-tenant. The pleadings in this case do not show the term of lease under which plaintiff occupied

the premises. If the rule invoked was properly applied in the Texas case, which we do not decide, there is enough difference between the facts in that case and those alleged in the pleadings in this case to differentiate the one from the other. The contract here by its terms was to apply and bind the lessee, its successors, assigns, etc. The railway company was protected in its contract against liabilities about to be imposed by the new conditions about to be created under the contract, and we think that anyone entering and using the sidetrack and adjoining premises as plaintiff is alleged to have entered, was bound to take notice of the existing conditions and of the right by which its lessor or predecessor was occupying the railway company's right of way, to say nothing of the recorded title of its immediate lessors, and that its occupancy must be regarded as being subordinated to the rights of the railway company under the contract. The special pleas aver that the extension of the sidetrack by plaintiff and the subsequent use and operation by it of said siding thus extended was under the terms and provisions of the original lease contract. The rule of our decisions, regarded as elementary, is that when the relation of landlord and tenant has been once established, it attaches to all who may succeed to the possession through or under the tenant, whether immediately or mediately, and the succeeding tenant is as much bound by the acts and admissions of his predecessors as if they were his own. Emerick v. Tavener, 9 Grat. (Va.) 220, 224, 58 Am. Dec. 217; Allen v. Bartlett, 20 W. Va. 46; Neff v. Ryman, 100 Va. 521, 524, 42 S. E. 314. Such, it seems to us, ought to be the rule applicable to the facts in this case. If not, how could a railroad company protect itself? If by subletting, the other party to the contract could at once turn over the premises to some third party, as a mere sub-tenant he might thereby obtain all the benefits without incurring the burdens of his contract.

[4] The next question is, does the waiver or release of damages in the contract apply to the extension of the sidetrack and to the lumber and other material stored along such extension? The special pleas aver that said extension was made and the same operated under and by virtue of the said original contract with the Limestone Railroad Company. If so, the contract would apply to that extension and to the lumber stored along the same.

[5] In response to the third question certified, on the subject of duress, we do not think this question material. It can not be said that the original lessee was under any duress in executing the contract. The lessee was not bound to enter into the contract, nor was the lessor in any way bound to confer on the lessee the rights thereby acquired. It

was freely entered into. It involved no contract of carriage or release of liability thereunder. The right of the railroad company to enter into such a contract, according to the authorities already cited, is a complete answer to the plea of duress. Of course, if there was no duress affecting the rights of the original lessee, the plaintiff cannot plead duress in avoidance of the contract.

[8] The fourth question submitted involves a proposition of more serious import. The special pleas filed are general and to all four counts. As to the first, second and third counts they may be said to present a complete defense to the several causes of action pleaded. But in addition to the facts pleaded in the first three counts, the fourth count pleads facts which we think amount to gross, or willful and wanton negligence. To a contract against such negligence the law seems to impose a bar. *Greenwich Ins. Co. v. L. & N. R. R. Co.*, 112 Ky. 598, 66 S. W. 411, 67 S. W. 16, 56 L. R. A. 477, 99 Am. St. Rep. 313. Can there be any question about the degree of negligence pleaded in the fourth count? The last paragraph of section 54 of chapter 62 of the Code (sec. 3518) provides that:

"In case of fire on its own or neighboring lands, the railroad company shall use all practicable means to put it out."

And this statute makes it the duty of engineers, conductors, or trainmen discovering or knowing of fires in fences or other material along or near the right of way of the railroad in such lands to report the same to the first station agent, and he is required to notify the nearest fire warden and use all means to extinguish the fire. Neglect of these duties is made criminal and punishable as a misdemeanor. The duty thereby imposed is of greater magnitude than the duty to remove the grass and other inflammable materials, imposed by the first paragraph of said section. Neglect of that duty if it may be provided against by contract as in this case, may result in no damage to anyone, but neglect of the duty pertaining to fires actually set out and threatening injury to property is condemned by the principles of humanity and justice independently of the positive provisions of the statute. *Wood on Railroads* (Minor's Ed.) § 327. There is some conflict among the decisions as to the proper import of the expressions "Willful Negligence" and "Wanton Negligence," but the expression "Willful and Wanton Negligence"

has found its way into many decisions. 4 Words and Phrases (Second Ser.) pp. 1316, 1317. And as employed in cases of this character they do not necessarily include the element of malice and actual intent to injure another, but impute to the wrongdoer a reckless disregard of the safety of the person or property of another, by failing, after discovering the peril, to prevent the injury. *Havel v. Minn. & St. L. R. Co.*, 120 Minn. 195, 139 N. W. 137; *Anderson v. Minn., St. P. & S. S. M. Ry. Co.*, 103 Minn. 224, 114 N. W. 1123, 14 L. R. A. (N. S.) 886, and cases cited; *Lake Shore & M. S. Ry. Co. v. Bodemer*, 139 Ill. 596, 29 N. E. 692, 32 Am. St. Rep. 218. We think these definitions define and characterize the kind of negligence averred in said fourth count. In the case of *Pittsburgh, C. & St. L. Ry. Co. v. Brough*, 168 Ind. 378, 81 N. E. 57, 12 L. R. A. (N. S.) 401, apparently all the cases on this particular question are referred to and reviewed. See also *Ginter v. Pennsylvania Railroad Co.*, 262 Pa. 474, 105 Atl. 824, 3 A. L. R. 505, and note. In his special plea defendant offered nothing except the contract to absolve him from the gross negligence imputed to him and his agents and servants in charge of the train. The principal case just cited and those cited and reviewed therein hold that as a general rule the primary duty of a train crew is to their train and passengers. But there is a concession in some, if not all of them, that where this primary duty may be discharged as well as the subordinate duty imposed, the latter duty also should not be neglected. The facts pleaded, we think, show that without neglect of this primary duty the train could have been stopped, and if the members of the crew could not have done so, their duty was to allow the passengers who volunteered their services to alight and extinguish the fire. No rule of universal application can be formulated. It depends on the character of the train being operated and the circumstances attending each case. Our conclusion is that the waiver pleaded in defendant's special pleas does not present a complete defense to the cause of action set forth in said fourth count.

So far as consistent herewith we affirm the judgment and rulings of the court below, but in so far as its judgment may be found inconsistent with our conclusions herein expressed we reverse the same, and our decision on the questions propounded will be certified back to the court below, as provided by the statute.

(85 W. Va. 446)

(102 S.E.)

STATE ex rel. CLARK v. FITZPATRICK,  
Mayor, et al. (four cases). (Nos.  
4083-4086.)

(Supreme Court of Appeals of West Virginia.  
Feb. 8, 1920.)

*(Syllabus by the Court.)*

1. ELECTIONS  $\S$  258, 259—CANVASSING BOARD CANNOT REFUSE CERTIFICATES OF ELECTION OR TRY TITLE TO OFFICE.

A municipal council, sitting as a canvassing board to canvass the returns of a municipal election, has no authority or jurisdiction to withhold or refuse to issue to the several candidates voted for at such election certificates setting forth according to the truth as shown by such canvass the number of votes received by them, or with or without notice, to try their right or title to the offices to which on the face of the returns such candidates appear to have been elected.

2. MANDAMUS  $\S$  14(3), 74(5)—CANVASSING BOARD MAY BE COMPELLED TO ISSUE CERTIFICATES TO CANDIDATES SHOWING VOTES RECEIVED.

When the members of such canvassing board, or a majority thereof, after canvassing the returns of such election and ascertaining the result thereof, neglect and refuse to issue and transmit to the candidates so voted for certificates showing the number of votes received by each, they may by mandamus be required to reconvene and discharge in respect thereto the duties imposed upon them by law.

Four mandamus proceedings by the State, on relation of G. E. Clark, O. H. Meador, F. H. Shumate, and M. D. McMahon, against J. E. Fitzpatrick, Mayor, and others. Peremptory writs granted.

Dillon & Nuckolls, of Fayetteville, for relators.

W. R. Bennett, of Fayetteville, and J. M. Ellis, of Oak Hill, for respondents.

MILLER, J. At a regular municipal election of the town of Scarbro, in Fayette County, held January 1, 1920, the relators Clark and Meador were candidates on the Citizens Party Ticket for the offices of mayor and recorder, respectively, and the relators Shumate and McMahon, along with W. C. Thompson and O. W. Dickson and W. J. Scott, were candidates on the same ticket for the office of councilmen.

At the same election respondents Fitzpatrick and Poteet were candidates on the Citizens Labor Ticket for the offices of mayor and recorder, respectively, and with them on the same ticket respondents T. T. Lewis and Dave Kearnes, with H. C. Darlington, Thomas Sunday, and Oat McCormick, were candidates for the office of councilmen.

When the mayor, recorder and council, consisting of respondents J. E. Fitzpatrick, May-

or, H. J. Smith, Recorder, and T. T. Lewis, G. A. Poteet, Thomas Garrett and Dave Kearnes, met as a canvassing board on January 7, 1920, as required by law, to canvass the returns of said election, it was ascertained and recorded on the minutes that on the Citizens Party Ticket the relators Clark for the office of mayor received 139 votes, Meador for recorder received 134 votes, and that the said Thompson, Scott and McMahon for councilmen each received 134 votes, and Dickson and Shumate each received 135 votes; and that on the Citizens Labor Ticket, the result was, Fitzpatrick for mayor 112 votes, Poteet for recorder 111 votes, and that for councilmen Lewis and McCormick each received 112 votes, Darlington and Kearnes each 110 votes, and Sunday 111 votes.

The alternative writs and the returns of the several respondents thereto, with the exhibits and affidavits filed, show that after having ascertained and recorded the result of said election, on motion of respondent Poteet, seconded by Lewis, an adjournment of the board was taken until the next day, Thursday, January 8, the purpose being, according to the language of the resolution, "to finish the canvassing and rendering of necessary certificates."

When the board of canvassers met pursuant to said adjournment, there were present, Fitzpatrick, Mayor, Smith, Recorder, and Lewis, Garrett and Poteet, Councilmen, Kearnes being absent. At this meeting the only business transacted was, on the motion of said Poteet, seconded by Lewis, to order that election certificates be not issued to relators Clark, Meador, McMahon and Shumate, and the said Scott, on the ground, as the resolution declares, that they were ineligible under the statute to hold office. This motion was carried by the affirmative votes only of said Poteet, Lewis and Garrett.

The joint returns of Fitzpatrick and Kearnes, as do the joint returns of respondents Lewis, Poteet and Garrett, admit the result of the said election as averred in the alternative writs, and respondents all aver that after the board had so canvassed and recorded the result of said election on January 7, 1920, one W. A. Wingrove, claiming to be a citizen and taxpayer of said town of Scarbro, appeared and filed a protest in writing against the issuing of certificates of election to said Clark, Meador, McMahon and Shumate, on the ground stated therein that they had not been assessed with nor paid taxes on one hundred dollars worth of property in said town as required by law; and also against the issuance of a certificate to said Scott on the ground that he was not a resident of said town.

The minutes of the board make no mention

of this protest, and relators all admit that Clark was not present at either of said meetings; but respondents Poteet, Lewis and Garrett say that he has never since then denied the charge as to his alleged ineligibility nor demanded a certificate. Fitzpatrick and Kearnes aver in their return that they never voted against nor refused to issue certificates to the relators; that when the action of said board was taken not to issue certificates, Kearnes was absent, and Fitzpatrick, Mayor, who was presiding did not vote. They further say that there was no reason why they should have been made parties to these proceedings, and that the same should be dismissed as to them; and that the peremptory writs prayed for should be awarded, and move the court accordingly to dismiss the suits as to them.

But by their demurrers to the petitions and their returns to the writs, the other respondents undertake to defend their action in denying certificates to relators, upon the ground that petitioners do not show themselves qualified to hold said offices, and upon the ground set forth in the protest of said Wingrove, namely, want of property qualifications and omission to pay taxes for the year preceding said election; and that being so disqualified and ineligible to hold the offices to which they were admittedly elected, they would be disqualified when awarded such certificates and inducted into office to sit in judgment on their cases on the question of their qualifications and eligibility; and that it was the duty of respondents and their associates in the council, under the law, to continue in office until others eligible and qualified should be elected and qualified as their successors.

[1] The action of respondents in denying to relators the certificates demanded, was done as a canvassing board; they do not defend it as the action of the common council, regularly called or sitting as such to judge of the election and qualification of its members. What is sought to be enforced by the present writs is the plain ministerial duty imposed upon the members of the council, sitting as a board of canvassers, by sections 85, 69 and 70 of chapter 3 of the Code 1918 (Code 1913, §§ 107, 91, 92), namely, that after canvassing the returns of an election and issuing the certificates as required thereby, they shall issue and transmit to each person for whom votes were cast at such municipal election one of such certificates setting forth, according to the truth as shown by said canvass, the number of votes received by relators and other candidates voted for at said election. The record shows that respondents, by the majority vote aforesaid, refused to obey the mandate of the statute and undertook as a canvassing board, in the ab-

sence of the relators, and without process, to say nothing of their want of jurisdiction, to determine the question of relators' rights and titles to the offices to which they were elected. Treating their action as councilmanic, we distinctly decided in the recent case of *Trunick v. Northview*, 80 W. Va. 9, 91 S. E. 1081, that the council to which a member has been elected, and not some previous council, is the one entitled to sit in judgment on his election to and qualification for the office. This holding constitutes a complete answer to one of the points made in the demurrers and returns of respondents Lewis, Poteet and Garrett. So that conceding as true all that they say in their returns as to the qualifications of relators, they had no right or jurisdiction as councilmen, or as a board of canvassers, to undertake to decide questions which could only be presented to and decided by the tribunal having jurisdiction to try relators' rights and titles to their offices. See, also, *Martin v. White*, 74 W. Va. 628, 82 S. E. 505; 9 Ruling Case Law, p. 1113, § 116.

[2] The certificates of election demanded of respondents by relators constitute in their hands the legal evidence of their prima facie right and title to the offices to which on the face of the returns they were elected. Having failed to perform their plain duty in the premises, respondents may be required, according to the alternative writs, to reconvene as a board of canvassers and complete the performance of their ministerial duty in the premises. *McKinzie v. Hatfield*, Mayor, 77 W. Va. 508, 513, 87 S. E. 879; *Sanders v. Board of Canvassers*, 79 W. Va. 303, 90 S. E. 865.

The motion of respondents Fitzpatrick and Kearnes, to have the suits against them dismissed for the reasons assigned, we think, should not prevail. They did not, as perhaps they might have done, prepare and sign proper certificates and deliver or tender them to relators, nor do they in their return say that before suit they manifested in any way their willingness to sign such certificates. Apparently they accepted the action of the majority present and voting on said resolution as binding on them. Moreover, as we do not in suits of this kind, when public officers have acted in good faith, award costs against them, their motion to dismiss presents questions of minor importance to them, and we think the writs should run against all the members of the canvassing board, including respondents Fitzpatrick and Kearnes.

For the foregoing reasons we are of opinion that respondents have presented no defenses to the alternative writs, and that peremptory writs of mandamus should be awarded in accordance with the alternative writs, and it will be so ordered.

(85 W. Va. 425)

(102 S.E.)

**DUNHAM v. WESTERN UNION TELEGRAPH CO. (No. 3355.)**(Supreme Court of Appeals of West Virginia.  
Jan. 27, 1920.)*(Syllabus by the Court.)***1. ACTION ON THE CASE — MATTERS IN CONFESSION AND AVOIDANCE PROVABLE UNDER GENERAL ISSUE.**

In an action of trespass on the case, defendant may, with few exceptions, prove under the general issue matters in confession and avoidance.

**2. TELEGRAPHS AND TELEPHONES — LAWFUL CONDITIONS OF CONTRACT PROVABLE UNDER GENERAL ISSUE.**

In an action of tort brought by the addressee of a telegram for damages for failure to deliver it, the telegraph company may prove as defenses, under the general issue, any reasonable and lawful conditions of the contract between the company and the sender.

**3. TELEGRAPHS AND TELEPHONES — CONDITIONS IN CONTRACT AGAINST LIABILITY FOR MISTAKE OR NEGLIGENCE BEYOND VALUATION VALID.**

The act of Congress of June 18, 1910 (U. S. Comp. St. § 8563), declaring telegraph companies to be common carriers and subject to the federal statutes regulating interstate commerce, and authorizing them to make a reasonable and just classification of messages transmitted by them, into day, night, repeated, unrepeat, letter, commercial, press, government, and to charge different rates for the different classes of messages, warrants such company in inserting, as a condition of its contract with the sender of a message, that, in no event shall it be liable for damages "for any mistakes or delays in the transmission or delivery, or for the nondelivery, of this telegram, whether caused by the negligence of its servants or otherwise, beyond the sum of fifty dollars, at which amount this telegram is hereby valued, unless a greater value is stated in writing hereon at the time the telegram is offered to the company for transmission, and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one per cent. thereof." Such a condition is a reasonable regulation within the purview of the federal statute.

**4. TELEGRAPHS AND TELEPHONES — CONDITION LIMITING FREE DELIVERY LIMITS VALID.**

A condition in a contract for the transmission of a telegram, prescribing free delivery limits to the radius of one mile in cities of 5,000 population or more, and to one-half mile in smaller towns, is a reasonable regulation.

**5. TELEGRAPHS AND TELEPHONES — CONDITION LIMITING TIME FOR PRESENTATION OF CLAIM VALID.**

A condition in such contract, relieving a telegraph company from liability for damages, unless the claim therefor is presented in writing within 60 days, is also a reasonable and valid regulation.

**6. TELEGRAPHS AND TELEPHONES — CONDITIONS IN CONTRACT BINDING ON ADDRESSEE.**

All just and reasonable conditions and regulations, prescribed in a contract between a telegraph company and the sender of a message, are binding on the addressee, whether his action to recover damages for breach of duty be in tort or in assumpsit on the contract.

**Error to Circuit Court, Wood County.**

Action of trespass on the case by W. W. Dunham against the Western Union Telegraph Company. Judgment for plaintiff, and defendant brings error. Reversed, and cause remanded for a new trial.

Fitzpatrick, Campbell, Brown & Davis, of Huntington, for plaintiff in error.

S. O. Prunty, of Harrisville, and Brown & Blizard, of Parkersburg, for defendant in error.

**WILLIAMS, P.** The Western Union Telegraph Company prosecutes this writ of error to a judgment recovered against it by W. W. Dunham in an action of trespass on the case for failure to deliver a message sent to him at Parkersburg, W. Va., over defendant's lines from Cleveland, Ohio, by Mildren & Son.

Said Dunham is an oil and gas well driller residing in Parkersburg, and claims he had a contract of employment with Mildren & Son, at \$6 per day, to drill a gas well for them as soon as they should erect the rigging and make the necessary preparations for drilling. Pursuant to a previous understanding between them, and as soon as the rigging was completed, Mildren & Son delivered to defendant at its office in Cleveland, on the 27th of October, 1914, the following telegram, and prepaid the charges for the transmission and delivery thereof to plaintiff in Parkersburg, viz.:

"W. W. Dunham 1724 Oak Street Parkersburg W. Va. Ready to work Thursday morning Pilgrim Farm Riverside Drive north of Kammes.  
J. M. Mildren."

The message was not delivered to plaintiff, nor to any member of his family at his residence, and, learning from another source that Mildren & Son had delivered to defendant in Cleveland a message to be sent to him, about the 27th of October, he inquired at defendant's office in Parkersburg on the 4th of November following, and was handed the message by one of its agents. This was after 7 o'clock p. m., and he left Parkersburg by train the next morning for Cleveland. On his arrival there he learned that Mildren & Son, having received no reply to their message, had employed another driller in his place, and therefore could not give him employment. He was permitted to prove, over defendant's objection, that he made unsuc-

cessful efforts to obtain other employment; that his contract for service with Mildren & Son was at \$6 per day for the period required to drill the well, which was shown to require 40 days; and that the expenses of his trip to Cleveland and return, including his board, were \$9.04. He recovered judgment for \$249.04.

Complaint is made: (1) Of the court's rejection of three special pleas tendered by defendant; (2) the admission of improper testimony over the objection of defendant; and (3) of the giving of certain instructions to the jury on behalf of the plaintiff, and the refusal to give certain others offered by defendant.

[1, 2] The special pleas set up certain conditions, printed on the blank form of telegram, made a part of the contract between defendant and the sender of the message. It was not error, in any event, to reject the special pleas, because, if the matters averred were valid defenses, they were provable under the general issue. The action is trespass on the case, wherein the general issue is "not guilty," which is merely a denial or traverse of the facts alleged. Logically speaking, the issue would seem to confine the defense to such denial. But, say Stephen and Chitty, there has been a relaxation of the rule or principle, similar to that which has taken place in actions of assumpsit, and now, under the plea of not guilty, defendant may not only contest the truth of the declaration, but (with certain exceptions not applicable here) may make any defenses that tend to show plaintiff has no right of action, although they are in confession and avoidance of the declaration. Andrew's Stephen's Pleading, § 118; 1 Chitty on Pleading, 490; Ridgeley v. Town of West Fairmont, 46 W. Va. 445, 33 S. E. 235.

Defendant offered no evidence, and at the conclusion of plaintiff's evidence moved the court to exclude it, which motion the court overruled and defendant excepted. Depositions of certain witnesses had been taken by defendant which, not being offered by it, were read by the plaintiff. The original telegram was identified by Mr. J. M. Mildren, the sender of it, and filed with his deposition. On the face of it there appear the following words printed in full face type:

"Send the following telegram, subject to the terms on back hereof, which are hereby agreed to."

The conditions that are material here are the following:

"1. The company shall not be liable for mistakes or delays in the transmission or delivery, or for nondelivery, of an unrepeatable telegram, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for nondelivery, of any repeated telegram, beyond fifty times the sum received for sending the same, unless specially valued; nor in any case for delays arising from

unavoidable interruption in the working of its lines; nor for errors in cipher or obscure telegrams.

"2. In any event the company shall not be liable for damages for any mistakes or delays in the transmission or delivery, or for the non-delivery, of this telegram, whether caused by the negligence of its servants or otherwise, beyond the sum of fifty dollars, at which amount this telegram is hereby valued, unless a greater value is stated in writing hereon at the time the telegram is offered to the company for transmission, and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one per cent. thereof.

"4. Telegrams will be delivered free within one-half mile of the company's office in towns of 5,000 population or less, and within one mile of such office in other cities or towns. Beyond these limits the company does not undertake to make delivery, but will, without liability, at the sender's request, as his agent and at his expense, endeavor to contract for him for such delivery at a reasonable price.

"6. The company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the telegram is filed with the company for transmission."

[3] This was an unrepeatable, interstate message, upon which no value was placed other than that stipulated in the conditions printed on the back of the telegram and referred to in the face thereof as the contract between the sender and the defendant company. The wrong complained of is its failure to deliver the message to the sendee. No excuse is offered for its neglect of duty, but it insists that its liability is limited by the terms of the contract to 46 cents, the rate charged and paid by the sender for transmitting the message, and in no event could its liability exceed \$50. By the act of Congress of June 18, 1910 (U. S. Comp. St. § 8563), telegraph companies doing an interstate business are declared to be common carriers and subject to the federal statute regulating interstate commerce. The act authorizes them to classify messages into day, night, repeated, unrepeatable, letter, commercial, press, government, and such other classes as are just and reasonable and to charge different rates for the different classes of messages.

Until Congress exercised its jurisdiction over telegraph companies by the passage of that act, the states had the right, under their police power, to impose penalties upon them for neglect of duty, provided their duty to the general public was not thereby materially interfered with. Western Union Tel. Co. v. Commercial Milling Co., 218 U. S. 407, 31 Sup. Ct. 59, 54 L. Ed. 1088, 36 L. R. A. (N. S.) 220, 21 Ann. Cas. 815; Western Union Tel. Co. v. White, 113 Va. 421, 74 S. E. 174. But since Congress has entered the field, as it had the right to do under the interstate commerce clause of the Constitution, and has provided for their regulation, its jurisdiction is necessarily exclusive, and supersedes all

state legislation or state laws attempting, in any manner, to regulate them. The states are bound to adhere to the law respecting their regulation as it is fixed and determined by the federal authorities. There had been, until recently, great diversity of opinion among the state courts respecting the provisions of a contract by a telegraph company, similar to those here involved, some courts holding them void on the ground of public policy, as an attempt to protect itself against its own negligence. But the Supreme Court of the United States, by a recent decision, has settled the question, by holding, in effect that such provisions are valid and binding under the act of Congress to regulate commerce above referred to. *Postal-Telegraph Cable Co. v. Warren-Godwin Lumber Co.*, 116 Miss. 660, 77 South. 601, decided December 8, 1919, and reported in *Advance Opinions*, published by *Lawyers Co-operative Publishing Company*, dated January 1, 1920. That case was taken to the Supreme Court of the United States on writ of certiorari to the Supreme Court of the state of Mississippi. The question presented in the state court was one of damages for an error in transmitting an unrepeatable message, and, following an earlier decision of its own in *Dickerson v. Western Union Tel. Co.*, 114 Miss. 115, 74 South. 779, that court held that the provision of the contract, limiting the liability of the telegraph company to a sum equal to the price paid for transmission of the message, did not relieve it from liability for the actual loss occasioned by its negligence, and rendered judgment for \$125.28. The Supreme Court of the United States reversed the judgment (250 U. S. 251, 40 Sup. Ct. 69, 64 L. Ed. —), and Chief Justice White, who delivered the opinion after quoting from the aforesaid act of Congress, which authorizes the classification of messages into specific classes, and further into "such other classes as are just and reasonable," and permits different rates to be charged for the different classes of messages, after referring to said provisions of the act, says:

"It would seem unmistakably to draw under the federal control the very power which the construction given below to the act necessarily excluded from such control."

As persuasive authority in support of his opinion, the learned Chief Justice cites the case of *Oultra v. Western Union Tel. Co.*, decided by the Interstate Commerce Commission, 44 Inters. Com. R. 670. In the conclusion of its report in that case the Interstate Commerce Commission holds that it was the intention of Congress, by the amendatory act of 1910, to give said commission jurisdiction and control over the "rates and practices of interstate telegraph companies, as well as the rules, regulations, conditions, and restrictions affecting their interstate rates; that the rate voluntarily used by the senders of

the message in question was an unrepeatable rate to which was lawfully attached, as a fundamental feature of it, the restricted liability insisted upon here by the defendant; that the Congress has expressly authorized such rates with a restricted liability attached; that such rates are not therefore contrary to public policy, but, on the contrary, are binding upon all until lawfully changed; and that neither the interstate rates of the defendant nor the rules, practices, conditions, and restrictions affecting those rates have been shown in this proceeding to be unreasonable or otherwise unlawful." As we interpret the opinion of the Supreme Court of the United States in the case above cited it settles the question, not only as to the exclusive jurisdiction of Congress over the subject of interstate messages, but also as to the validity and binding effect of the terms of the contract in this case, limiting defendant's liability for negligence in failing to deliver the message. Numerous other decisions by the highest courts of many of the states, in harmony with that decision, are also cited in the opinion, some of which are *Western Union Tel. Co. v. Billisoly*, 116 Va. 562, 82 S. E. 91, which appears to be one of the first decisions rendered after the passage of the amendatory act of June 18, 1910, and *Gardner v. Western Union Tel. Co.*, 231 Fed. 405, 145 C. O. A. 399. See, also, *Western Union Tel. Co. v. Bolling*, 120 Va. 413, 91 S. E. 154, Ann. Cas. 1918C, 1036.

The valuation placed upon a message for the purpose of determining the liability of the telegraph company is similar, in effect, to a valuation agreed to by the shipper of an article of merchandise, for the purpose of fixing the liability of the carrier, in case of its loss or damage, and it has been generally held that such an agreement, fairly made, is binding. 2 *Michie on Carriers*, pp. 1058, 1059; 1 *Hutchinson on Carriers*, § 5, pp. 389-390; *C. & O. Ry. Co. v. Rebman*, 120 Va. 71, 90 S. E. 629; *Adams Express Co. v. Byers*, 177 Ind. 33, 95 N. E. 513; *Baum v. Long Island Railroad Co.* (N. Y. City Ct.) 108 N. Y. Supp. 1013.

[5] The sixth condition above quoted, relieving the company from liability for damages and statutory penalties, unless the claim is presented in writing within 60 days after the telegram is filed with the company for transmission, is sustained by the weight of authority as a reasonable regulation. 3 *Sedgwick on Damages*, § 876; *Jones on Tel. & Tel. Cos.*, § 386. One reason justifying such a provision, says Mr. Jones, section 387, "is found in the multitude of messages transmitted, requiring a speedy knowledge of claims to enable the company to keep an account of its transactions before, by reason of their great number, they cease to be within their recollection and control." Similar provisions in freight contracts are upheld. C.

& O. Ry. Co. v. McLaughlin, 242 U. S. 142, 37 Sup. Ct. 40, 61 L. Ed. 207, and cases cited in the opinion. Sixty days and even a much shorter time is uniformly held to be reasonable in such cases. Jones on Tel. & Tel. Cos., § 386. Such a provision, says Mr. Jones (section 386), does "relieve the company somewhat from being held for some alleged liability, about which it would be unable to make a proper and expedient defense."

[6] Although this is an action of tort brought by the addressee, and not a suit on the contract, nevertheless these conditions being reasonable regulations, are binding on the addressee as well as the sender. But the decisions on this point are in hopeless conflict. Some of the courts make it depend on the character of the action which the receiver of the message happens to bring, holding that, in actions of assumpsit, a contract exists between him and the company, made by the sender as his agent having implied authority from him. While this is entirely logical, we hardly think the rule should be made to depend on the form of action. A plaintiff may bring either tort or assumpsit; and, although his cause of complaint may be the same in either case, the measure of his damages is often affected by the character of action. The present action is tort, and we think the rule should be applied notwithstanding, for the reason, given in many cases of like character, that such provisions, when reasonable, are determinative of the company's duty to the public, regardless of any contractual relation. It should certainly be held to no greater degree of liability to the receiver of a message, nor liable under different conditions than it had contracted with the sender it should be, when such conditions are reasonable. The following authorities support this view: Sykes v. Telegraph Co., 150 N. C. 431, 64 S. E. 177; Telegraph Co. v. Mellon, 96 Tenn. 66, 33 S. W. 725; M. M. Stone & Co. v. Telegraph Co., 31 R. I. 174, 76 Atl. 762, 29 L. R. A. (N. S.) 795; Russell v. Telegraph Co., 57 Kan. 230, 45 Pac. 598; Telegraph Co. v. Dant, 42 App. D. C. 398, L. R. A. 1915B, 685, Ann. Cas. 1916A, 1132; Halsted v. Telegraph Co., 120 App. Div. 433, 104 N. Y. Supp. 1016; Findlay v. Telegraph Co. (C. C.) 64 Fed. 459; Telegraph Co. v. Waxelbaum & Co., 113 Ga. 1017, 39 S. E. 443, 56 L. R. A. 741; and Colt v. Telegraph Co., 130 Cal. 657, 63 Pac. 83, 53 L. R. A. 678, 80 Am. St. Rep. 153.

No such timely notice as is stipulated for was proved, and the suit was not instituted until nearly a year after the cause of action arose.

[4] Provision No. 4, prescribing the free delivery limit to one-half mile from the company's office in towns of 5,000 population or less, and to one mile in larger cities and towns, is also a reasonable regulation, and

therefore binding on both the sender and addressee of the message. Jones on Tel. & Tel. Cos., § 302. But the company in this instance may have waived its right to insist upon this provision. Plaintiff's evidence tends to prove that it had been defendant's custom to make free delivery at his place and in his neighborhood, although he testified the distance was a mile, or a mile and a quarter.

The court should have sustained defendant's motion to exclude plaintiff's testimony to prove a contract of employment at \$6 per day to drill a well. In view of the limited liability, this evidence was inadmissible.

It is not necessary to discuss the assignments relating to the instructions, as the opinion disposes of all the questions arising thereon.

The judgment is reversed, and the cause remanded for a new trial.

(95 W. Va. 392)

**CITY OF PARKERSBURG v. KANAWHA TRACTION & ELECTRIC CO.**  
(No. 3848.)

(Supreme Court of Appeals of West Virginia.  
Jan. 27, 1920.)

*(Syllabus by the Court.)*

1. STREET RAILROADS ⇨24(4) — MUNICIPAL FRANCHISE CONSTRUED TO ENTITLE CITY TO BASE ITS PERCENTAGE ON GROSS RECEIPTS WITHOUT ABATEMENT FOR LINES BEYOND ITS LIMITS.

A provision in a franchise granted to a street railway company by a city providing for the payment of a certain percentage of the gross revenues of such street railway company from all of its lines operated wholly within the corporate limits, and certain other specified lines which are partly within and partly without the corporate limits, properly construed, entitles the city to receive the percentage provided in the contract upon the entire gross receipts from such lines without any abatement therefrom because of that part of the specified lines which may lie without the corporate limits.

2. STREET RAILROADS ⇨24(4) — MUNICIPAL FRANCHISE CONSTRUED AS GIVING CITY NO RIGHT TO COLLECT PERCENTAGE OF RECEIPTS EARNED BEFORE TIME PROVIDED IN CONTRACT.

Where a franchise is granted to a street railway company authorizing it to use certain of the streets of the city in consideration of the payment by the railway company of a certain percentage of its gross receipts, and said franchise provides that such compensation shall be based upon such gross receipts beginning at a certain time in the future, the city will not be entitled to collect such fixed percentage of the receipts of said company earned before the time provided in the contract at which such compensation shall begin to be calculated.



Appeal from Circuit Court, Wood County.

Suit by the City of Parkersburg against the Kanawha Traction & Electric Company involving the construction of paragraphs of defendant's franchise. From the decree, the defendant appeals. Modified and affirmed.

Van Winkle & Ambler, of Parkersburg, for appellant.

McCluer & McCluer, of Parkersburg, for appellee.

RITZ, J. On the 6th day of August, 1913, the city of Parkersburg granted to the Parkersburg, Marietta & Interurban Railway Company, the predecessor of the defendant herein, a certain franchise which was by the said railway company accepted on the following day. This franchise by its terms granted certain rights to the railway company and imposed upon it certain obligations in consideration of the grant of those rights. The controversy here involves the construction of paragraph "g" of section 11, which is as follows:

"In addition to such sums as are now or hereafter may be required by law to be paid to the city by said railway company, the railway company, its successors and assigns, shall pay to the city annually, on the 1st day of January in each and every year commencing January 1, 1914, during the life of this and the franchises held by said railway company from the city, directly or indirectly, for the use of the streets, which are now, or which may hereafter be, occupied by said railway company, the following percentage of its gross receipts from the lines it, its successors and assigns, operates wholly within the corporate limits as they now exist, and also including what is known as the South Side line, the North End line, and the Beechwood line, and also from such other lines of the said railway company that may hereafter be operated within the said city limits, as they now exist or may exist at any time during the life of said franchises (it being understood that receipts from the railway company's interurban line between the city of Parkersburg and Williamstown are excluded, as follows: 1 per cent. annually for five (5) years from January 1, 1914; 2 per cent. annually for the next five (5) years; 2½ per cent. annually for the next five (5) years; and 3 per cent. thereafter until this franchise and the other said franchises expire. Said percentages shall be calculated upon the gross receipts from the next preceding year's business."

[1] It will be observed that this paragraph provides for the payment to the city by the traction company of a certain percentage of its gross receipts from certain lines in consideration of the grant of the right to use its streets, as therein provided. Such percentage is to be calculated upon the gross receipts of the traction company from the lines it, its successors and assigns, operate, wholly within the corporate limits as they now exist, and also including what is known as the South Side line, the North End line, and the Beechwood line. In order to understand

the controversy it is necessary to state that the defendant company operates what is known as the inner loop and outer loop, both of which are wholly within the corporate limits, and there is no contention but that the compensation required to be paid is to be based upon the total receipts from these lines. In addition to this the company operates what is known as the South Side line, the North End line, and the Beechwood line, each of which is partly within and partly without the city limits. It also operates an interurban line extending from the city of Parkersburg to the city of Marietta, in the state of Ohio, which, it will be observed from the provision above quoted, is excluded from the calculation. The traction company's contention is that, as to the North End line, the South Side line, and the Beechwood line, the receipts therefrom should be divided in the proportion that the mileage of each of said lines within the city and without the city bears to the total mileage, and the city's percentage calculated only upon that part thus determined to have been earned within the city, while the city's contention is that by the language of the franchise it is entitled to collect the percentage stipulated upon the total receipts from these lines, regardless of whether they are within or without the city limits. The defendant cites some authorities to the effect that, where a franchise provides for the payment of a stipulated percentage of the receipts of a street railway company in consideration of a grant to it of the right to use the city streets, it will be held that it was the intention to limit such compensation to a percentage of the receipts produced from the lines operated under the grant, and in case such lines are operated in connection with others, such receipts will be determined by dividing the total receipts of the company between the lines operated within the city and without the city upon the basis of the miles of track operated within and without, and the city's percentage calculated upon the receipts thus determined to have been earned by the mileage operated within the city. Those decisions would be pertinent if the franchise simply granted to the defendant, or its predecessor, the use of the city streets in consideration of the payment of a certain percentage of its receipts. It might then be held under the authority of the decisions cited by the defendant that it was the intention of the council in granting the franchise to include only the receipts from tracks operated within the city limits. We cannot construe the language used in this franchise as having that meaning. It will be observed that the franchise provides for the payment of the stipulated percentages upon the lines operated wholly within the city limits. If it was the intention to limit the compensation to a percentage of the receipts from lines wholly within the city limits, no further provision

need have been made, but the contract goes further, and says that, in addition to the lines operated within the city limits, there shall be paid the same percentage upon the gross receipts of the other mentioned lines, expressing in our view a clear intention to include not only a percentage of the gross revenue derived from the operation of tracks within the city, but a percentage of the gross revenue of the other lines mentioned whether entirely within the city or not. To give the contract the construction contended for by the defendant would make a large part of the language meaningless, and we are not to assume that the parties when they entered into this contract did not intend that all of the language used by them was to be given its ordinary meaning. It is contended that it is not to be assumed that the city intended to collect revenue from earnings of the company derived from lines outside of the city. This argument is without force, for the reason that this is not revenue collected for the use of streets or roads outside the city, but the consideration for this payment is the use of the city's streets granted by the franchise, and there is no reason why the amount of the compensation to be paid for the use of these streets cannot be measured by any standard to which the parties may agree. They agreed that the amount of this compensation should be measured by a certain percentage of the receipts from the lines wholly within the city and certain other lines partly within and partly without the city. No reason is perceived why this could not be done. It furnished a reasonably accurate and convenient means of arriving at the compensation to be paid. There is no inhibition against the parties setting up such a standard for measuring the compensation. They could have fixed it as a certain percentage of the receipts of railway lines entirely without the city, and entirely dissociated from either of the parties, if they had found such to be a convenient method of measuring what was to be paid by the one party to the other for the use of its public streets. We think the circuit court was clearly right in the interpretation given to this language of the contract.

[2] It will be observed, however, that the contract provides that the compensation shall be 1 per cent. annually for five years from January 1, 1914; 2 per cent. annually for the second five years; 2½ per cent. annually for the next five years; and 3 per cent. thereafter until the expiration of the franchise. As before stated, the franchise was accepted on the 7th of August, 1913. The circuit court in its decree construed this franchise to require the payment of 1 per cent. of the gross receipts to begin with the 7th of August, 1913, and this, it is contended by the defendant, was error; its contention being that the language provides that the compensation shall

not begin until the 1st of January, 1914. It seems to us that this is the clear language of the contract. It says in so many words that the 1 per cent. annually shall run for five years from the 1st of January, 1914. There is absolutely no authority in the contract for charging any percentage prior to that time. The contract does not specify that anything is to be paid before that, but it does clearly say that the compensation for the grant of the franchise, so far as it is made up of a percentage of the gross receipts, shall begin from the 1st of January, 1914. This being true, we think it was error to decree against the company for 1 per cent. of its gross receipts prior to January 1, 1914. It appears from the record that the amount of the gross receipts for the period beginning with the 6th of August, 1913, and ending with the 31st of December, 1914, was \$175,693.16. It further appears that the gross receipts for the year ending December 31, 1914, was \$122,227.24. The court in its decree allowed 1 per cent. on the \$175,693.16, or \$1,756.93, when it should have allowed 1 per cent. on \$122,227.24, or \$1,222.27. Deducting from this the amount paid by the company for that period, to wit, \$1,011.20, would leave a balance due by the company to the city for the year ending December 31, 1914, of \$211.07 instead of \$745.73, as decreed; and adding to this interest to the date of the court's decree, January 27, 1919, would make a total which should have been decreed of \$262.78 instead of \$927.76.

We will correct the decree entered by the circuit court in this regard, and as thus modified affirm the same, with costs to the appellant.

(85 W. Va. 391)

**McKENZIE v. MACKALL.** (No. 3393.)

(Supreme Court of Appeals of West Virginia.  
Jan. 27, 1920.)

(Syllabus by the Court.)

**APPEAL AND ERROR 548(1)—EVIDENCE NOT CONSIDERED UNLESS PART OF RECORD BY BILL OF EXCEPTIONS.**

Evidence introduced upon the trial of an action will not be considered upon a writ of error, unless the same is made part of the record by proper bill of exceptions.

**Error to Circuit Court, Hancock County.**

Action of unlawful entry and detainer before a justice of the peace by J. A. McKenzie against Nora Mackall. Judgment on a verdict for plaintiff, rendered by the circuit court on appeal, and defendant brings error. Affirmed.

O. S. Marshall, of New Cumberland, for plaintiff in error.

Hart & McKenzie, of New Cumberland, for defendant in error.

RITZ, J. This writ of error brings here for review a judgment of the circuit court of Hancock county in an action of unlawful entry and detainer, begun before a justice of the peace, and taken to the said circuit court upon appeal. The judgment complained of is based upon the verdict of a jury in favor of the plaintiff, rendered by direction of the court.

The defendant in error calls our attention to the fact that the evidence taken upon the trial in the circuit court is not properly part of the record. It appears printed in the record, but nowhere is there any order making it part thereof, nor is the same in the form of a bill of exceptions, nor is it certified by the judge trying the case. As an introduction to the evidence there is a statement by the clerk that the attorney for the plaintiff in error presented the same, certified by the court reporter, and requested that it be copied into the record, which the clerk did, although he certifies that he finds no bill of exceptions or order of the court making the same a part of the record of the suit. It is well settled that, before the evidence taken upon the trial of a case can be considered as part of the record in the appellate court, it must be made part thereof by some proper bill of exceptions which must be filed by a proper order. *Bashar v. Railway Co.*, 73 W. Va. 39, 79 S. E. 1009.

It follows, therefore, that we can consider upon this writ of error only such questions as arise upon the pleadings and the judgment rendered. An examination of the summons issued by the justice, and of the orders of the court showing the trial of the case upon appeal and rendering the judgment complained of, discloses no ground for reversal. The errors assigned upon which it is sought to have a reversal are such as require for their proper determination a consideration of the evidence heard upon the trial. This we cannot do.

The pleadings, and the court's action thereon, as shown by his judgment and orders, disclosing no error, the judgment is affirmed.

(85 W. Va. 434)

**CAIN v. KANAWHA TRACTION & ELECTRIC CO.**

(Supreme Court of Appeals of West Virginia.  
Jan. 27, 1920.)

*(Syllabus by the Court.)*

**1. CARRIERS §320(26) — CARRIER DISCHARGING PASSENGERS IS BOUND TO HIGHEST DEGREE OF CARE NOT TO START CARS WHEN ANY PASSENGERS ARE IN DANGER.**

It is the duty of an electric street railway company, in stopping its car to let off and take on passengers, to see that it remains

standing a reasonable length of time for them to alight or board it with safety, and that none of them is in a position of danger before starting the car. In respect to this duty it is held to the highest degree of care.

**2. CARRIERS §320(26) — REASONABLENESS OF TIME IN STOPPING TO DISCHARGE PASSENGERS GENERALLY JURY QUESTION.**

What is a reasonable time for a street car to stop in discharging and receiving passengers depends on the circumstances of each particular case, and is generally a mixed question of law and fact for jury determination.

**3. TRIAL §143 — NUMERICAL PREPONDERANCE OF WITNESSES DOES NOT AUTHORIZE A PEREMPTORY INSTRUCTION.**

When the question at issue depends upon conflicting testimony of witnesses, and there is no established fact or circumstance, determinative of the issue, the court is not warranted, on a mere numerical preponderance of witnesses, to give a peremptory instruction.

**4. TRIAL §244(2) — INSTRUCTION SINGLING OUT EVIDENCE IS PROPERLY REFUSED.**

An instruction calling the jury's attention to a particular, uncontrolling fact or circumstance, and thereby giving it undue prominence, is properly refused.

**5. TRIAL §260(1) — REPETITION OF INSTRUCTIONS UNNECESSARY.**

It is unnecessary to repeat instructions.

Error to Circuit Court, Wood County.

Action by Charles S. Cain against the Kanawha Traction & Electric Company. Verdict and judgment for plaintiff, defendant's motion to set aside the verdict and to grant a new trial overruled, and it brings error. Affirmed.

Van Winkle & Ambler and J. W. Vander-vort, all of Parkersburg, for plaintiff in error.

Reese Blizzard, R. E. Bills, C. N. Matheny, and C. M. Hanna, all of Parkersburg, for defendant in error.

**WILLIAMS, P.** This is the second writ of error awarded in this case. A review of it on the former writ of error is reported in 81 W. Va. 631, 95 S. E. 88, and the principles therein decided settle nearly all the questions here presented. Plaintiff's evidence is not materially different on the second trial from what it was on the first, and, although the defendant has introduced some testimony in addition to what it presented before, it is only cumulative, and not decisive of the issues; hence it would not warrant the court to take from the jury, by the peremptory instruction, which was offered by defendant and refused by the court, the questions either of defendant's negligence or plaintiff's contributory negligence.

[2] In addition to the irreconcilable conflict in the testimony, the facts and circum-

stances, from which the alleged negligence of the defendant as well as the contributory negligence of plaintiff must be determined, are such as to make them mixed questions of law and fact, and therefore proper for jury determination. *Ewing v. Lanark Fuel Co.*, 65 W. Va. 726, 65 S. E. 200, 29 L. R. A. (N. S.) 487; *Foley v. City of Huntington*, 51 W. Va. 396, 41 S. E. 113; and 10 Ency. Dig. Va. and W. Va. Rep. p. 414. Plaintiff testified that he was sitting near the front end of the car when it stopped at Williamstown, the place of his destination, and as soon as the car stopped he picked up his suit case, rain coat, and umbrella, and started to the rear end of the car to alight; that, when he got out on the platform and started down the steps, he met a couple of ladies who were getting on the car, and backed out of their way to allow them to pass him; that as soon as they passed him he again started down the steps, and when he was near the bottom, perhaps on the step next to the bottom step, the car started with a jerk and threw him to the pavement and injured him. He does not say the car started with an unusual jerk, but that it started with the usual jerk peculiar to all electric cars on which he had traveled; that they all start with a jerk. He says he walked at his usual gait, "not so very fast or not so very slow." Two or three witnesses for the defendant say they heard some passengers warn plaintiff of the danger of trying to get off, before he reached the platform, but plaintiff says he did not hear it, and one of them, Mrs. Snodgrass, swears she met him in the aisle and warned him that the car was moving. Plaintiff is dull of hearing, and swears he did not hear the warning, if any was given, and he contradicts Mrs. Snodgrass respecting his location when the car started, and says it did not start until he had started down the steps and was near the bottom step. The jury are the sole judges of the credibility of the witnesses, and they had a right to accept plaintiff's testimony in preference to that of the other witnesses. Mrs. Snodgrass is contradicted, as to plaintiff's location, not only by his own testimony, but also by that of the motorman, who says that, before starting the car, he looked back and did not see plaintiff in the aisle or on the platform; that he saw two or three ladies in the aisle, and could have seen plaintiff if he had been there.

[3] This evidence tends to corroborate plaintiff respecting his location on the steps when the car started. The court could not take the question from the jury on the mere numerical preponderance of witnesses. *Harman v. Appalachian Power Co.*, 77 W. Va. 48, 86 S. E. 917. Mrs. Snodgrass was not a witness at the former trial, and stated, as an excuse for her absence, that she was sick, but on cross-examination admitted she had not been summoned to the first trial. Plain-

tiff's contention is, as supported by his testimony, that the car did not stop a reasonable length of time to allow him to alight in safety by the exercise of reasonable diligence. He was then between 68 and 69 years of age, incumbered with a suit case, a rain coat, and umbrella, which no doubt tended, in some measure, to impede his progress. He does not attempt to fix the length of time the car had stopped, otherwise than by saying it did not give him time to walk from the front of the car back to the platform and down the steps to the pavement, by the exercise of reasonable diligence. On the other hand, some of defendant's witnesses fix the time of the stop at about two minutes; two of defendant's servants, the conductor and motorman, so fix the time. Defendant's line crosses the Baltimore & Ohio Railroad tracks immediately beyond the point where the stop was made, and the front of the car was about 10 or 12 feet from the Baltimore and Ohio tracks when it stopped. A rule of the defendant company required the conductor, before allowing his car to pass over the tracks, to go before it and see that the way was clear. He did so on this occasion, and, when he had reached the center of the tracks and saw there was no danger, he signaled the motorman to come forward. He testified that he assisted the passengers to alight and others to board the car, before going forward, and that he observed no one in the act of getting off when he left the car. The car is 53 feet in length, in the clear, and, the distance of the front of it from the Baltimore & Ohio tracks being 12 or 15 feet, the conductor was required to walk a distance of from 65 to 68 feet, before he gave the signal to the motorman to start, whereas plaintiff had only to walk hardly the full length of the car, descend the steps, and alight in the same length of time. But having to stop and move back after he had reached the platform and started to descend the steps, in order to allow the two ladies to pass him, according to his evidence, and being burdened with a suit case, rain coat, and umbrella may have so retarded his progress, that more time was necessary for him to alight than was required for the conductor to reach the railroad tracks and signal the motorman, and considering that the jury may not have accepted the conductor's testimony as true, wherein he says he remained to assist the passengers off and then others on the car before leaving it, which they had a right to do in view of the apparent discrepancy in his testimony on the two trials, the jury were justified in reaching the conclusion, which they evidently did, that the time of the stop was unreasonably short.

[1] The question what is a reasonable time, depends upon the circumstances of each particular case. It was the duty of defendant's servants to exercise the highest degree

of care to see that its passengers were given a reasonable time to alight and that none of them was in a position of danger before starting the car. There is no established and controlling fact or circumstance to overcome plaintiff's testimony, which is sufficient to support the verdict. As we view it, the question at issue depends solely upon conflicting testimony of witnesses. In their brief, counsel for defendant lay much stress upon the admitted fact that plaintiff fell with his head in the direction in which the car was going, and the established fact, undisputed, that he landed on the pavement from 8 to 10 feet forward of the place where the rear end of the car was before it was started. These circumstances, they insist, conclusively show plaintiff's theory to be false, because it contradicts the law of gravity. They insist that, if plaintiff's testimony is true, his feet would have been in the opposite direction and he would have fallen where the car stood. But plaintiff does not say that he was on the bottom step, but on the step next to the bottom, he thinks, and in view of the fact that the steps are narrow and steep, 11 inches high and 3 in number, and protected on either side, the sudden jerk may have first thrown his body against the rear guard and then forward against the car, before throwing him off, in which case his body would naturally be carried forward. This is highly probable, and very likely the theory entertained by the jury as a proper explanation of the manner in which he fell.

If plaintiff was so near the bottom of the steps when the car started and thought he would be subjected to greater danger by remaining there than to try to step off, whether he was guilty of negligence in attempting to do so was a question for the jury, even according to defendant's theory of the case that he voluntarily stepped off after the car was in motion.

The former opinion in this case, and the principles announced in *Normile v. Traction Co.*, 57 W. Va. 132, 49 S. E. 1030, 68 L. R. A. 901, and *Harman v. Appalachian Power Co.*, supra, determine most of the questions presented.

The principal argument in brief of counsel for defendant is based on the refusal of the court to give a peremptory instruction for defendant, based on the ground, either that no negligence on the part of defendant is established, or that the verdict is contrary to the great weight of the evidence, and these points we have disposed of. But defendant complains also of the giving of plaintiff's instructions Nos. 1, 3, 7, and 8. The only objection urged against Nos. 1 and 3 is that they are abstract. We do not think this criticism is good; but, even if it were, we can clearly see that the jury could not have been prejudiced by them. Nos. 7 and 8 are the same as plaintiff's Nos. 2 and 8, which

were given on the former trial, with only a slight modification to answer the criticism of them in the former opinion. As given at the first trial, they told the jury that it was negligence to start the car "without warning," and this court expressed the opinion that the phrase, "without warning," might have misled the jury to believe that some direct, personal warning to plaintiff was necessary, and to meet that criticism they were amended so as to read, "without warning of some kind." The sounding of the gong is the only warning which defendant gave, and the jury may have believed, as they had a right to do from the testimony of the motorman, that the starting of the car was instantaneous after ringing the gong, and therefore was of no service to plaintiff as a warning, even if they believed it was sounded, which is disputed.

[4, 5] The refusal of the court to give defendant's instructions Nos. 3, 7, 8, 9, 10, 11, and 14 is also assigned as error. All of them are fully covered by others which were given, except No. 9, and it was properly refused because it would have been confusing and misleading. It would have told the jury that, if they believed the conductor waited at the rear steps a reasonable time, until some passengers had gotten off and others had gotten on, and "until no other passenger was apparently attempting to get off or board said car," he had the right, and it was his duty, to leave the car, and go forward to the Baltimore & Ohio Railway Company's tracks, and see that the way was clear, and "there was no negligence on the part of the conductor under such facts and circumstances in leaving the car." This instruction would lay too much emphasis upon a single uncontrolling fact and thereby confuse the jury as to the main issue. The conductor may not have been negligent in leaving the car, even if he left before any of the passengers had gotten off or on it. The negligence consisted, not in leaving the car, but in signaling it to start before plaintiff had a reasonable time to alight.

The refusal of the court to admit as evidence photographic copies of three affidavits, certified by the Commissioner of Pensions as being photostats of originals filed in his office, by plaintiff when he applied for a pension on account of alleged disabilities resulting from military service in the Civil War, is complained of. They were offered to contradict plaintiff's testimony respecting the nature and severity of the injury complained of, as resulting from defendant's negligence. On cross-examination he admitted making the affidavits, and defendant's counsel questioned him at length respecting the matters therein alleged. They would have tended to prove no more than plaintiff admitted; hence it was not error to exclude them.

For the foregoing reasons, the court properly overruled defendant's motion to set aside the verdict and grant it a new trial, and we affirm the judgment.

(85 W. Va. 423)

STATE ex rel. BOETTE v. NEWMAN, Police Judge. (No. 4040.)

(Supreme Court of Appeals of West Virginia. Jan. 27, 1920.)

*(Syllabus by the Court.)*

1. PROHIBITION  $\S$  13—WRIT WILL NOT GO AGAINST TRIAL JUDGE WHERE COURT IN WHICH JUDGMENT WAS RENDERED DOES NOT ATTEMPT AFTER APPEAL TO ENFORCE IT.

When the judgment of an inferior court which is alleged to have exceeded the bounds of its jurisdiction, in taking cognizance of a case and rendering the judgment, has been transferred to another court by an appeal, and the court in which the judgment was rendered no longer attempts to enforce it, the writ of prohibition will not be awarded against the judge thereof.

2. PROHIBITION  $\S$  13—WRIT WILL NOT GO TO REVIEW JUDICIAL PROCEEDING THAT HAS ENDED.

Prohibition is a preventive remedy, and cannot be successfully invoked for review, annulment, rescission, or abrogation of a judicial proceeding that has been fully completed and ended.

Original prohibition by the State, on the relation of H. O. Boette, against L. D. Newman, Police Judge. Rule discharged, and writ refused.

H. H. Darnall and F. W. Riggs, both of Huntington, for relator.

O. J. Deegan, of Huntington, for respondent.

POFFENBARGER, J. [1, 2] The relief sought here is prohibition of enforcement of a judgment founded upon a charge and conviction of violation of a Sunday closing ordinance of the city of Huntington, upon the ground of alleged invalidity of the ordinance, it being contended that the passage thereof was an act in excess of the powers vested in the city by its charter, at the date of its passage.

As the plaintiff here, before the filing of his petition or award of the rule, took an appeal from the judgment rendered by the respondent, the judge of the police court of the city of Huntington, to the common pleas court of Cabell county, whereby the claim of jurisdiction of the former court over the proceeding and the judgment was terminated, the writ cannot be awarded, nor can any of the numerous questions argued be decided on this application. Prohibition never goes to undo a

thing that has been completely done and ended. Hall v. Norwood, Siderfin, 185; United States v. Hoffman, 4 Wall. 158, 18 L. Ed. 354; Hull v. Shasta County Superior Court, 63 Cal. 179; Spelling, Extraordinary Relief, § 1720. By the appeal, the case was completely withdrawn from the actual or pretended jurisdiction of the police judge, and his functions in the matter had then been fully performed and ended. Dunbar v. Dunbar, 5 W. Va. 567; State v. Harness, 42 W. Va. 414, 28 S. E. 270; McLaughlin v. Janney, 6 Grat. (Va.) 609. He is now powerless to enforce his judgment, and it would be futile and idle to prohibit him from performance of an act he cannot do and is no longer attempting to do. The case is now wholly in the hands of another court against which no writ is sought. For all that appears here, it may reverse the judgment and dismiss the proceeding.

For the reason stated, the rule will be discharged, and the writ refused.

(85 W. Va. 470)

LEMMON v. SCAGGS. (No. 3885.)

(Supreme Court of Appeals of West Virginia. Feb. 8, 1920.)

*(Syllabus by the Court.)*

TAXATION  $\S$  628, 688, 734(7)—DELINQUENT LIST, UNLESS SWORN TO, VOID AND VERIFICATION ON FOLLOWING DAY IS OF NO EFFECT.

A delinquent list of lands, to be valid, must have the affidavit of the sheriff thereto, required by statute, when acted on by the county court; otherwise the tax sale and deed depending thereon are void; and such fatal defect is not cured by the action of the officer in verifying such return on a subsequent day, after the court has adjourned.

Appeal from Circuit Court, Wayne County.

Suit by R. B. Lemmon against Fisher F. Scaggs. From a decree in favor of defendant, plaintiff appeals. Reversed and remanded, with directions.

Dillon & Nuckolls, of Fayetteville, for appellant.

J. M. Rigg, of Wayne, and Meek & Renshaw, of Huntington, for appellee.

MILLER, J. The object of plaintiff's bill is to remove as a cloud upon his title to lots numbered twenty-four (24) and twenty-five (25) in the town of Westmoreland, Wayne County, a certain tax deed, made by Sam J. Crum, clerk of the county court of said county, to the defendant Fisher F. Scaggs, dated December 12, 1917, recorded in Deed Book No. 105, page 375, which lots, the bill alleges, the sheriff of said county, on December 11, 1916, pretended to sell as delinquent for the

non-payment of the taxes thereon for the year 1914, and at which sale the defendant Scaggs was the purchaser thereof for the sum of \$7.08.

Several grounds for relief are alleged and relied on, the first and foremost of which is, that there was no delinquent return by the sheriff of said county for the year 1914 warranting the sale and conveyance of said lots for the taxes charged and chargeable thereon for that year.

The delinquent list referred to and exhibited with the bill, and alleged therein to be void, and the only one relied on by defendant as the basis of his right and title to said lots, purports on its face to have been sworn to by John S. Billups, Sheriff, June 26, 1915. The delinquent list called for and allowed by the order of the county court entered June 25, 1915, was one purporting to have been then sworn to by Billups, Sheriff, and three of his deputies. The order of the county court, entered June 25, 1915, is as follows:

"At a special session of the County Court of Wayne County, West Virginia, held at the Court House thereof on Friday, June 25, 1915. R. S. Sansom, President, C. M. Fraley and H. W. Thompson, Commissioners.

"This day the Court completed its examination of the list of real estate and personal property, delinquent for the non-payment of taxes thereon for the fiscal year of 1914, verified by the affidavit of *John S. Billups, S. W. C. and James Williams, Robert Adkins and Hartley Ferguson, his Deputies*, appended thereto which said list being found correct is therefore allowed, a recapitulation of which is as follows."

But the record contains no recapitulation. Immediately after this order is the following:

"Ordered that this court do now adjourn until Monday, July 5, 1915."

A delinquent list such as is called for by said order of June 25, 1915, has not been produced. The delinquent list purporting to have been sworn to by said Billups, Sheriff, on June 26, 1915, has endorsed on it by the clerk the following:

"West Virginia, SS: At a County Court held for the County of Wayne at the Court House thereof on Saturday the 26th day of June, 1915. This day John S. Billups, Sheriff of this County, presented to the Court a list of real estate which is improperly placed on the Assessor Books or is not ascertainable with the amount of Taxes charged on such property for the year 1914. Verified by his affidavit thereto appended, which said list being examined by the Court, and found to be correct is therefore allowed. A copy. Teste: Sam J. Crum, Clerk of County Court."

But as the record shows the court adjourned on June 25, to July 5, after considering a delinquent list then before it, and identified as having been sworn to by Billups and his

three deputies, manifestly the court was not in session on June 26, and if it could have been the order just referred to shows no action on a delinquent list. As a matter of fact the record shows that no such order as purports to be endorsed and attested by said clerk, nor any order, was entered by the court on June 26, 1915. A certified copy from the Auditor's Office, corresponding with the record of the county court, shows no delinquent return from said county for the year 1914 sworn to on or before June 25, 1915, and the sheriff on the witness stand swears that the return purporting to have been verified by him on June 26, 1915, is the only one made up and returned by him. So that taking the record as presented, we must hold that if the delinquent return relied on was actually before the county court on June 25, 1915, and the court then undertook to act thereon, when it was not sworn to by Billups nor by Billups and his deputies as stated, this was a grave omission.

But does this omission amount to a mere error or irregularity, curable after deed by section 25 (sec. 1084) of chapter 31 of the Code? We think not.

We have heretofore decided, not once but thrice at least, that a list of delinquent lands must have the affidavit required by statute when acted on by the county court, otherwise the tax sale and deed resting on it are void. *Plaster v. Harmon*, 70 W. Va. 634, 74 S. E. 905; *Wilkinson v. Linkous*, 64 W. Va. 205, 61 S. E. 152; *Devine v. Wilson*, 63 W. Va. 409, 60 S. E. 351. The fact that the delinquent list may have been sworn to by the sheriff the day after the order and action of the county court thereon is as fatal to the validity of the return as if sworn to a month or more after such action. The statute must be substantially complied with before such action is taken. A return not so sworn to, is no return. Without a valid return no title passes by the subsequent proceedings.

As the conclusion reached on the delinquent return is conclusive of the rights of plaintiff, we think it unnecessary to respond to the several other questions presented and argued.

We are therefore of opinion to reverse the decree below, and to remand the cause with directions to ascertain the amount of the taxes paid by defendant for said lots at said tax sale, and all taxes paid by him on said property since then, together with the costs of any survey and report made to the clerk of the county court, with interest thereon as provided by law, and upon the payment thereof by plaintiff, as proposed and tendered by his bill, to cancel and set aside as a cloud on his title the tax deed complained of, and to award him a writ of possession, if possession has been acquired by defendant.

(85 W. Va. 485)

**PATTON v. EICHER et al.** (No. 3862.)(Supreme Court of Appeals of West Virginia.  
Feb. 8, 1920.)*(Syllabus by the Court.)*

1. COURTS  $\S$ 18—QUIETING TITLE  $\S$ 31 —  
STATE MAY DETERMINE TITLE OF NONRESIDENT TO REALTY AND PROVIDE METHODS FOR IMPARTING NOTICE.

The general control possessed by the state over property within its borders carries with it the power through its courts to protect titles to land situated therein against the claims of nonresidents upon whom it is impossible to obtain personal service. Though the state's process goes not out beyond its borders to bring the person of a nonresident within its jurisdiction, yet it may determine the extent of his title to real estate within its limits, and, for the purpose of such determination, may provide any reasonable methods of imparting notice.

2. QUIETING TITLE  $\S$ 31, 52—CIRCUIT COURT MAY DETERMINE TITLE TO LAND AS AGAINST NONRESIDENT DEFENDANT AND GRANT RELIEF BY DECREE IN REM.

The circuit court of the county wherein the land lies has jurisdiction, on order of publication, to hear and determine the claim of a plaintiff that a nonresident defendant holds title to such land as trustee for the benefit of the plaintiff and subject to his right to have conveyance thereof made to him pursuant to the agreement alleged to exist between them. And if, upon full and satisfactory proof, it determines the right to exist as plaintiff alleges, the court may grant relief by a decree in the nature of a decree in rem, appointing a special commissioner to convey the legal title.

3. APPEARANCE  $\S$ 19(3) — APPEARANCE TO CHALLENGE JURISDICTION IS NOT A SUBMISSION TO JURISDICTION.

A defendant who appears in a cause for the special purpose of making a motion challenging the jurisdiction of the court in which such cause is pending does not thereby submit to such jurisdiction, whether his motion does or does not prove to be well founded.

**Appeal from Circuit Court, Ohio County.**

Proceedings by T. H. Patton against C. Ward Eicher and others to quiet title. The bill was dismissed for want of jurisdiction, and plaintiff appeals. Reversed and remanded.

Hubbard & Hubbard, of Wheeling, for appellant.

J. M. Ritz, of Wheeling, for appellees.

**LYNCH, J.** This writ prosecuted by plaintiff below brings here for review the decree of the circuit court of Ohio county dismissing his bill for want of jurisdiction of the subject-matter of the suit and of the persons of the defendants, neither of whom resides in this state and to whom the only notice of the pendency of the suit was by a duly ex-

ecuted order of publication. The material allegations of the bill are: That prior to February 23, 1917, plaintiff was the owner of an undivided one-third interest in 1,553 acres of coal land situate in Ohio county, W. Va., which was subject to the lien of a deed of trust executed by plaintiff in 1911 to defendant Cecil E. Heller, trustee, to secure payment of a bond issue aggregating \$18,000; that defendant was unable to pay said indebtedness at its maturity on February 15, 1916, whereupon sale of plaintiff's property was advertised by the trustee for February 23, 1917; that on the day immediately preceding the sale the plaintiff, feeling confident of the immediate consummation of negotiations for a private sale of certain other coal land owned by him in Washington county, Pa., likewise subject to the same lien, at a price more than sufficient to pay off the entire indebtedness, apprised Heller of such negotiations, and they agreed between themselves that the latter should formally offer the Ohio county property for sale in accordance with the advertisement, and bid it in at the price of \$5,000, and reconvey to plaintiff the title thereto upon his payment of the entire indebtedness when the private sale of the Washington county coal property was perfected, and an additional \$1,000 to compensate the trustee for the services occasioned by the agreement; that, accordingly, the trustee proceeded to and did make such sale, and bid in the property at the price stipulated by them, but in the name of defendant C. Ward Eicher, his personal friend, business partner, and professional associate, who had full notice and knowledge of the agreement; that the property so sold was then worth approximately \$50,000; that by deed dated February 27, 1917, the trustee conveyed said property to Eicher; that the private sale of the Washington county coal land was delayed in consummation, but that plaintiff had procured other parties who were ready to take an assignment of plaintiff's indebtedness, pay the trustees the balance due thereon, and accommodate plaintiff by extending the time for payment thereof and to pay the trustee or Eicher the said sum of \$6,000 for a conveyance of the Ohio county coal and mining rights, pursuant to said agreement; that such persons, at the instance of plaintiff, offered such payments to the trustee and to Eicher, but each of them refused to accept the money and reconvey the property; that the plaintiff had at all times thereafter been able, willing, and ready, and here offers, to pay to the defendants or either of them the \$6,000 or such other amount as the court may deem proper, for the redemption of the property so sold; that the trustee on June 30, 1917, sold part of plaintiff's Washington county property and received at said sale a price sufficient to pay the remainder of his indebtedness; and



that defendant Eicher now fraudulently asserts that he is the unconditional owner of the Ohio county property, free and discharged from any trust in favor of plaintiff.

The prayer of the bill asks that defendant Eicher be adjudged to hold title to the above-mentioned coal lands as trustee for the benefit of the plaintiff and subject to the right of the plaintiff to have conveyance thereof made to him or his assigns upon payment of \$6,000 or other proper compensation.

Defendants, evidently intending to avoid subjection of their persons to the jurisdiction of the court, "appeared specially . . . for the sole and only purpose of moving to dismiss said suit on the ground that it appears from the face of the record that the court does not have jurisdiction of the subject-matter of said suit, or of the persons of the defendants." This motion the court sustained and dismissed the bill.

Plaintiff relies for reversal upon two propositions: (1) That this is a suit in rem in which the court can and should enter a valid decree upon constructive service; (2) that by uniting in a motion questioning the court's jurisdiction of the subject-matter and of the persons of the defendants the latter have entered a general appearance.

[1] With respect to the first proposition there can be but little doubt, in view of the decisions of this and other courts upon similar questions. The situation here involved and the relief sought are analogous in many ways to suits to quiet titles and to remove clouds therefrom. The questions so raised and principles so involved are controlled by the third clause of the first section of chapter 123 of the Code, which confers jurisdiction upon the circuit court of Ohio county to entertain the suit, the land being therein, and discussed fully in *Tennant's Heirs v. Fretts*, 67 W. Va. 569, 68 S. E. 387, 29 L. R. A. (N. S.) 625, 140 Am. St. Rep. 979, and *Birch v. Covert*, 99 S. E. 92, which assert the power of the state through its courts to protect titles to land situate within its borders against the claims of nonresidents upon whom it is impossible to obtain personal service. The theory upon which service by publication rests in cases analogous to this is nowhere better expressed than by the Supreme Court of the United States in *Arndt v. Griggs*, 134 U. S. 316, 320, 10 Sup. Ct. 557, 559 (33 L. Ed. 918):

"If a state has no power to bring a nonresident into its courts for any purposes by publication, it is impotent to perfect the titles of real estate within its limits held by its own citizens; and a cloud cast upon such a title by a claim of a nonresident will remain for all time a cloud, unless such nonresident shall voluntarily come into its courts for the purpose of having it adjudicated. But no such imperfections attend the sovereignty of the state. It has control over property within its limits; and the condition of ownership of real estate there-

in, whether the owner be stranger or citizen, is subjection to its rules concerning the holding, the transfer, liability to obligations, private or public, and the modes of establishing titles thereto. It cannot bring the person of a nonresident within its limits—its process goes not out beyond its borders—but it may determine the extent of his title to real estate within its limits; and for the purpose of such determination may provide any reasonable methods of imparting notice."

For the varied application of this principle, see 4 *Pomeroy's Equity Jurisprudence* (4th Ed.) § 1436. The case there cited of *Porter Land & Water Co. v. Baskin* (C. C.) 43 Fed. 323, is closely similar to this.

[2] But it is appellees' contention that a case of this character, involving personal transactions between the parties, is quite different from one where the right asserted rests upon written evidence. Of course, the nature of the proof required in one case may differ materially from that necessary in another. But if the right exists, the nature of the proof offered to establish its existence can make no difference other than by prompting the court always to require of plaintiff a full, clear, and adequate establishment of the claim he asserts. When not evidenced by writing and where in such case the evidence is ambiguous or vague or dependent upon oral conversations, the court should examine carefully the character of the proof submitted to show the right to such relief.

[3] Respecting the question whether defendants have entered a general appearance in the cause, we are disposed to give a negative answer. If they had restricted their motion to one challenging only the jurisdiction of the court over their persons because of nonservice of process upon them, there could have been no doubt in the matter; for it is generally held that a special appearance by a defendant for the purpose of denying the jurisdiction of the court over his person or property does not subject him to the general jurisdiction of the court. *United States Oil & Gas Well Supply Co. v. Gartlan*, 65 W. Va. 689, 64 S. E. 933; *Lebow v. Rope Co.*, 81 W. Va. 21, 93 S. E. 939; *Big Vein Coal Co. of West Virginia v. Reed*, 229 U. S. 31, 33 Sup. Ct. 694, 57 L. Ed. 1053; *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 38 Sup. Ct. 65, 62 L. Ed. 260, L. R. A. 1918C, 497, Ann. Cas. 1918B, 461; 4 C. J. 1368. However, the defendants did not so restrict their motion, but broadened it to include also a challenge to the jurisdiction of the court over the cause of action. Many cases hold that a defendant may appear specially only for the purpose of denying the court's jurisdiction over his person, and that, if he also challenges its jurisdiction over the cause of action, he waives want of service and enters a general appearance in the cause and submits himself to the personal jurisdiction of the court. 4 C. J. 1333, note 2, and cases cited.

We are not disposed, however, so to limit the right of a defendant. When he challenges the jurisdiction of the court over the cause of action, he is taking no step involving the merits of the case, none bearing any substantial relation to the cause. His objection is merely preliminary. He has not assumed the rôle of actor in the cause as yet, the test recently adopted by the United States Supreme Court in *Merchants' Heat & Light Co. v. Clow*, 204 U. S. 286, 27 Sup. Ct. 285, 51 L. Ed. 488, for he merely questions the right of the court to proceed with its hearing of the cause. A court acquires personal jurisdiction over a defendant only by service of its process upon him summoning him to appear, or by his voluntary general appearance in the absence of service. Respecting the latter this court has said:

"A general appearance must be express or arise by implication from the defendant's seeking, taking or agreeing to some step or proceeding in the cause, beneficial to himself or detrimental to the plaintiff, other than one contesting the jurisdiction only." *Fulton v. Ramsey*, 67 W. Va. 321, pt. 3, Syl., 68 S. E. 381, 140 Am. St. Rep. 969.

In view of these facts, it cannot fairly be said that defendants have entered a general appearance in the cause such as subjects them to the personal jurisdiction of the court. One of the purposes of their special appearance was to deny such personal jurisdiction over them. The part of the motion challenging the court's jurisdiction over the cause of action, though not well founded, was likewise preliminary and jurisdictional, involving the right of the court to sit in such a cause. There was no conduct on their part from which could be inferred or implied a recognition of the jurisdiction of the court over them. Every action contradicted it. Hence we hold that their appearance was special, not general, and that they did not submit themselves to the personal jurisdiction of the court. *Citizens' Savings & Trust Co. v. Ill. Cent. R. Co.*, 205 U. S. 46, 27 Sup. Ct. 425, 51 L. Ed. 703.

Our order, therefore, will reverse the decree and remand the cause.

(85 W. Va. 493)

#### IRONS v. BIAS. (No. 3978.)

(Supreme Court of Appeals of West Virginia.  
Feb. 3, 1920.)

(Syllabus by the Court.)

**BANKRUPTCY — 287(3) — TRUSTEE CANNOT SUE IN EQUITY TO RECOVER UNLAWFUL PREFERENCE, WHERE REMEDY AT LAW ADEQUATE.**

The remedy at law being adequate, equity is without jurisdiction to entertain a suit brought

by a trustee in bankruptcy solely to recover back money unlawfully paid by the insolvent debtor to one of his creditors in preference to others, in violation of the federal Bankruptcy Act (U. S. Comp. St. § 9585 et seq.). Section 2, c. 74, Code W. Va. 1918 (Code 1913, § 3830), has no application in such case.

#### Appeal from Circuit Court, Cabell County.

Suit by Harry S. Irons, trustee in bankruptcy of A. R. Stealey, against H. W. Bias. Decree for plaintiff, and defendant appeals. Reversed, and bill dismissed.

D. B. Daugherty, of Huntington, for appellant.

Livezey & Irons, of Huntington, for appellee.

**WILLIAMS, P.** This suit in chancery was instituted by Harry S. Irons, trustee in bankruptcy of A. R. Stealey, against H. W. Bias, to recover from said Bias \$4,316, evidenced by two checks which were indorsed and transferred by said Stealey to said Bias, within less than four months before said Stealey was adjudged a bankrupt, and which, the bill alleges, said Bias received when he knew, or had reasonable grounds to believe, that said Stealey was insolvent, and that said assignment was made with the intent of giving the said Bias a preference over the other creditors of said Stealey, contrary to the provisions of the act of Congress relating to bankruptcy. The bill also alleges that said Bias received the money on the checks and has converted the same to his own use.

Defendant demurred to the bill and, not waiving his demurrer, answered, admitting the receipt of the checks from Stealey and the collection of the money thereon as alleged in the bill, but denied that he received them with the intent of thereby obtaining a preference over said Stealey's other creditors, and denied also that he knew or had any cause to believe, at that time, that said Stealey was insolvent.

The demurrer appears not to have been directly passed upon, but the case was heard upon bill, answer, and replication thereto, and depositions taken on behalf of the respective parties, and a decree was rendered in favor of plaintiff for \$3,316, and from that decree the defendant has appealed.

The demurrer was in effect overruled by the final decree, rendered in favor of plaintiff. *Hinchman v. Ballard*, 7 W. Va. 152; *Le Sage v. Le Sage*, 52 W. Va. 323, 43 S. E. 137; and *Sizemore v. Lambert*, 78 W. Va. 243, 88 S. E. 839.

But two questions are presented; the first relating to the jurisdiction of the court, and the second, whether the evidence is sufficient to justify the decree. If the first is decided against the jurisdiction, the second question

is eliminated; for, if equity had no jurisdiction to entertain the bill, this court has no jurisdiction to consider the merits upon appeal. The bill clearly shows that it is filed to recover back money paid by an insolvent debtor to one of his creditors, thereby intending to give him a preference over his other creditors, in violation of the federal Bankruptcy Act. The suit being simply one to recover back money, unlawfully paid in violation of the federal statute, it is clear plaintiff has an adequate remedy at law. This is decided in *Maxwell, Trustee, v. Davis Trust Co.*, 69 W. Va. 276, 71 S. E. 270, a similar case, in which point 5 of the syllabus reads as follows:

"Equity does not have jurisdiction of cases in which the plaintiff has a full, complete, and adequate remedy at law, unless some peculiar feature of the case comes within the province of a court of equity."

The bill here seeks only the recovery of money. Counsel for plaintiff, however, contends that the jurisdiction is sustained by section 2, c. 74, Code of W. Va. But that statute itself furnishes a sufficient answer to the contention, for in terms it excepts from its operation securities assigned in payment of debts, by providing:

"That nothing in this section contained shall be taken to affect any transfer of bonds, notes, stocks, securities or other evidences of debt in payment of or as collateral security for the payment of a bona fide debt or to secure any indorser or surety whether such transfer is made at the time such debt is contracted or indorsement made or for the payment or security of a pre-existing debt."

Accordingly, the assignment of the checks, which were evidence of debt, by *Stealey to Blas*, was permissible and lawful, whether the debt thereby paid was pre-existent or presently contracted, and no suit to recover it, or any part of it back, either in equity or in a court of law, could be maintained. The suit is clearly one brought under the federal Bankruptcy Act, and the jurisdiction depends solely upon the question whether plaintiff has an adequate and complete remedy at law. We think he has. There was no transfer to be set aside and no trust to be declared, no relief prayed for that a court of law was not as competent to give as a court of equity, and hence the well-recognized rule, subject to few exceptions, which have no application here, applies, that equity has no jurisdiction where the law affords an adequate and complete remedy. We therefore hold that equity had no jurisdiction to entertain the suit, and that the demurrer should have been sustained and plaintiff's bill dismissed without prejudice, and such will be the order of this court.

Decree reversed, and bill dismissed.

## ICE v. BARLOW.

ICE et al. v. SAME.

(Nos. 108-A, 108-B.)

(Supreme Court of Appeals of West Virginia.  
Feb. 3, 1920.)

*(Syllabus by the Court.)*

USURY  $\Rightarrow$  92, 102(6)—EQUITY HAS JURISDICTION OF SUIT TO RECOVER USURIOUS INTEREST WITHOUT PRAYER FOR DISCOVERY.

Independent of section 7, c. 96, Code 1918 (Code 1913, § 4166), and concurrently with courts of law, equity has jurisdiction of a suit to recover back usurious interest paid, and in such case a prayer for discovery is not essential to the jurisdiction.

Certified Questions from Circuit Court, Randolph County.

Suit by E. Clark Ice against A. D. Barlow, and suit by E. Clark Ice and others, partners as the Elk Grove Realty Company, against A. D. Barlow. Demurrers were overruled, and the questions arising thereon certified to this court. Affirmed.

Samuel T. Spears, of Elkins, for plaintiffs.  
W. B. & E. L. Maxwell, of Elkins, for defendant.

**WILLIAMS, P.** Plaintiffs in the above-styled cases filed their respective bills in equity to recover back usurious interest alleged to have been paid. The bills set out a number of the transactions alleged to be usurious, and state the amount of usury involved in each transaction, aggregating in the first case \$4,978.08, and in the second, \$1,619.63. Neither of said bills prays for a discovery, but both do pray for an accounting. A demurrer to each of them was overruled, and the questions arising thereon are certified to this court for decision. The demurrer challenges the jurisdiction of the court to entertain the bill. Plaintiffs' counsel relies upon section 7, c. 96, Code 1918 (Code 1913, § 4166), and *Lorentz v. Pinnell*, 55 W. Va. 114, 46 S. E. 796. Defendant's counsel question the correctness of that decision, and contend that, unless some distinct ground of equitable jurisdiction is alleged, equity will not entertain a suit to recover money voluntarily paid, that a court of law furnishes a remedy which is adequate and complete, and in such case equity is without jurisdiction. Section 7, c. 96, was copied from section 7, c. 141, Code of Va. 1860. It was enacted by the Legislature of Virginia in very early times (Rev. Code, vol. 1, c. 102, § 3), and continued to be the law of that state, with very slight modification, until after the formation of this state, and our Legislature adopted it with the following modification:

That whereas the statute allowed the lender to "recover only his principal money or other thing, without interest, and pay the costs of suit," it was changed so as to permit the lender to recover his "principal money or other thing with six per cent. interest only, but shall recover no costs." The further provision was also added that—

"If property has been conveyed to secure the payment of the debt, and a sale thereof is about to be made, or is apprehended, an injunction may be awarded to prevent such sale, pending the suit."

Section 1, c. 102, vol. 1, Revised Code of Virginia 1819, voided the entire contract, and section 2 of that chapter subjected the lender to a penalty or forfeiture double the value of the money so lent, exchanged or shifted, one moiety of which was to go to the commonwealth and the other to the informer. The law of this state at no time has subjected the lender to any penalty whatever, and renders the contract void only as to the usury.

Originally the statute was evidently designed to enable the borrower to compel the lender to discover the usurious transaction, without subjecting him to a penalty; hence the statute required the borrower to do equity by returning the money borrowed, in obedience to the maxim that he who seeks equity must do equity. Other well-settled principles of equity are that it will not enforce penalties and forfeitures, nor will it compel a defendant to disclose matters that will expose him to penalties and forfeitures or to a criminal prosecution. *Northwestern Bank v. Nelson*, 1 Grat. (Va.) 108; *Young v. Scott*, 4 Rand. (Va.) 416; *Polindexter v. Davis*, 6 Grat. 481; *Thompson et al. v. Whitaker Iron Co.*, 41 W. Va. 574, 23 S. E. 795. In view of the penalty imposed by the Virginia statute for exacting usurious interest, the debtor could get no relief where a discovery was essential thereto, and hence the necessity for the statute to compel a discovery of the usury, but as a condition to granting the relief the borrower was required to waive the penalties when they were within his control, and restore to the lender his principal. The present bills being not for discovery, but to recover back usury paid, and praying for an accounting, it is unnecessary for us to decide to what extent section 7, c. 96, Code W. Va. applies, or whether it applies at all, to these

proceedings, as the jurisdiction to entertain such suits exists, independent of that statute. The exaction of usury, while, strictly speaking, not a fraud, is nevertheless regarded by courts of equity as being in the nature of a fraud, the contracting parties standing on unequal footing, with the advantage in favor of the lender, and for that reason they take jurisdiction in order to compel a restoration by the lender of the usury which he has wrongfully and unjustly exacted from the borrower; such transactions standing on a different footing from gaming transactions, wherein both parties are regarded as in pari delicto. *Story, Eq. Juris.* (14th Ed.) § 425; 2 *Pomeroy's Eq. Juris.* (4th Ed.) § 937, and cases cited in note; 2 *Robinson's Prac.* (Old Ed.) p. 221; *Hogg's Eq. Prin.* p. 596; *Bosanquett v. Dashwood*, Cases temp. Talbot, 40, 25 Eng. Reprint, 649; 22 *Encly. Pl. & Pr.* p. 466; *Lorentz v. Pinnell*, 55 W. Va. 114, 46 S. E. 796; and *Davis, Committee, v. Demming*, 12 W. Va. 246, point 3 of the syllabus of which is as follows:

"A bill in equity for relief on account of money already paid on usurious contract is not a bill under said seventh section, but such a bill as a party has a right to file, independent of the statute; and the relief therefor, to be afforded in such a case, is the relief which is afforded on the general principles of a court of equity; and the measure of this relief, in such case, is the excess paid above the principal and legal interest, with interest on such excess from the time of its payment."

In a very able and elaborate opinion prepared by Judge Green in that case, from which there was no dissent, he reviews the early Virginia decisions relating to the proper construction and application of section 7, c. 141, Code Va.; section 7, c. 96, Code W. Va., and reaches the conclusion stated in the point of the syllabus above quoted, which is unquestionably the law of this state, and determines the questions certified according to the ruling thereon by the circuit court.

The fact that plaintiffs also have an adequate remedy at law does not, in this instance, deny their right to relief in equity. The remedies being concurrent, they can choose their forum.

We therefore affirm the ruling of the court below, and order the cases certified back to it.

(149 Ga. 771)

**HILTON v. WILCOX et al.** (No. 1398.)

(Supreme Court of Georgia. Feb. 12, 1920.)

*(Syllabus by the Court.)***REFUSAL OF INTERLOCUTORY INJUNCTION.**

Under the pleadings and the evidence, the judge did not err in refusing to grant an interlocutory injunction.

Error from Superior Court, Telfair County; J. P. Highsmith, Judge.

Action for injunction by W. A. Hilton against J. C. Wilcox and others. Injunction denied, and plaintiff brings error. Affirmed.

W. B. Smith, of McRae, and S. D. Dell, of Hazlehurst, for plaintiff in error.

Gordon Knox, of Hazlehurst, for defendants in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(149 Ga. 666)

**ROANE v. McINTOSH.** (No. 1376.)

(Supreme Court of Georgia. Jan. 14, 1920.  
Rehearing Denied Feb. 14, 1920.)

*(Syllabus by the Court.)*

**1. DISMISSAL AND NONSUIT** ¶81(7)—ON PETITION AFTER NONSUIT FOR REINSTATEMENT DEPENDING ON THE EVIDENCE BRIEF OF EVIDENCE IS NECESSARY.

Where, after a judgment of nonsuit has been rendered, a petition for reinstatement is based on the grounds that the judgment is contrary to the law (the decision of which depends on the evidence) and contrary to the evidence, the filing of a brief of the evidence is essential. *City of Atlanta v. Jenkins*, 137 Ga. 454, 73 S. E. 402(2).

**2. DISMISSAL AND NONSUIT** ¶81(7)—OVERRULING OF GENERAL DEMURRER TO PETITION TO REINSTATE AFTER JUDGMENT OF NONSUIT ERRONEOUS.

Where, after such a judgment, the petition to reinstate alleges surprise on account of an amendment of defendant's plea calling for proof of a material fact, and prays for time to produce the necessary evidence, but fails to show any reason why such evidence could not have been available on the trial, or that any effort was made by plaintiff to obtain a postponement or continuance, it is error to overrule a general demurrer to the petition and to set aside the judgment and reinstate the case.

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by T. M. McIntosh against M. P. Roane. Judgment of nonsuit entered, general demurrer to petition to set aside the judgment overruled, judgment set aside, and case

reinstated, and defendant brings error. Reversed.

J. W. Mason, W. S. Dillon, and Colquitt & Conyers, all of Atlanta, for plaintiff in error.

S. G. McLendon and O. L. Pettigrew, both of Atlanta, for defendant in error.

GILBERT, J. Judgment reversed. All the Justices concur.

(149 Ga. 738)

**HODGES et ux. v. SUMMERLIN.** (No. 1334.)

(Supreme Court of Georgia. Feb. 10, 1920.)

*(Syllabus by the Court.)*

**1. LANDLORD AND TENANT** ¶331(6)—EVIDENCE IN ACTION ON CROPPING CONTRACT INSUFFICIENT TO SHOW CONTRACT OF SALE OF FARM.

The evidence authorized the finding of the auditor against the contention of the defendants, who insisted that there was a contract of sale of the premises in dispute, which was denied by the plaintiff.

**2. OVERRULING OF EXCEPTIONS TO AUDITOR'S FINDING.**

The judgment of the trial court overruling the exception to the auditor's finding upon the other issue of fact is not shown to be erroneous.

Error from Superior Court, Laurens County; J. L. Kent, Judge.

Action by A. T. Summerlin against J. O. Hodges, in which by order of the court defendant's wife was made a party defendant, and in which plaintiff and defendants prayed for an accounting, and plaintiff prayed for an injunction. Case referred to an auditor, defendants' motion to recommit granted, and their second motion to recommit denied, and defendants except and bring error. Affirmed.

A. T. Summerlin brought his petition against J. O. Hodges, alleging that in the year 1915 petitioner and defendant entered into a contract by the terms of which the defendant was to cultivate a three-horse farm on shares for petitioner, who furnished for the purpose the land, the stock, and one-half of the fertilizer; that the defendant was to cultivate the land and was to receive one half of all the crops produced, petitioner being entitled to the other half; that defendant did cultivate the land, but had not turned over to petitioner the part of the crop to which plaintiff was entitled under the contract; that the plaintiff was the owner of certain mules upon the farm in question, which were in the possession of the defendant; and that certain hogs had not been turned over to petitioner that should

have been delivered. The defendant answered that the hogs upon the premises to which the plaintiff was entitled were subject to his control and removal at his pleasure; that the crops growing upon the premises during the year 1915, which had not been divided prior to the date of the filing of the suit, were subject to the direction of the plaintiff at all times; that the mules used in operating the farm belonged to plaintiff, but that plaintiff had taken a note for the purchase money of the mules from the wife of defendant, and defendant was ready to account in full to plaintiff for all farm products, hogs, and mules. The defendant also answered that he and his wife entered upon the land in controversy as purchasers from the petitioner, and made valuable permanent improvements; that the contract between the parties provided that in any year during the farming operations the defendant and his wife could pay for the premises the agreed price of \$2,000, and upon the payment of this sum plaintiff was to execute to defendant's wife a deed conveying to them the land in question; that the time limit on this option was December 31, 1915; that the wife of defendant tendered the \$2,000 on December 15, 1915; that the tender is continuous and unconditional, and plaintiff refuses to accept it. It was prayed that the wife be made a party defendant; and an order to this effect was passed by the court. Both the plaintiff and the defendants prayed for an accounting, and plaintiff prayed for an injunction. The case was referred to an auditor, who in due course made his report containing the findings, in substance, that the plaintiff had sustained his contentions; that the relation of landlord and cropper existed between the plaintiff and defendant; that if Mrs. Hodges had an option to buy the place the contract was unilateral and unenforceable; that either party had the right to terminate the same at will; and that, if there had been such a contract as the defendants allege, it would have been necessary to tender the purchase price to the plaintiff before he elected to rescind; and that the original defendant was indebted in a stated sum to the plaintiff. To these findings the defendants filed exceptions of law and fact, and afterward they moved to recommit the case for additional report and findings, because the report was erroneous, indefinite, and confused, and mingled the findings of law and fact. The court thereupon ordered that the case be recommitted to the auditor for a more complete report, and "especially as to whether or not there was an option to purchase on the part of Mrs. Hodges growing out of the transaction between A. T. Summerlin and J. C.

and Mrs. J. C. Hodges." Afterwards the auditor filed an additional report finding:

"First, that there never existed a contract to purchase the premises described in the petition between the plaintiff and the defendant Mrs. J. C. Hodges; second, that the defendant Mrs. J. C. Hodges, at no time during the transactions or growing out of the transactions between A. T. Summerlin and J. C. Hodges and Mrs. J. C. Hodges, ever had an option to purchase the premises mentioned in the petition, as contended for by her; third, that the only contract made by the defendants or either of them was made by J. C. Hodges, touching the premises in dispute, and that contract was one solely and alone of landlord and cropper, and that neither of the defendants had an option at any time to purchase the premises in dispute during the transactions between A. T. Summerlin and J. C. and Mrs. J. C. Hodges."

After this second report was filed the defendants again made a motion to recommit, which the court denied, and the defendants filed additional exceptions.

R. E. Camp, of Dublin, and B. T. Rawlings, of Sandersville, for plaintiffs in error.  
R. M. Daley, of Dublin, for defendant in error.

BECK, P. J. (after stating the facts as above). [1] While the first report of his findings made by the auditor was open to the objection that the findings were not properly classified, and that the report was lacking in clearness, the case was recommitted to the auditor, and he thereupon made the findings set forth above, which clearly cover the issues in this case. The main question to which inquiry was necessarily directed in the hearing before the auditor was whether a contract for the sale of the lands in controversy had been made between the plaintiff on the one side and the defendants on the other. This was a clearly defined issue of fact. The plaintiff denied the existence of such a contract in his pleadings, supported this denial by his own evidence, and to some extent strengthened it by the corroborating testimony of other witnesses. It may be true that apparently from the reading of the record there was a preponderance of the evidence submitted upon this issue in favor of the defendants, but the auditor found otherwise, and his findings have the approval of the trial court. That settles the main contention in the case.

[2] The judgment of the trial court overruling the exception to the auditor's finding upon the other issue of fact is not shown to be erroneous.

Judgment affirmed.

All the Justices concur.

(149 Ga. 767)

BIRD v. TRAPNELL et al. (No. 1503.)

(Supreme Court of Georgia. Feb. 11, 1920.)

*(Syllabus by the Court.)***1. PLEADING**  $\S$ 248(4), 251—AMENDMENT DISALLOWED AS SETTING UP NEW CAUSE OF ACTION; AMENDMENT TOO INDEFINITE TO SET UP CAUSE OF ACTION.

The first offered amendment to the petition in this case was properly disallowed as setting up a new cause of action. The allegation of the second amendment, as to a contract between the plaintiff and the defendant's intestate, was too vague and indefinite as to set forth a cause of action.

**2. SPECIFIC PERFORMANCE**  $\S$ 45 — PAROL AGREEMENT FOR SERVICES OF CONVEYANCE OF LAND WILL BE DECREED WHERE PROOF OF CONTRACT IS CLEAR.

Equity will specifically enforce a parol agreement entered into between two persons, by the terms of which one is to perform certain services during the lifetime of the other, and the latter is to convey certain land at or before his death in consideration of such services, if the contract be definite and specific, based upon a full or partial performance of consideration in the way of services performed on the one side and a failure or refusal to perform on the other, and the proof of such contract be clear, strong, and satisfactory. The evidence in this case not measuring up to the rule just stated, the court did not err in granting a nonsuit.

Error from Superior Court, Candler County; R. N. Hardeman, Judge.

Action by Josiah Bird against Judson Trapnell and others. Judgment of nonsuit, and plaintiff brings error. Affirmed.

Kirkland & Kirkland, of Metter, and Hines, Hardwick & Jordan, of Atlanta, for plaintiff in error.

Johnston & Cone and Anderson & Jones, all of Statesboro, and J. Alex Smith & Son and A. S. Bradley, all of Swainsboro, for defendants in error.

HILL, J. [1] This is the third appearance of this case in this court. On the first trial a demurrer to the petition was sustained, which judgment was reversed. See *Bird v. Trapnell*, 147 Ga. 50, 92 S. E. 872. When the case was returned for trial a plea in abatement was filed by the defendants, setting up the pendency of a former suit. This plea was sustained, and that judgment also, on review in this court, was reversed, and the case remanded for trial. *Bird v. Trapnell*, 148 Ga. 301, 96 S. E. 417. When the case was last tried, at the conclusion of the evidence a motion was made for a nonsuit. Before the court ruled on the motion two amendments to the petition were filed. The first amendment alleged:

"That by virtue of the agreement between him and the said A. J. Bird, set out in paragraph 8 of the petition in this case, and by virtue of the full compliance on his part, with the terms, conditions, covenants, and agreements in said contract on his part assumed and undertaken, your petitioner and said Sarah E. Woodward became, upon the death of the said A. J. Bird on December 2, 1891, joint tenants and owners of the tract of land described in paragraph 13 of the petition in this case; \* \* \* that said Sarah E. Woodward, on the death of said A. J. Bird, by permission of your petitioner, took possession of said tract of land; received the rents, issues, and profits of said land from January 1, 1893, to the 8th day of October, 1913, of the yearly value of \$400, \* \* \* using and cultivating the same for her benefit, and excluding your petitioner from any share and part of said rents, issues, and profits; \* \* \* that if he is not entitled to all of said tract of land, which he insists he is entitled to have and recover, your petitioner submits that he is entitled to recover one-half of said tract of land, with one-half of the rents, issues, and profits thereof from January 1, 1893, up to date, his half of said rents, issues, and profits to be charged upon the one-half undivided interest of said Sarah E. Woodward in said land."

The prayer was that if it be found that the plaintiff is not entitled to recover the whole of the tract of land in controversy, he recover a one-half undivided interest in the land and one-half of the rents, issues, and profits; that the land be partitioned between the plaintiff and J. A. Woodward, or his vendee, Judson Trapnell, and that his half of the rents, issues, and profits be made up on the half interest of Mrs. Woodward. There was also a prayer for general relief.

The second amendment alleged substantially as follows: Mrs. Woodward, the widow of Andrew J. Bird, while and after she was the wife of Bird, fully recognized the agreement between the plaintiff and Bird, and often stated to various persons that the place in controversy would belong to plaintiff at her death; and she fully recognized and adopted the agreement between the plaintiff and her husband, and recognized, and often admitted, that the land in controversy belonged to plaintiff at her death, she having agreed to give her interest in said place to plaintiff in consideration of work and services rendered her in the conduct and management of her business. The prayer of this amendment was that the agreement between plaintiff and Andrew J. Bird be specifically performed, that the land be decreed to be his property, and that he recover the premises.

The first amendment was demurred to on the grounds that it set up a new cause of action, and that it was a stale demand. The second amendment was objected to on the grounds that it set up a new cause of action, and because no consideration was alleged for the contract as set out. The court

sustained the objections to the amendments and disallowed both of them, and then sustained the motion for nonsuit and dismissed the case. Each of these rulings was excepted to, and the case is here for review on those two questions.

The petition, as it was originally drawn, alleged facts under which the plaintiff sought to recover on an alleged contract with Mrs. Woodward, formerly the widow of A. J. Bird, alleging the abandonment of the old contract with A. J. Bird, the latter serving only as a consideration moving to Mrs. Bird for the new contract. See *Bird v. Trapnell*, 147 Ga. 50, 92 S. E. 872. The first amendment seeks to recover on the original contract with A. J. Bird, independently of the contract with his widow, Mrs. Woodward, except in so far as it is an adoption or ratification of the old contract. We think that this amendment set out an entirely new cause of action against A. J. Bird, and his administrator was not made a party to the suit. It appears from the record that A. J. Bird died in 1891. The amendments were filed at the February term, 1916, of the superior court, 25 years after A. J. Bird, one of the parties to the alleged contract, had died. We hold as to the first amendment that it sets up a new cause of action.

As to the second amendment, we think that the allegation as to any work and services rendered to Mrs. Woodward by the plaintiff is too vague and indefinite to show a consideration for the contract sought to be specifically enforced; and therefore we think that the court was right in sustaining the objection to the second amendment.

[2] On the question of nonsuit, after a careful investigation of the evidence, we reach the conclusion that the trial judge did not err in granting the nonsuit and in dismissing the case. This court has held, in cases of this kind, that where a parol contract is entered into between two persons that, in consideration of services to be performed by one party, the other will, on his death, by will or otherwise, convey certain property to the other party to the contract, equity will specifically enforce the contract if it be definite and specific, based upon sufficient legal consideration, and the proof of the contract be strong, clear, and satisfactory. *Pair v. Pair*, 147 Ga. 754, 757, 95 S. E. 295, and cases cited. The evidence in the present case does not measure up to that standard. The strongest evidence in the record (and we have examined all carefully) on this point was delivered by Mrs. Julia A. Parrish, who testified as a witness for the plaintiff:

"She told me of her first husband's death, and spoke of the present. I asked her if her last husband would be any trouble about Little Joe [Bird] 'getting the property,' and she said, no,

that she had everything arranged, there would be no trouble at all. I asked her if she had made her will. She replied that she had everything fixed, and carried it with her every day, and when she died the papers would be found on her body. Mrs. Sallie E. Woodward told me that Josiah Bird would get the home place and all other property that was hers."

There is no evidence in the record to show that when Mrs. Woodward died she left a will or other instrument conveying the property in controversy to the plaintiff. The other evidence bearing on the question does not come up to the rule as laid down by this court and referred to above; and, this being so, the court properly granted a nonsuit. Judgment affirmed.

All the Justices concur.

(24 Ga. App. 776)

### REDDICK v. STATE. (No. 10404.)

(Court of Appeals of Georgia, Division No. 1.  
Feb. 24, 1920.)

(Syllabus by the Court.)

#### 1. CRIMINAL LAW §262—AFTER PARTICIPATION IN SELECTION OF JURY AND INTRODUCTION OF EVIDENCE, FORMAL ARRAIGNMENT DEEMED WAIVED.

In answer to questions in this case certified to the Supreme Court by this court, that court said: "After the selection of a jury in the trial of a criminal case, in which the accused has participated (assuming from the question under review that the defendant in the instant case did participate in the selection of a jury), and after the introduction of evidence upon the merits of the case has commenced, the defendant will be deemed to have waived formal arraignment, and it is then too late for him to demur; and the court did not err in refusing to allow the defendant to demur, nor in overruling the motion to quash." For the statement of facts upon which the above ruling was made, see *Reddick v. State*, 102 S. E. 347.

#### 2. SUFFICIENCY OF EVIDENCE.

There is no merit in any of the special grounds of the motion for new trial; the evidence supports the verdict, which is approved by the trial judge, and the judgment is affirmed.

Error from Superior Court, Putnam County; J. B. Park, Judge.

Joe Reddick was convicted of an offense, and he brings error. Affirmed.

Davidson & Callaway, of Eatonton, for plaintiff in error.

Doyle Campbell, Sol. Gen., of Monticello, for the State.

BLOODWORTH, J. Affirmed.

BROYLES, C. J., and LUKE, J., concur.



(24 Ga. App. 689)

**JOHNSON v. HARRIS.** (No. 10045.)

(Court of Appeals of Georgia, Division No. 1.  
Jan. 27, 1920. Rehearing Denied  
Feb. 13, 1920.)

*(Syllabus by the Court.)*

**COSTS** ~~260~~(1)—**DEFENDANT IN ERROR WILL BE ALLOWED COSTS WHERE WRIT OF ERROR IS PROSECUTED FOR DELAY ONLY.**

This was a suit upon a promissory note. The only defense filed was the plea of payment, and upon this issue of fact the evidence amply supported the verdict for the plaintiff. Under the facts of the case the special grounds of the motion for a new trial are wholly without merit; and, it appearing to this court that the writ of error must have been prosecuted for delay only, the prayer of the defendant in error that 10 per cent. damages be assessed against the plaintiff in error is granted.

Error from City Court of Blakely; R. H. Sheffield, Judge.

Action between H. S. D. Johnson and J. W. Harris. Judgment for the latter, and the former brings error. Affirmed, with damages.

B. W. Fortson, of Arlington, for plaintiff in error.

A. H. Gray, of Blakely, for defendant in error.

**BROYLES, O. J.** Judgment affirmed, with damages.

**LUKE and BLOODWORTH, JJ.,** concur.

(24 Ga. App. 767)

**LAMB v. HOWARD.** (No. 10013.)

(Court of Appeals of Georgia, Division No. 2.  
Feb. 13, 1920.)

*(Syllabus by the Court.)*

**AFFIRMANCE OF JUDGMENT ON ANSWER TO QUESTIONS CERTIFIED.**

In accordance with the answer made by the Supreme Court to the question certified to it in this case (102 S. E. 438), the judgment of the court below, overruling the demurrer to plaintiff's petition, is affirmed.

Error from Superior Court, Coweta County; J. R. Terrell, Judge.

Proceedings by George P. Howard against E. T. Lamb, receiver. A demurrer to plaintiff's petition was overruled, and defendant brings error. Affirmed in accordance with answer to question certified to Supreme Court.

A. H. Freeman, of Newnan, Hutton Lovejoy, of Lagrange, and Brandon & Hynds, of Atlanta, for plaintiff in error.

Westmoreland, Anderson & Smith, of Atlanta, for defendant in error.

**SMITH, J.** Affirmed.

**JENKINS, P. J., and STEPHENS, J.,** concur.

(24 Ga. App. 769)

**LOUISVILLE & N. R. CO. v. HOOD.**  
(No. 9481.)

(Court of Appeals of Georgia, Division No. 1.  
Feb. 24, 1920.)

*(Syllabus by the Court.)*

**1. MASTER AND SERVANT** ~~204~~(1)—**EMPLOYEE WITHIN FEDERAL EMPLOYERS' LIABILITY ACT ASSUMES ORDINARY RISKS.**

Under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) an employé of a railroad company, except in cases involving violation by the carrier of the statute enacted for the safety of employées, assumes the ordinary risks and hazards of his particular employment, and also those defects and risks which are known to him, or which are plainly observable, although due to the master's negligence. *Charleston & Western Carolina Ry. Co. v. Sylvester*, 17 Ga. App. 85, 86 S. E. 275, and authorities cited.

**2. OVERRULING OF MOTION FOR NEW TRIAL.**

Under the above ruling and the facts of the instant case a recovery by the plaintiff was unauthorized, and the court erred in overruling the motion for a new trial.

**3. OTHER ASSIGNMENTS.**

In view of the above holding it is unnecessary to pass upon the special assignments of error.

Error from Superior Court, Cobb County; N. A. Morris, Judge.

Action by D. F. Hood against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

Tye, Peeples & Tye, of Atlanta, and W. E. Roberts, Jno. H. Boston, and D. W. Blair, all of Marietta, for plaintiff in error.

Geo. F. Gober and W. I. Heyward, both of Atlanta, and J. E. Mozley and H. B. Moss, both of Marietta, for defendant in error.

**BROYLES, O. J.** Judgment reversed.

**LUKE and BLOODWORTH, JJ.,** concur.

(24 Ga. App. 767)

**ASH et al. v. PEOPLE'S BANK OF OLIVER.**  
(No. 10044.)(Court of Appeals of Georgia, Division No. 1.  
Feb. 13, 1920.)*(Syllabus by the Court.)***COURTS  $\S$ 189(14), 217 — WRIT OF ERROR WILL NOT LIE FROM CITY COURT OF SPRINGFIELD TO COURT OF APPEALS; CITY COURT OF SPRINGFIELD CANNOT GRANT NEW TRIAL.**

In answer to questions certified by this court, the Supreme Court, on January 16, 1920 (101 S. E. 912), handed down the following headnotes (for an elaboration of these notes, see the full opinion of the Supreme Court in this case rendered on January 16, 1920):

"1. Writs of error do not lie from the city court of Springfield to the Court of Appeals of Georgia.

"2. Nor has the judge of that court power or authority to hear and determine a motion for a new trial.

"3. Upon review of the cases of Monford v. State, 114 Ga. 528, 40 S. E. 798, and Welborne v. State, 114 Ga. 793, 40 S. E. 857, and other decisions to the same effect, the rulings there made are reaffirmed."

Under the above rulings the writ of error is dismissed.

Error from City Court of Springfield; P. D. Shearouse, Judge.

Action between J. A. Ash and others, executors, and the People's Bank of Oliver. Judgment for the latter, and the former bring error, and the Court of Appeals certified questions. Writ of error dismissed in conformity to answers of Supreme Court (101 S. E. 912).

H. B. Strange, of Statesboro, and Travis & Travis, of Savannah, for plaintiffs in error.

A. B. Lovett, of Sylvania, for defendant in error.

**BROYLES, O. J.** Writ of error dismissed.

**LUKE and BLOODWORTH, JJ.,** concur.

(24 Ga. App. 739)

**HODGES v. MURKISON.** (No. 10555.)(Court of Appeals of Georgia, Division No. 2.  
Feb. 7, 1920.)*(Syllabus by the Court.)***1. MASTER AND SERVANT  $\S$ 217(1), 220(8), 245 (1)—ASSUMPTION OF RISK AND CONTRIBUTORY NEGLIGENCE DEFINED.**

A servant is bound to obey a command, when given as such by the master, if it pertains to the duties of the servant's employment and does not involve a violation of the law, and if the act required is not one which is of itself

so obviously dangerous that no person of ordinary prudence could be expected to perform it. If, under the circumstances existing at the time of its issuance, the giving of such an order constitutes an act of negligence, but the servant, acting under the duty and obligation thus resting upon him, proceeds to execute the command, and is injured as a consequence, the master is liable in damages to the servant for the injuries so sustained. *Whiters v. Mallory S. S. Co.*, 23 Ga. App. 47, 97 S. E. 453, and cases cited. And while ordinarily the law reads into contracts of employment an agreement on the servant's part to assume the known risks of the employment, so far as he has the capacity to realize and comprehend them, yet this implication may be abrogated by an express or implied contract to the contrary. Thus, if the servant complains to the master that the instrumentality with which, or the place where, he is required to perform his duties appears to be dangerous, and thereupon the master commands him to proceed with the work, and assures him there is no danger, then, unless the danger be so obvious and manifest that no prudent man would expose himself thereto, the law implies a quasi new agreement, whereby the master relieves the servant from his former assumption of risk, and places responsibility for resulting injuries upon the master. *International Cotton Mills v. Webb*, 22 Ga. App. 309, 96 S. E. 16 (3), and cases cited.

**2. MASTER AND SERVANT  $\S$ 286(39), 289(37)—PLEADING  $\S$ 216(1)—NEGLIGENT ORDER OF EMPLOYER AND CONTRIBUTORY NEGLIGENCE AS QUESTIONS FOR JURY.**

Applying to the petition in this case the rulings announced above, the questions as to whether the order as given to the plaintiff by the defendant was a negligent one, and whether the act required under the assurance given, was one which of itself was so obviously dangerous that no person of ordinary prudence could be expected to perform it are questions of fact to be determined by the jury from the evidence adduced upon the trial of the case. The petition, therefore, set out a cause of action, and the court did not err in overruling the general demurrer, since questions as to diligence and negligence, including contributory negligence, are questions peculiarly for the jury, and the court will decline to solve them by decision on demurrer, except in plain and indisputable cases. Such of the special grounds of the demurrer as were meritorious were properly met by an appropriate amendment.

Error from City Court of Bainbridge.

Action by J. S. Murkison against O. S. Hodges. General and special demurrer to the petition overruled, and defendant excepts and brings error. Affirmed.

Statement of Facts by the Court.

This is an action for damages for personal injuries by a servant against the master. The petition alleges: That the plaintiff was a locomotive engineer on a log train operated by the defendant. That he hauled the log train from the mill of the defendant to the

woods, and back to the mill and to the log ramp (describing it), where logs were unloaded from the train, remaining on his engine while the logs were unloaded; that the skids composing the log ramp were about 8 or 10 feet apart, and the logs hauled on the train ranged in length from 30 to 60 feet. That he had never worked at or on a log ramp, and had no experience in loading or unloading logs, and knew nothing of the dangers incident to such work. That on the day of the injury, because of the absence of one of the hands regularly employed to unload the logs from the train to the log ramp, the defendant ordered him to help unload the logs from the train. That he replied to the defendant that he knew nothing about unloading logs, that he had noticed that some of the skids were out, and was afraid that the skidway was not safe, and that he was afraid he would be hurt, if he attempted to comply with the defendant's order. That the defendant then told the plaintiff that he knew the condition of the skidway, knew that it was safe, and said: "Just fasten your cant hook in the log, jump off, turn loose when the log starts, and duck your head, and the log will pass over and not hurt you. There is no danger. Now run on and unload the logs quick. The skidway is perfectly safe." That in compliance with this order, and acting on the assurance of the defendant that there was no danger, the plaintiff went ahead to assist the negro laborers in unloading the logs, and acted exactly as ordered by the defendant. That in unloading one of the logs he was at the butt end thereof, and that the butt end, being larger than the other end, rolled faster. That as soon as the log started rolling, he attempted to get out of the way, and he would have done so but for the fact that the log rolled onto a place where one of the skids had been broken, and, reaching that place, became overbalanced and fell overboard on him, injuring him as described in the petition. The petition further alleges that on the day of the injury one of the skids composing the skidway had rotted and been broken out, and that the plaintiff was injured at the place where the skid had rotted out. That, while he knew the skid had rotted out of the ramp, he did not know the number of skids that were necessary to sustain the logs, and did not know, and by the exercise of ordinary care could not have known, of the dangers of the skidway, and that he could not by the exercise of ordinary care have avoided the injury. That the defendant was familiar with the condition of the log ramp, had been unloading logs on the ramp in the condition in which it was in for quite a time, and that the dangers of the skidway were known to the defendant. The petition charges the defendant with negligence in the following particulars: (a) In not furnishing petitioner a safe place to work. (b) In taking petitioner

from his position on the locomotive and ordering him to unload the logs with the assistance of two negroes. (c) In assuring petitioner that the place where he was assigned to unload logs was safe and not dangerous, and that he would not be injured. (d) In ordering petitioner to perform the work of unloading the logs after he had protested and stated to the defendant that he did not consider the skidway safe, and in assuring him that the skidway was safe, and that he would not be injured. (e) In taking a man unexperienced in unloading logs, not employed for that purpose, and ordering him to unload the logs, and assuring him that it was safe to unload them in the manner and at the place stated by the defendant, when in fact it was not a safe place to work and the assurance of the defendant was untrue. The defendant demurred generally and specially, the court overruled the demurrers and the defendant excepted.

JENKINS, P. J. Judgment affirmed.

STEPHENS and SMITH, JJ., concur.

(24 Ga. App. 749)

THOMAS N. BAKER LUMBER CO. v. ATLANTIC MILL & LUMBER CO.  
(No. 10643.)

(Court of Appeals of Georgia, Division No. 2.  
Feb. 9, 1920.)

(Syllabus by the Court.)

1. ASSUMPSIT, ACTION OF ~~6~~(1)—SALES ~~6~~—363—NONSUIT IS PROPER WHERE WRITTEN CONTRACT DEFINED RIGHTS OF PARTIES; ON EVIDENCE THAT PLAINTIFF ACCEPTED DEFENDANT'S WRITTEN ORDERS AND THAT GOODS DELIVERED THEREON WERE NOT PAID FOR NONSUIT WAS ERRONEOUS.

Although in a suit upon indebitatus assumpsit a nonsuit is proper, where it appears from the plaintiff's evidence that there was a written contract between the parties which defined their rights and obligations touching the subject-matter of the suit (*Blue v. Ford*, 12 Ga. 45), yet where in such a suit for the price of goods sold the only evidence of a written contract between the parties was that the goods were sold on various written orders of the defendant and written acceptances of the plaintiff, and that the obligations on the part of the plaintiff were performed and that the goods ordered and accepted were not paid for, it was error to grant a nonsuit. See *Southern Printers' Supply Co. v. Felker*, 125 Ga. 148, 54 S. E. 193.

2. TRIAL ~~6~~—105(5)—WHERE WRITTEN ORDERS WERE SHOWN ONLY BY ORAL TESTIMONY NOT OBJECTED TO MAKING PRIMA FACIE CASE NONSUIT WAS ERROR.

While it is true that in this case the written orders and acceptances were not introduced in evidence and were shown only by oral tes-

timony, this testimony was unexcepted to when offered, and no motion was made to rule it out. "If secondary evidence \* \* \* is admitted \* \* \* without objection, it is to be considered as evidence, and a charge or verdict may be based upon it; and such a verdict will not be set aside as being unsupported by evidence." *Munroe v. Baldwin*, 145 Ga. 215, 88 S. E. 947. As the evidence admitted made a prima facie case for the plaintiff, it was error for the trial judge to grant a nonsuit.

Smith, J., dissenting.

Error from City Court of Albany; Clayton Jones, Judge.

Action by the Thomas N. Baker Lumber Company against the Atlantic Mill & Lumber Company. From a judgment of nonsuit plaintiff brings error. Reversed.

Guy O. Buckner and Peacock & Gardner, all of Albany, for plaintiff in error.

Milner & Farkas, of Albany, for defendant in error.

STEPHENS, J. Judgment reversed.

JENKINS, P. J., concurs.

SMITH, J. (dissenting). I cannot agree with the decision of the majority of the court, for, under my view of the law, if a suit is brought upon an account and the defendant files a general denial, and upon the trial of the case the plaintiff's evidence shows that the account consists of a number of items and balances on different bills for merchandise, all growing out of written orders and acceptances, the burden is upon the plaintiff to introduce in evidence these written contracts and show a compliance with them, and upon his failure to make such proof a nonsuit is proper.

"In a complaint founded on an account, it was proven by the plaintiff's witness, on the trial, that there was a written contract between the parties touching the subject-matter of the account. Held, that the plaintiff could not proceed, and that the defendant was entitled to a nonsuit." *Blue v. Ford*, 12 Ga. 45.

There is in my opinion a clear distinction between the case at bar and the cases cited in the majority decision. See *Southern Cotton Oil Co. v. Farkas*, 23 Ga. App. 413, 98 S. E. 411. It clearly appears from the *Ford* and *Farkas* Cases, *supra*, that when the plaintiff's own testimony showed that the account was based upon a written contract the burden was upon him to produce and introduce such contract, and then prove to the satisfaction of the court and jury that he had complied with his contract and that nothing remained to be done except the payment of the money.

(24 Ga. App. 714)

LANG, Sol. Gen., v. HITT.

SAME v. DENMAN et al.

(Nos. 10190, 10203.)

(Court of Appeals of Georgia, Division No. 1.  
Jan. 29, 1920.)

(Syllabus by the Court.)

1. INTOXICATING LIQUORS §250—IN CONDEMNATION PROCEEDINGS STATE HAS BURDEN OF SHOWING USE OF VEHICLE FOR TRANSPORTING LIQUORS WITH KNOWLEDGE OF OWNER OR LESSEE.

"In a proceeding under section 20 of the Prohibition Act approved March 28, 1917 (Laws Ex. Sess. 1917, pp. 7, 16), to condemn a vehicle or conveyance used in transporting any liquors or beverages the sale or possession of which is prohibited by law, the burden is upon the state, the condemnor, to show that such vehicle or conveyance was used in conveying the prohibited liquors or beverages with the knowledge of the owner or lessee."

2. INTOXICATING LIQUORS §250—KNOWLEDGE THAT AUTOMOBILE WAS USED IN TRANSPORTING LIQUORS MAY BE SHOWN BY CIRCUMSTANTIAL EVIDENCE, BUT KNOWLEDGE OF AGENT OR SERVANT IS INSUFFICIENT.

"Knowledge of the owner or lessee that prohibited liquors were being transported in the automobile is a question of fact, to be determined under the pertinent rules of evidence, as a prerequisite to the right to condemn the automobile in a proceeding instituted for that purpose against the owner or lessee thereof. Such knowledge may be shown by circumstantial as well as direct evidence. (a) Whether such knowledge will be presumed as a matter of fact, upon proof of the use of the car by the agent of the owner or lessee for the purpose of transporting prohibited liquors or beverages, is a matter not involved under the question as certified by the Court of Appeals. (b) Knowledge of the agent or servant of the owner or lessee, employed to use an automobile for a specified legal purpose only, that prohibited liquors were being conveyed in the automobile, will not be imputed as a matter of law to the owner or lessee thereof."

3. INTOXICATING LIQUORS §250—"LESSEE" OF VEHICLE USED TO TRANSPORT LIQUORS MUST HAVE PROPERTY THEREIN, AS DISTINGUISHED FROM "BAILEE."

"Technically, the word 'lessee' denotes the holder of a contract for the possession and profits of lands and tenements for a fixed term, for life, or at will. Civ. Code 1910, § 3890. By the term 'lessee,' as used in section 20 of the above-mentioned act is meant one who has some property in the vehicle or conveyance which itself may be the subject of condemnation, as distinguished from a mere 'bailee,' with a special property in the vehicle or conveyance intrusted to him. Civ. Code 1910, § 3468. The term 'lessee' is not to be construed as having the same meaning as the word 'bailee.'"

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Bailee; Lessee.]

**4. INTOXICATING LIQUORS ⇨250 — PERSON EMPLOYED TO DRIVE CAR SOUGHT TO BE CONDEMNED IS NOT "LESSEE."**

"One who is merely engaged by the owner to drive an automobile, either for a stipulated wage or part of the earnings of the car, is not a 'lessee,' within the meaning of section 20 of the above-mentioned act."

**5. AFFIRMANCE IN CONFORMITY WITH QUESTIONS ANSWERED BY SUPREME COURT.**

The above rulings were made by the Supreme Court (101 S. E. 795), in answer to certain questions certified by this court, and, under them and the facts of the instant cases, the trial judge did not err in directing verdicts for the claimants and against the condemnation of the automobiles.

No. 10190:

Error from Superior Court, Whitfield County; M. C. Tarver, Judge.

No. 10203:

Error from Superior Court, Dade County; M. C. Tarver, Judge.

Separate proceedings by J. M. Lang, Solicitor General, against E. T. Hitt and against Gus Denman and others. Directed verdict for claimants against the condemnation of an automobile, and the Solicitor General in each case brought error, and the Court of Appeals certified questions. Judgment affirmed, in conformity with answer of the Supreme Court (101 S. E. 795).

J. M. Lang, Sol. Gen., of Calhoun, in pro. per.

Maddox, McCamy & Shumate and F. K. McCutchen, all of Dalton, and W. F. McGaughy, of Chattanooga, Tenn., for defendants in error.

**BROYLES, C. J.** Judgment affirmed.

**LUKE and BLOODWORTH, JJ.,** concur.

(24 Ga. App. 764)

**MOTES v. PHILLIPS et al. (No. 11032.)**

(Court of Appeals of Georgia, Division No. 2. Feb. 10, 1920.)

(*Syllabus by the Court.*)

**APPEAL AND ERROR ⇨1005(2)—REFUSAL OF NEW TRIAL ON GROUND THAT VERDICT IS WITHOUT EVIDENCE TO SUSTAIN IT CANNOT BE INTERFERED WITH.**

There being evidence to authorize the verdict returned, which has the approval of the trial judge, his judgment overruling the motion for a new trial, based solely on the ground that the verdict is without evidence to sustain it, cannot be interfered with.

Error from Superior Court, Bartow County; M. C. Tarver, Judge.

Action between W. M. Motes and G. C. Phillips and others. Judgment for the latter, motion for new trial overruled, and the former brings error. Affirmed.

M. B. Eubanks, of Rome, for plaintiff in error.

Neel, Finley & Neel, of Cartersville, for defendants in error.

**SMITH, J.** Judgment affirmed.

**JENKINS, P. J., and STEPHENS, J.,** concur.

(24 Ga. App. 717)

**STANDARD COAL CO. v. ECLIPSE COAL CO. (No. 10802.)**

(Court of Appeals of Georgia, Division No. 2. Feb. 7, 1920. Rehearing Denied Feb. 23, 1920.)

(*Syllabus by the Court.*)

**1. SALES ⇨174—BUYER'S FAILURE TO MAKE PAYMENT WHEN DUE UNDER CONTRACT RELIEVED SELLER OF OBLIGATIONS TO MAKE FURTHER DELIVERIES.**

Where a seller agrees to deliver to a purchaser commodities in specified quantities weekly and at designated prices payable on the 1st of each month after delivery, a failure by the latter to meet payments when due relieves the former of any obligation to make further deliveries.

**2. SALES ⇨180(3) — BUYER ACCEPTING DELAYED DELIVERIES AND FAILING TO PAY THEREFOR CANNOT HOLD SELLER LIABLE FOR FAILURE TO MAKE FURTHER DELIVERIES UNDER CONTRACT.**

Although the seller may have delayed deliveries and failed to make them on time as contracted for, the purchaser cannot, after accepting such delayed deliveries and also subsequent deliveries, and failing to make payment due therefor under the contract, hold the seller liable for a failure to continue making any further deliveries contracted for. The case of *Bernhardt v. Federal Terra Cotta Co.*, 24 Ga. App. —, 101 S. E. 588, is not in conflict with this ruling. The decision in that case holds that by the acceptance of a delayed delivery the purchaser does not ipso facto waive his right to damages for any delay which is in violation of the contract.

**3. SALES ⇨71(5)—DELIVERY OF MINIMUM SUFFICIENT UNDER MAXIMUM AND MINIMUM CONTRACT.**

Where, under the terms of such contract, the seller may make deliveries in weekly installments ranging from a minimum to a maximum number, he complies with the contract by delivering the minimum number specified.

**4. DEPARTURE FROM TERMS OF CONTRACT IS A QUASI NEW AGREEMENT.**

"Where parties, in the course of the execution of a contract, depart from its terms and

pay or receive money under such departure, before either can recover for failure to pursue the letter of the agreement, reasonable notice must be given the other of intention to rely on the exact terms of the agreement. Until such notice, the departure is a quasi new agreement." Civ. Code 1910, § 4227.

##### 5. CHARGE OF COURT.

The jury having determined the issues of fact, the evidence supporting the verdict, and the above principles of law having been properly applied, there was no error in the charge of the court, or in the failure to charge as requested.

##### 6. COSTS $\S$ 262—NO ALLOWANCE OF DAMAGES TO DEFENDANT IN ERROR WHERE IT IS NOT PLAINLY APPARENT THAT APPEAL WAS FOR DELAY.

It not being plainly apparent that the writ of error was prosecuted for delay only, the motion of the defendant in error for damages is denied.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action between the Standard Coal Company and the Eclipse Coal Company. Judgment for the latter, and the former brings error. Affirmed.

C. L. Pettigrew, of Atlanta, for plaintiff in error.

Douglas & Douglas, of Atlanta, for defendant in error.

STEPHENS, J. Judgment affirmed.

JENKINS, P. J., and SMITH, J., concur.

(179 N. C. 178)

SWIFT & CO. v. MEEKINS et al. (No. 9.)

(Supreme Court of North Carolina. Feb. 18, 1920.)

##### 1. SALES $\S$ 261(7)—SELLER'S AGENT'S STATEMENT AS TO QUALITY A WARRANTY.

Statements by seller's agent at time of sale of fertilizer that it was as good as any of the same analysis sold to be used for cotton and corn, and was as good a fertilizer as there was on the market, amounted to a warranty as a matter of law.

##### 2. SALES $\S$ 261(6), 428, 442(3)—POSITIVE REPRESENTATION AS TO QUALITY AND USEFULNESS AMOUNTS TO "WARRANTY"; BREACH OF WARRANTY MAY BE COUNTERCLAIMED; DAMAGES FOR BREACH OF WARRANTY; DIFFERENCE BETWEEN CONTRACT PRICE AND REAL VALUE.

The positive representation by a seller that the article sold possesses a certain value and certain qualities amounts to a "warranty," and by counterclaim the buyer may set up breach of the warranty, and reduce the sum claimed by the difference between the contract price

and the actual value, although there was no deceit in the sale.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Warranty.]

Appeal from Superior Court, Pasquotank County; Devin, Judge.

Action by Swift & Co. against Isaac M. Meekins and others. From the judgment rendered, defendants appeal. New trial.

The following issues were submitted:

(1) Is the defendant I. M. Meekins indebted to the plaintiff as alleged in the complaint? if so, in what sum? Answer: \$1,477.88, and interest from July 15, 1917.

(2) Did the plaintiff warrant the goods sold to defendant Meekins, as alleged in the answer? Answer: No.

(3) Was there a breach of warranty by the plaintiff as alleged in the answer? Answer: No.

From the judgment rendered, the defendants appealed.

Aydlett & Sawyer, Ehringhaus & Small, and P. W. McMullan, all of Elizabeth City, for appellants.

W. A. Worth and Thompson & Wilson, all of Elizabeth City, for appellee.

BROWN, J. The plaintiff sued to recover on a note of the defendant given for the purchase of fertilizer. The defendant admitted the execution of the note and his indebtedness thereupon as alleged in the complaint, subject to his counterclaim as set out in the answer for breach of warranty as to the quality of said fertilizer, made at the time of the sale.

The contract was made in January, 1919. Plaintiff agreed to sell and deliver to the defendant 40 tons of fertilizer, analyzing 5-7-0 and 10 tons of acid phosphate.

The defendant testified that he had never used plaintiff's fertilizer, and so stated to Le Roy, the agent who sold it to him. Le Roy testified:

"I told him it was as good fertilizer as there was on the market. I told him it was as good fertilizer as there was on the market of the same analysis. He told me he was buying it for cotton and corn, and I told him it was as good as any sold to be used for cotton and corn, of the same analysis. I told him it was as good as anybody else's fertilizer of the same analysis. I told him that I sold this fertilizer cheaper than anybody else. I told him that Swift & Co.'s goods were as good as any from any other factory."

The defendant Meekins testified that the agent told him that the fertilizer was as good as any one could get, and that Swift & Co. could sell it cheaper on account of their output from their packing house, and that

(102 S.E.)

he told the agent if it was all right that he would take it.

[1] The judge submitted the question of warranty to the jury. The defendant contends that there was a warranty as a matter of law upon Le Roy's testimony, who was the agent of the plaintiff and introduced by him, and that the judge should have so held, and instructed the jury accordingly.

[2] We agree with the defendant that the language used by the agent constituted a warranty in law. It is not necessary that the language should be intentionally false, or that there should have been any purpose to deceive. The positive representation by a vendor that the article sold possesses a certain value and certain qualities amounts to a warranty, and by counterclaim the defendant may set up the breach of the warranty, and reduce the sum claimed by the difference between the contract price and the actual value, although there was no deceit in the sale.

McKinnon v. McIntosh, 98 N. O. 89, 3 S. E. 840. This case is very much on all fours with the one under consideration. In Pelger v. Worth, 130 N. O. 268, 41 S. E. 877, 89 Am. St. Rep. 865, it was held that representations that rice is excellent seed rice amounts to a warranty. In that case the court held also that his honor correctly instructed the jury as a matter of law that the defendant's representations amounted to a warranty, and that they should answer that issue, "Yes." See, also, Love v. Miller, 104 N. O. 582, 10 S. E. 685; Lewis v. Rountree, 78 N. O. 323.

We are of opinion that the judge should have instructed the jury as a matter of law that the language used by the plaintiff's agent amounted to warranty, and that they should answer the second issue "Yes."

For this error there must be a new trial.

(85 W. Va. 530)

**DETROIT STEEL PRODUCTS CO. v.  
DAILY TELEGRAPH PRINTING  
CO. (No. 3859.)**

(Supreme Court of Appeals of West Virginia.  
Feb. 10, 1920.)

*(Syllabus by the Court.)*

**1. GUARANTY §46(1)—CONTRACT CONSTRUED  
AS CONDITIONAL.**

A contract of guaranty of the payment of purchase money of goods, effected by means of letters, in one of which the guarantor says he will see the account paid, but wants the bill rendered promptly, so he can take care of himself in settlement, and, in the other of which the guarantee says he will render the invoices to the debtor, but will advise the guarantor of failure to remit within a reasonable time, after the maturity of the bill, which is 30 days from

the date of shipment, is a conditional, not an absolute, contract.

**2. GUARANTY §27—AGREED MODIFICATION IS  
PART OF CONTRACT.**

A slight modification of an offer of guaranty, favorable to the guarantor, made in the acceptance thereof and acquiesced in by him, is a part of the contract of guaranty.

**3. GUARANTY §67—WHEN GUARANTOR DIS-  
CHARGED BY FAILURE TO NOTIFY OF NONPAY-  
MENT.**

Failure of the guarantee in a contract of guaranty to comply with a condition of the contract requiring him to give the guarantor notice of nonpayment, within a reasonable time after maturity of the debt, discharges the guarantor, if, within such reasonable time, the debtor has become insolvent, or conditions have changed in such manner as to work injury and damage to him.

**4. GUARANTY §46(1), 92(1)—REASONABLE-  
NESS OF TIME FOR PERFORMANCE OF CONDI-  
TIONS; QUESTION FOR JURY.**

What is a reasonable time in such case depends upon the nature of the contract, the situation of the parties thereto, and all the circumstances, and if upon these the court cannot see clearly and beyond doubt that the notice was given within such time, or after it had elapsed, the question of the reasonableness of the time thereof is one for jury determination.

**5. GUARANTY §67—GUARANTOR'S KNOWL-  
EDGE OF RECEIPT OF GOODS BY DEBTOR AND  
AMOUNT OF BILL DO NOT JUSTIFY PEREMPTO-  
RY INSTRUCTION AGAINST HIM.**

Neither the defendant's knowledge of the receipt of the goods by the debtor and the amount of the bill, before maturity thereof, nor the voluntariness of his offer of guaranty, nor both combined, will justify the giving of a peremptory instruction to find for the plaintiff in such case.

**6. GUARANTY §72—DEBTOR'S FALSE REPRE-  
SENTATION OF PAYMENT DOES NOT RELEASE  
GUARANTOR, NOR DOES HIS RELIANCE THERE-  
ON WAIVE CONDITION OF NOTIFICATION.**

A false representation of payment of the debt, made by the debtor to the guarantor, within the reasonable time allowed for notice of default, does not release the guarantor, nor does his reliance thereon amount to a waiver of the condition of the guaranty.

Error to Circuit Court, Mercer County.

Action by the Detroit Steel Products Company against the Daily Telegraph Printing Company. Judgment for defendant upon a directed verdict, and plaintiff brings error. Reversed, verdict set aside, and cause remanded for a new trial.

A. F. Kingdon and French & Easley, all of Bluefield, for plaintiff in error.

Sanders & Crockett and A. G. Fox, all of Bluefield, for defendant in error.

POFFENBARGER, J. The principal grounds of the complaint on this writ of

error to a judgment for the defendant, on a directed verdict, in an action by motion on a contract of guaranty, are the direction to the jury to find for the defendant and refusal of the prayers of the plaintiff for four instructions tendered by it.

The subject-matter of the guaranty was an open account for \$411.93, with some interest, less \$27.82, an allowance for freight paid, due the plaintiff from the Bluestone Construction Company, a corporation, for material, steel sash and accessories, used by it in the erection of a building for the defendant. Being uninformed as to the financial worth and standing of that company, and unable to find it rated in any of the commercial directories, the plaintiff, before accepting its order for the sash, amounting to \$414, applied to the defendant for information as to the financial standing of the construction company, by a letter dated some time prior to October 27, 1916. Having had no reply to that letter, it repeated its request by a letter dated October 27, 1916, and received a reply thereto, dated October 30, 1916, in which the president of the defendant company said:

"I desire to state that they have excellent credit in this country, and have contracted to erect a building for us, and I authorize you to make this shipment at once, and we will see that the account is paid. Of course, we want the bill rendered promptly, so that we can take care of ourselves in settlement. However, the building has just been started, and we can take care of it very nicely."

Thereupon the plaintiff wrote in reply as follows:

"We thank you for your letter of October 30th, regarding the Bluestone Construction Company, and for your kind offer to see that the account is paid. In accordance with the signed order, we will render invoices to the contractors, but will advise you if they fail to remit within a reasonable time after the account has matured, which will be 30 days from the date of shipment."

The materials were shipped, and the invoice, dated November 14, 1916, was sent to the construction company. Before the completion of the building, that company filed a petition in voluntary bankruptcy and was duly adjudged a bankrupt. Repeated efforts of the plaintiff, made by letter at various times from December 21, 1916, until February 8, 1917, to obtain payment of the account by the construction company, were unavailing. By a letter dated February 14, 1917, four days after the date of the filing of the petition in bankruptcy, the plaintiff notified the defendant of the default and requested payment by it. Deeming its guaranty to have been conditional upon notice of the default, to be given by the plaintiff within a reasonable time after the maturity of the bill, and the plaintiff's delay in giving such

a notice to have been unreasonable, the defendant refused to pay and denied liability. In the meantime, on December 4, 1916, it had paid to the Bluestone Construction Company the amount of an estimate in which was included the bill for the sash, amounting, with the freight, to \$436.50, and, on January 9, 1917, it had paid to the construction company all that was due it for work and materials up to that date, \$2,120. The president of the defendant company says that, at the date of the payment of the estimate, including the bill for sash, he was informed by the manager of the construction company that the bill had been paid to the plaintiff.

The first instruction requested by the plaintiff, and refused, would have directed the jury to find for the plaintiff peremptorily, if it had been given. The second would have left it to the jury to say whether the plaintiff had notified the defendant, within a reasonable time after the bill became due, of the failure of the contractor to pay it, and directed them to find for the plaintiff in such case. The third would have directed them to find for the plaintiff, if they believed the last payment to the construction company by the defendant had been made before a reasonable time had expired after the maturity of the bill. The fourth would have told them the failure of the plaintiff to send the bill to the defendant was immaterial, and constituted no ground of defense, and that, if they believed from the evidence the defendant had money with which it could have paid the account at the time of its knowledge of the delivery of the materials, they should find for the plaintiff.

The first and fourth instructions asked for by the plaintiff treated the contract between the parties as one guaranteeing the payment of the bill absolutely and unconditionally, and the other two treated it as a conditional contract of guaranty, leaving to the jury only the question of reasonableness of the time in which the notice of default was given. The peremptory instruction given at the instance of the defendant was based upon the theory of a conditional guaranty, but it withheld from the jury the inquiry as to the reasonableness of the time of the notification, upon the assumption that the delay had been unreasonable, as matter of law. Hence it is manifest that one of the vital questions in the case is the correct interpretation of the contract involved.

[1-4] It would be at variance with a fundamental and uniformly recognized rule of interpretation to say the sentence in the letter of October 30, 1916, relating to the rendition of the bill for the goods, was inserted without purpose. There is a presumption that every word, phrase, and clause used in any written instrument was put into it for some purpose. Limitation or qualification of the guaranty made in the letter is the



only substantial purpose the sentence could have had. Besides, the words of guaranty, taken in connection with what follows, express clear and undoubted intention to pay the bill, if at all, out of money to become due to the contractor. Considered as a whole, the letter cannot be deemed to have expressed an agreement to pay the bill at all hazards, or in any event; and it is equally clear that prompt rendition of the bill was required by the defendant as a means of enabling it to make payment out of the money to become due to the construction company. Whether this requirement was intended to be a condition of the guaranty might not be entirely clear, however, if the plaintiff had not placed its own interpretation upon the letter. The defendant might have obligated itself unconditionally to pay the bill, and then required prompt rendition thereof, as a mere matter of convenience to itself. Compliance therewith would have relieved it of the necessity of ascertainment of the date and amount of the bill from some other source. If, however, the guaranty was susceptible of a double interpretation, the plaintiff had clear right to accept it in accordance with the one most favorable to the guarantor. The plaintiff put such an interpretation upon it, for it was careful to observe the modifying clause in the defendant's letter and obligate itself to give notice of default within a reasonable time, in a manner only slightly different from that suggested by the defendant's letter. Strict compliance with the order for the goods required the invoice to go to the contractor, instead of the guarantor; but an equivalent was substituted—notice of default in a reasonable time after maturity of the bill. In this modification the defendant acquiesced, and that made it a part of the contract. *McKell v. Chesapeake, etc., Railroad Co.*, 175 Fed. 321, 99 C. C. A. 109, 20 Ann. Cas. 1097; *English, etc., Co. v. Arduin*, L. R. 5 H. L. 64, 80; 13 C. J. 283.

The insolvency of the principal debtor, the construction company, inflicts inevitable loss upon either the plaintiff or the defendant; wherefore principles respecting notice and demand of payment, applicable in cases in which the debtor is solvent, need not be regarded. What is a reasonable time for notice of default, under the circumstances of this case, is always important, and such notice within such time is always required to fix liability upon the guarantor, or prevent his discharge. *Brandt, Suretyship and Guaranty*, § 217; *Stearns, Suretyship*, § 58, p. 91. There are no doubt cases in which the court could say, as matter of law, notice has been given within a reasonable time, or not within such time. As the circumstances of each case control, they may be such as to make it clear and unquestionable in either case. In *Craft v. Isham*, 13 Conn. 28, notice of default, given more than two years after

the date thereof and about a year after the debtor had become insolvent, was held not to have been given in reasonable time. In *Salem Manufacturing Co. v. Brower*, 4 Jones, Law (49 N. C.) 429, in which it was held that the guarantor could have suffered no loss from lack of notice, there is a dictum to the effect that what is a reasonable time is a question of law; but it is not to be assumed that the court intended to say it is so in all cases. The contrary has been asserted in *Barnes Cycle Co. v. Reed*, 91 Fed. 481, 33 C. C. A. 646; *Currie Fertilizer Co. v. Byfield*, 9 Ind. App. 180, 34 N. E. 451, 36 N. E. 438; *Sewing Machine Co. v. Mills*, 55 Iowa, 543, 8 N. W. 356; *Singer Manufacturing Co. v. Littler*, 56 Iowa, 601, 9 N. W. 905. These cases, as well as *Wadsworth et al. v. Allen*, 8 Grat. (Va.) 174, 56 Am. Dec. 137, hold that, ordinarily, what is a reasonable time for notice in the law of guaranty is a question of fact for jury determination. For this proposition there is a clear and decided weight of authority.

To determine whether notice was given within a reasonable time, so as to bind the guarantor, or after the lapse of reasonable time, so as to permit it to be discharged from liability, it is necessary to consider the law of the case, all of the facts and circumstances, and the situation of the parties. The guaranty is one of payment, not mere indemnity against loss. *Stuart v. Carter*, 79 W. Va. 92, 90 S. E. 537, L. R. A. 1918D, 1070. The bill matured December 14, 1916. The notice of the default was dated February 14, 1917. Inasmuch as the defendant paid to the contractor all that was due on January 9, 1917, and no longer had anything in its hands belonging to the contractor out of which payment could be made, notice given between the 9th of January and the 14th of February might not have availed anything. If the defendant was not hurt by failure to give notice between said dates, it cannot complain of the lack thereof. To discharge the guarantor, delay and damage must both concur. *Brandt, Suretyship and Guaranty*, § 223. If the principal is insolvent when the debt becomes due, no demand upon him, nor notice of his default to the guarantor, is necessary. *Brandt, Suretyship and Guaranty*, § 223. It necessarily follows that, if notice of default within a reasonable time is a condition of a guaranty, and such time expires and the debtor becomes insolvent before the expiration thereof, and the creditor has had no notice of his failing circumstances, demand of payment and notice of default to the guarantor are unnecessary, because they would be unavailing to save him from loss or damage. Hence the period of delay for the purposes of this case was from December 14, 1916, until January 9, 1917, after which date there was no money of the debtor in the hands of the guarantor,

from which payment could be made, and on which date the debtor must have been insolvent. The defendant's witness does not claim it could have protected itself after that date. There is no evidence in the record tending to show that the creditor had any knowledge of the failing circumstances of the debtor, nor any proof that the guarantor knew it was insolvent. All knowledge of that fact is directly and emphatically denied by its president. The plaintiff waited about a week after the maturity of the debt before it demanded payment. The first demand was made December 21, 1916, the second December 29, 1916, and the third January 6, 1917. The futility of these demands sufficed to apprise the plaintiff that the debtor was not prompt in payment, and may have been sufficient to raise a doubt in the mind of a prudent man as to its financial soundness. On the other hand, the defendant had been advised or informed that the debt had been paid. Though it could not rely upon this representation, and was not thereby released from its obligation to the plaintiff, the circumstance may have tended to lull it into a sense of security, and induced it to refrain from action in the premises for its protection. In view of all the facts and circumstances, we are of the opinion that the question of reasonableness of time of notice was one for jury determination; wherefore the court did not err in refusing the plaintiff's first and fourth instructions, and did err in its direction of a verdict in favor of the defendant. This conclusion also condemns the action of the court in its refusal of the second and third instructions asked for by the plaintiff.

[5, 6] The defendant's knowledge of the receipt of the goods and amount of the bill

does not constitute ground for the peremptory instructions sought by the plaintiff. Nor does this fact, supplemented by the additional one that the offer of guaranty was voluntary, do so. It was entitled to notice of default in payment. Nor does it signify anything that an inquiry would have elicited knowledge of nonpayment. The plaintiff undertook to give notice thereof, and the defendant could rightfully rely upon that undertaking. On the other hand, the false representation of payment, made by the debtor, did not release the guarantor, nor justify the direction of a verdict in its favor. In so far as it relied upon that representation, it did so at its peril, and its reliance upon it does not argue intention to waive the condition of the guaranty, for the defendant was under no duty to act until it received notice of default.

The contention, made in oral argument, that the guaranty was the personal contract of the president of the defendant corporation is not well founded. Although he appended his own signature to the letter, describing himself as "President Daily Telegraph Printing Co.," the correspondence evidencing the contract, of which this letter is a part, as well as the oral evidence, clearly shows the contract was made by him for and on behalf of the corporation. *Deitz v. Prov. Wash. Ins. Co.*, 31 W. Va. 851, 8 S. E. 616, 18 Am. St. Rep. 909; *Murdock v. Franklin Ins. Co.*, 33 W. Va. 407, 10 S. E. 777, 7 L. R. A. 572; *Coulter v. Blatchley*, 51 W. Va. 163, 41 S. E. 133.

For the errors noted, the judgment will be reversed, the verdict set aside, and the case remanded for a new trial.

RITZ, J., absent.

(85 W. Va. 496)

JONES v. HINES, Director General of Railroads. (No. 3937.)

(Supreme Court of Appeals of West Virginia. Feb. 10, 1920.)

*(Syllabus by the Court.)***1. BAILMENT §21 — BAILEE IN POSSESSION MAY SUE FOR INJURY TO PROPERTY.**

A bailee, having the actual possession of animals, may maintain an action to recover damages for wrongfully killing or injuring them.

**2. RAILROADS §421 — DRIVING CATTLE ON TRACK WITHOUT LOOKING OR LISTENING CONSTITUTES NEGLIGENCE PRECLUDING RECOVERY.**

Where one in charge of cattle conducts them across a railroad track at a crossing, without looking or listening for the approach of trains, and some of the cattle are struck and injured by a train moving on said railroad, his negligence in so conducting them upon the crossing without looking or listening for the approach of the train will preclude the recovery of damages for the injury, although the servants of the railroad may have been negligent in failing to ring the bell or blow the whistle before reaching the crossing, unless it appears that those in charge of the train could have stopped the same in time to have prevented the injury after discovering that the cattle were in a position of danger, or after such discovery should have been made by the exercise of the lookout required of those in charge of locomotives when approaching crossings.

Error to Circuit Court, Mercer County.

Action by G. W. Jones against Walker D. Hines, Director General of Railroads. Judgment for plaintiff, and defendant brings error. Reversed, verdict set aside, and cause remanded for new trial.

Reynolds & Reynolds, of Princeton, for plaintiff in error.

RITZ, J. In this case, brought to recover for the alleged negligent killing of two cows by coming into collision with a train operated by the defendant over the line of the Norfolk & Western Railway Company, the plaintiff obtained judgment in the circuit court for the value of both of the animals, amounting to the sum of \$180, to review which this writ of error is prosecuted.

The plaintiff lived upon a farm, just east of the city of Bluefield, owned by one W. F. Beckett. The Norfolk & Western Railway Company runs through this farm, dividing it into two parts. The residence occupied by the plaintiff is on the south side of the railway company's tracks, while a pasture which the plaintiff used for grazing his stock lay on the north side thereof. This pasture field was reached by a road extending from the residence occupied by the plaintiff across the tracks of the railway company. At the point

at which this road crossed the railroad the tracks of the same were at a considerable height above the bed of a small stream, flowing east, just to the south of the railway. This road came down this stream and ascended the bank to the level of the tracks of the railway through a considerable cut. At this point the railway tracks were likewise in a cut, so that a train approaching the crossing from the west could not be seen by any one using the private road until he reached a point about 40 feet from the tracks, where the road reached the same level as the railway roadbed. When this point was reached the tracks were visible for a considerable distance in either direction. It likewise appears that an engineer on an east-bound train would not have a view of any one using the road until such person came within a distance of about 40 or 50 feet from the tracks. On the morning of the occurrence which resulted in the killing of the two cows for which this suit was brought, the animals were being driven from the plaintiff's residence on the south side of the track to the pasture field on the north side thereof. It was shown by the plaintiff's wife that during this time trains passed over this crossing at very frequent intervals; her statement being that one passed every 15 minutes. Because of this fact it was the custom of the plaintiff in driving the cattle to the pasture field to have them accompanied by some one in front, as well as another person behind, so that when the railroad crossing was reached, if there was a train in view, the party in front could stop the cattle and prevent their going upon the track until the train passed. On this occasion the plaintiff's wife and a hired man were conducting five cows and two horses to the pasture field, the plaintiff's wife going in front in order to protect them at the railroad crossing in case of danger from an approaching train, and the hired man driving the animals. Plaintiff's wife testifies that she did not see the train approaching from the west until she was almost upon the track, and that, when she did see it, it was within 40 or 50 feet of her, and that she only escaped by hurrying across the track in front of the train, leaving the cattle unprotected, with the result that one of them got so close to the track that it was hit by the engine with such force that it was knocked against another one of the cows, causing both of them to roll over the embankment, which is 35 or 40 feet high. They were so injured in the accident that it was necessary to kill them.

[1] The defendant insists that plaintiff is not entitled to the judgment rendered in his favor for both of the animals, for the reason that one of them did not belong to him. It appears from the evidence that one of the cows was owned by the plaintiff, and the other was owned by his landlord. It is

shown that when plaintiff rented the farm there went with it all of the cattle and stock upon it, which included one of the cows that was killed, and he had this cow in his custody and possession under his contract at the time it was killed. It seems to be settled that a mere bailee of animals may maintain an action against one wrongfully killing or injuring them. 3 C. J. 159; 6 O. J. 1149; 3 R. C. L., title, Bailments, § 49. And this is true as to one who is an agistor of cattle. Story on Bailments, § 443.

[2] The defendant also insists that the plaintiff cannot maintain this suit because of the contributory negligence of his wife, in charge of the cattle, in allowing them to go upon the track, or to come in dangerous proximity thereto. It is claimed by the plaintiff that the engineer on the locomotive did not sound the whistle or ring the bell when approaching this crossing, and that the defendant was negligent in this regard. The defendant, however, says that whether or not it was negligence not to sound the whistle or ring the bell under the circumstances, the plaintiff was guilty of contributory negligence barring a recovery. As before stated, it appears from the plaintiff's testimony, which was all of the testimony introduced in the case, that one approaching the track from the south side could see a train approaching from the west for a considerable distance when within 40 feet of the track. This fact appears without contradiction; in fact, it is the statement of plaintiff's wife who had charge of the cattle on this occasion. It is likewise shown by her that she did not see this train approaching until it was within 40 or 50 feet of the crossing, at which time she was on the track, or practically upon it. Manifestly if she had looked when she was within 40 or 50 feet of the track, or within 20 feet of the track, she would have seen this train approaching, and would have prevented the cattle from approaching nearer to the track than was safe. Why she did not look is not explained. She was preceding the cattle for the very purpose of protecting them against just such an occurrence as this. There is just as much duty upon one passing over a railroad crossing to exercise the faculties given him for his own protection as there is upon the railroad company to sound an alarm, or give warning of the approach of its train to such crossing, and it is very well

established, both in this jurisdiction and elsewhere, that, where one suffers injury at a crossing by going upon the same without looking or listening for the approach of trains, he can have no recovery, unless it appears that the injury could have been avoided by the railway company's servants after his peril was discovered, or could have been discovered by the exercise of the diligence required to be exercised by such servants when approaching a crossing. In this case it appears without contradiction that the person in charge of these cattle could have seen this train if she had but looked in ample time to have prevented the cattle from reaching a place of danger. In fact, she was preceding the cattle along the road for the very purpose of protecting them against the danger which they encountered. Her conduct in approaching the railroad track without looking to see whether this train was coming until she was practically upon the rails was, under the circumstances, to say the least, negligent, and because of this negligence of the plaintiff's agent in charge of the cattle he is not entitled to recover, unless he has shown that after the perilous position of the cows was discovered, or could have been discovered, the defendant's agents in charge of the train could have stopped the same in time to avoid the accident. *Berkeley v. Railway Co.*, 43 W. Va. 11, 26 S. E. 349; *Riedel v. Traction Co.*, 63 W. Va. 522, 61 S. E. 821, 16 L. R. A. (N. S.) 1123; *Bassford v. Railway Co.*, 70 W. Va. 280, 73 S. E. 926; *Stokes v. Railway Co.*, 104 Va. 817, 52 S. E. 855; *Smith v. Railway Co.*, 107 Va. 725, 60 S. E. 56; *Southern Ry. Co. v. Hansbrough*, 107 Va. 733, 60 S. E. 58; *Chesapeake & Ohio Ry. Co. v. Hall*, 109 Va. 296, 63 S. E. 1007. There is no attempt to show that the peril to the cattle could have been discovered by the defendant's agents in time to have prevented the accident. In fact there is no effort to show within what distance the particular train could have been stopped, or even approximately how far the engine was from the crossing when the danger to the cattle became imminent. Under these circumstances the circuit court should have directed a verdict for the defendant as requested.

It follows that the judgment of the circuit court will be reversed, the verdict of the jury set aside, and the cause remanded for a new trial.

(149 Ga. 783)

(102 S.E.)

DE VANE v. DE VANE et al. (No. 1506.)

(Supreme Court of Georgia. Feb. 12, 1920.)

*(Syllabus by the Court.)***1. WITNESSES §141—IN ACTION BETWEEN BANK AND ADMINISTRATRIX OF DECEDENT BANK CASHIER MAY TESTIFY AS TO HIS TRANSACTIONS AS AGENT WITH DECEASED.**

A cashier of a bank is not excluded by section 5858 of Civil Code 1910 from testifying as a witness in a case to which the corporation is a party, concerning transactions had between such cashier, as agent, in behalf of the corporation, and a person since deceased, whose administrator is the other party to the case.

**2. EXECUTORS AND ADMINISTRATORS §76—EQUITY WILL INTERFERE IN ADMINISTRATION TO PREVENT LOSS OF INTERVENING EQUITIES.**

As a general rule, a court of equity will not interfere with the regular administration of an estate by an administrator. But where one is interested in the title to certain real estate in the hands of the administrator and has intervening equities therein not reached by law, and is liable to suffer loss unless a court of equity intervenes, a court of equity will interfere to prevent such loss.

**3. SPECIFIC PERFORMANCE §121(4) — EVIDENCE SUFFICIENT TO SHOW THAT BANK MADE PARTY PLAINTIFF WAS PARTY TO CONTRACT.**

The evidence in the case was sufficient to authorize a finding that the bank was a party to the alleged agreement sought to be specifically performed.

Error from Superior Court, Cook County; W. E. Thomas, Judge.

Action by J. P. De Vane against Mrs. Lollie Bell De Vane, as administratrix of J. G. De Vane, deceased, in which, by amendment to the petition, the Bank of Adel was made a party plaintiff. Injunction granted, and receiver appointed as prayed, and defendant brings error. Affirmed.

J. P. De Vane brought his petition against Mrs. Lollie Bell De Vane, as administratrix of the estate of J. G. De Vane, for injunction, receiver, etc. It appears that J. G. De Vane died on October 21, 1918, leaving a considerable estate of real and personal property. His widow was appointed administratrix upon his estate, and qualified as such. She made application for, and had set apart to her, a year's support. She also applied for dower, which was duly assigned to her. While administering the remainder of the estate, the father of her intestate, the plaintiff in this case, brought the present action against her as administratrix, in which he prayed, among other things, that she be enjoined from selling any property belonging to her intestate's estate, and that a receiver be appointed to take charge of the assets re-

maining in her hands. By an amendment to the petition the Bank of Adel was made a party plaintiff; and there was a prayer for specific performance of a certain contract between J. P. De Vane and J. G. De Vane and the Bank of Adel, by the terms of which J. G. De Vane was to borrow certain sums of money from the Bank of Adel, giving his notes therefor, and J. P. De Vane was to, and did, sign the notes as surety. It was further agreed that J. G. De Vane was to execute a deed to certain realty belonging to him to the Bank of Adel, in order to indemnify J. P. De Vane against loss by reason of the suretyship. The Bank of Adel agreed to accept said deed. Before the deed was executed J. G. De Vane died. Administration was had upon his estate, and the present suit has, as one of its objects, the specific performance of the alleged contract and the appointment of a receiver to take charge of the property; the plaintiff claiming that he has an equitable lien upon the real estate which was to be conveyed by deed to the bank to indemnify him against loss, and that, unless a receiver is appointed to take charge of the property, it will be sold by the administratrix and the funds dissipated, to the loss and damage of the plaintiff in the amount of the notes which he signed as surety, and which amount to approximately \$7,000. The defendant filed a demurrer to the petition as amended, and also an answer. Upon hearing evidence the court granted an injunction and appointed a receiver as prayed, and the defendant accepted.

J. W. Powell, of Adel, and E. K. Wilcox, of Valdosta, for plaintiff in error.

J. Z. Jackson, of Adel, and Branch & Snow, of Quitman, for defendants in error.

HILL, J. (after stating the facts as above). [1] 1. On the trial of the case the cashier of the bank and its attorney were permitted to testify over objection that the agreement between J. G. De Vane and J. P. De Vane and the bank was entered into substantially as set out in the foregoing statement of facts. The objection was upon the ground that, the bank having been made a party plaintiff to the case, and the present suit proceeding against the defendant as administratrix of the deceased husband, the witnesses were not competent to testify under Civil Code 1910, § 5858. In the brief of counsel for the plaintiff in error it is admitted that this question has been before this court a number of times, and that it has been decided against their contention in the following cases: Ullman v. Brunswick Title, etc., Co., 96 Ga. 625, 24 S. E. 409; Rosser v. Georgia Pacific Ry. Co., 102 Ga. 164, 29 S. E. 171; Maxwell v. Imperial Fertilizer Co., 103 Ga. 108, 29 S. E. 597; Holston v. Southern Ry. Co., 116 Ga. 656, 43 S. E. 29; Cody v. First

National Bank, 103 Ga. 789, 30 S. E. 281; Fla. C. & P. Ry. Co. v. Usina, 111 Ga. 697, 36 S. E. 928. But, counsel argue, these decisions are wrong in principle; and they request this court to review and overrule them. In the Ullman Case, *supra*, this court held:

"There is nothing in the evidence act of 1889, or the amendments thereto, which excludes a director or other agent of a corporation from testifying as a witness in a case to which the corporation is a party, concerning transactions had between such director or agent in behalf of the corporation and a person since deceased whose executor or administrator is the other party to the case."

This ruling, and the rulings in the cases which follow and approve the Ullman Case, is controlling of the question raised in the present record. We have examined that and subsequent cases, and decline to overrule them. The Ullman decision was rendered in 1895, and, so far as we are aware, has been uniformly followed since that time. Counsel and parties have doubtless acted upon the rule there laid down; and the Legislature, which has convened many times since its rendition, has not seen fit to change or abrogate that rule, nor has this court seen fit to overrule the decision so rendered.

[2] 2. It is insisted that the court erred in appointing a receiver to take charge of the assets of the estate and in granting an injunction against the sale of the assets in the hands of the administratrix. It is argued that the court had no right to interfere with the regular administration of the estate of the deceased, unless mismanagement on the part of the administratrix was alleged and shown. The general rule is that a court of equity will not interfere with the regular administration of an estate by the administrator (Civil Code of 1910, § 4596); but there are exceptions to the rule, and we think that the present case falls within the exceptions. One of the exceptions is where a person interested in the estate has intervening equities not reached by law, and he is liable to suffer loss unless a court of equity intervenes for his protection. See *Moody v. Ellerbe*, 36 Ga. 666; *Howes v. Whipple*, 41 Ga. 322; *Hill v. Arnold*, 79 Ga. 367, 4 S. E. 751; *Perkins v. Keith*, 33 Ga. 625; *Knight v. Knight*, 75 Ga. 386(3). In the present case it is alleged that the two De Vanes and the Bank of Adel entered into an agreement under the terms of which, as set out in the foregoing statement of facts, J. G. De Vane was to execute to the bank his deed to certain real estate to indemnify J. P. De Vane against loss in case he should have the surety notes to pay; and it is also insisted that the Bank of Adel was a party to this agreement, but that, on account of the failure of the attorney of the bank to write the deed before the death of the defendant's intestate, the deed was not

executed. If this is the truth of the matter (and there is evidence in the record to support it), then we think the plaintiff would have such an intervening equity in the property which was to have been conveyed as to be entitled to the relief sought under the allegations of the petition and the evidence offered in support thereof.

[3] 3. One other ground of exception remains to be considered, viz. that the alleged contract was one between J. P. De Vane and J. G. De Vane, by which the latter agreed to make the conveyance to the land in question to the Bank of Adel, and that the bank was not a party to the agreement, and therefore that the alleged contract was illegal and void. Under the pleadings and the evidence submitted to the trial judge, we think he was authorized to hold that the contract was entered into between the two De Vanes and the bank. The cashier of the bank testified that the agreement was substantially as alleged by the plaintiff, and that he instructed the attorney for the bank to execute the deed in accordance with the terms of the agreement. The purpose of the deed was doubtless twofold, to indemnify J. P. De Vane against loss, and also as additional security to the bank; and, this being so, we think that there was ample consideration moving to the bank for entering into the agreement, and further that the same was not void as between the three parties thereto for any reason assigned.

Judgment affirmed.

All the Justices concur.

(149 Ga. 763)

OLIVER et ux. v. LEWIS. (No. 1462.)

(Supreme Court of Georgia. Feb. 11, 1920.)

(Syllabus by the Court.)

1. FRAUDULENT CONVEYANCES — 237(2)—PETITION IN SUIT TO SET ASIDE NOT DEMURRABLE ON GROUND OF COMPLETE ADEQUATE REMEDY AT LAW.

C. G. Lewis brought an action against J. T. Oliver and his wife, praying for cancellation of a conveyance of land from the husband to the wife. The allegations of the petition, in so far as are here material, were as follows: The Oliver-Pratt Manufacturing Company, a partnership, and J. T. Oliver and J. S. Pratt, composing the firm, during the year 1912 became indebted to petitioner in the sum of \$812, besides interest, for which sums petitioner obtained a judgment against the partnership and the members thereof, at the November term, 1913, upon which execution was issued and is now unsatisfied in the hands of the levying officer. During the fall or winter of 1912 J. T. Oliver made and executed to his wife a deed, with warranty, conveying a described parcel of land containing 325 acres, and a certain house and lot in a named city, for a stated considera-

tion of \$1,000. The property so conveyed is worth many times more than the stated consideration of the deed. Both the firm and the maker of the deed were insolvent at the time of its execution and record, and are now insolvent, and the conveyance was made by Oliver to his wife with the intention to hinder, delay, or defraud the creditors of the partnership, as well as his own creditors, among which was petitioner, and such intention was known to the wife at the time of the execution and delivery of the deed, and it is therefore fraudulent and void. Demurrers to the petition were overruled, and exceptions pendente lite were filed by the defendants. The answer denied all the material allegations of the petition. A verdict was rendered for the plaintiff. The defendants' motion for a new trial was overruled, and they excepted. *Held*, the petition was not subject to demurrer on the ground that the plaintiff had a complete and adequate remedy at law. *Maynard v. Armour Fertilizer Works*, 138 Ga. 549, 75 S. E. 582.

**2. FRAUDULENT CONVEYANCES §260—PETITION IN SUIT TO SET ASIDE NOT DEMURRABLE AS FAILING TO ALLEGE TIME OF CREATION OF DEED OR CHARACTER OF INDEBTEDNESS.**

As the petition alleged that judgment had been obtained for the amount of the plaintiff's indebtedness against the firm and the members thereof, and stated the term at which the judgment was obtained, the petition was not subject to demurrer on the ground that it failed to allege sufficiently the time at which the debt was created, and the nature or character of the indebtedness.

**3. APPEAL AND ERROR §1078(3) — GROUNDS OF DEMURRER NOT REFERRED TO IN BRIEF ARE ABANDONED.**

Other grounds of demurrer, not referred to in brief of counsel for the plaintiffs in error, under the rulings of this court, will be considered as abandoned.

**4. EVIDENCE §818(8)—FRAUDULENT CONVEYANCES §241(5) — EVIDENCE AS TO JUDGMENTS AND EXECUTIONS IN FAVOR OF THIRD PARTIES ADMISSIBLE AGAINST FRAUDULENT GRANTEE.**

The solvency of a husband at the time of a transaction between himself and his wife being an issue in the case, it was not error to admit in evidence copies of judgments in favor of third persons against the firm and the members thereof, including the husband, together with executions issued on such judgments and entries of nulla bona by the levying officer, over objection that such documents and entries of nulla bona were irrelevant and hearsay as against the wife. *Lawson v. Wright*, 21 Ga. 242; *Buttram v. Jackson*, 82 Ga. 409; *Jennings v. National Bank of Athens*, 74 Ga. 783; *Virginia-Carolina Chemical Co. v. Hollis*, 23 Ga. App. 634, 99 S. E. 154 (4); *Fryberger v. Berven*, 88 Minn. 311, 92 N. W. 1125; 20 Cyc. 775. This is true, although some or most of the indebtedness for which such judgments were rendered was contracted subsequently to the date of the execution of the conveyance by the husband to his wife, but prior to the date of

its record; the husband and his wife being in possession of the property at the time of the creation of such indebtedness and up to the time of the record of his conveyance to her.

**5. FRAUDULENT CONVEYANCES §218—"CREDITOR" DEFINED.**

A person having a contract in existence at the time when an alleged fraudulent conveyance is made, under which the other party to the contract might become liable to him, and who does subsequently become liable to him under such contract, is a "creditor" of such other person from the time the contract went into effect, within the meaning of the statute against fraudulent conveyances. 12 R. O. L. 492, § 25, and cases cited.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Creditor.]

**6. CONTINUANCE FOR ABSENCE OF DEFENDANT.**

Under all the circumstances disclosed in the several grounds of the motion for new trial complaining, in effect, that the judge erred in refusing to continue the case on account of the absence of the defendants, it does not appear that there was any abuse of discretion.

**7. APPEAL AND ERROR §1033(5)—TOO FAVORABLE INSTRUCTION AS TO NECESSITY OF SHOWING THAT CONVEYANCE FROM HUSBAND TO WIFE WAS MADE IN CONTEMPLATION OF INSOLVENCY NOT INJURIOUS TO DEFENDANTS HUSBAND AND WIFE.**

One ground of the motion for a new trial sets forth an excerpt from the judge's charge, and the movants contend that "the portion of the charge which asserts that the plaintiff must show that the deed [from the husband to his wife] was made in contemplation of insolvency is error." There was no error here which was cause for a new trial in behalf of the plaintiffs in error. See *Banks v. McCandless*, 119 Ga. 793, 47 S. E. 832; Civ. Code 1910, § 8011.

**8. SUFFICIENCY OF EVIDENCE.**

The only evidence submitted in behalf of the defendants was the depositions of the wife, taken at the instance of the plaintiff; and when her entire testimony is considered, it does not appear that it required a finding by the jury for the defendants. There was no abuse of discretion in refusing a new trial.

Error from Superior Court, Randolph County; W. O. Worrill, Judge.

Action by O. G. Lewis against J. T. Oliver and wife. Judgment for plaintiff, new trial was denied, and defendants bring error. Affirmed.

R. Terry, of Columbus, O. W. Worrill, of Cuthbert, and M. O. Edwards, of Dawson, for plaintiffs in error.

Yeomans & Wilkinson, of Dawson, and Jas. W. Harris, of Cuthbert, for defendant in error.

FISH, O. J. Judgment affirmed. All the Justices concur.

(149 Ga. 753)

BENSON v. ANDREWS et al. (No. 1450.)

(Supreme Court of Georgia. Feb. 11, 1920.)

*(Syllabus by the Court.)*

1. APPEAL AND ERROR  $\S$ 878(1)—JUDGMENT OVERRULING DEMURRER NOT EXCEPTED TO IS CONCLUSIVE AGAINST DEMURRANT NOT APPEALING FROM JUDGMENT ON THE MERITS.

The judgment overruling the demurrer to the petition included, among other things, construction of the will; and, there being no exception thereto, under former rulings of this court the judgment was conclusive against the demurrant, and as to her became the law of the case. *Brooks v. Bawlings*, 138 Ga. 310, 75 S. E. 157; *Bailey v. Georgia & Florida Ry.*, 144 Ga. 139, 86 S. E. 326.

2. PLEADING  $\S$ 198—JUDGMENT OVERRULING DEMURRER BY ONE DEFENDANT NOT EXCEPTED TO OR REVERSED IS CONCLUSIVE AGAINST OTHER DEFENDANT.

The judgment on the demurrer, unexcepted to and unreversed, was also conclusive upon the executor. *McKinney v. Powell*, 149 Ga. 422, 100 S. E. 375; *Tillman v. Davis*, 147 Ga. 206, 93 S. E. 201 (1); *Tate v. Goode*, 135 Ga. 738, 70 S. E. 571, 33 L. R. A. (N. S.) 310; 6 Enc. Proc. 939.

3. WILLS  $\S$ 327—EVIDENCE SUFFICIENT TO SUPPORT ALLEGATIONS OF PETITION AS TO WHICH DEMURRER HAD BEEN OVERRULED AUTHORIZED DIRECTED VERDICT FOR PLAINTIFF.

Under application of the foregoing rulings, evidence submitted at the trial, sufficient to support the allegations of the petition, authorized a verdict for the plaintiff; and, without regard to the impropriety of directing a verdict for a defendant upon the conclusion of the plaintiff's evidence where he fails to prove his case as laid (*Copeland v. Jordan*, 147 Ga. 601, 95 S. E. 13), it was erroneous in this case to direct a verdict for the defendants.

George, J., dissenting.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by M. I. Benson, by guardian, against Frankie Andrews, the Central Bank & Trust Corporation of Atlanta, as executor of Perry Andrews, deceased, and others, involving the construction of a will. General demurrer by defendant Frankie Andrews overruled, petition amended, and case tried on the merits, and judgment for defendants on a directed verdict, and plaintiff brings error. Reversed.

Perry Andrews died testate, leaving a widow Frankie Andrews, and her daughter, Idelia, by a former marriage, whom he had formally adopted and given his name. The will provided, among other things:

"Item 2. To my wife, Frankie Andrews, I will and bequeath my place of residence located at number 397 North Jackson street, City of At-

lanta, Ga., together with all household and kitchen furniture and other personal property belonging to and necessary to said home. In the event of my disposing of such property prior to my death, then it is my will that my said wife should own and possess any other home or place of residence, with the personalty therein contained, of which I may die possessed. This property is willed to my wife for and during her life or widowhood. In the event of her death or marriage during the life of my adopted daughter, Idelia Andrews, then it is my wish that said dwelling house, with the furniture and personal property connected with the same, shall become the property of my adopted daughter, Idelia Andrews. If my daughter, Idelia Andrews, should marry and become the mother of a child or children, and should die previous to the death or marriage of my said wife, then it is my desire that the property described and mentioned in this item should descend to the child or children of my said daughter, if any. Should my said wife, Frankie Andrews, die previous to the death of my daughter, it is my will that the property described and mentioned in this item should descend directly to the daughter for life, with fee to her children; the purpose and intent of this will being that this home property should be a home for my wife so long as she shall live or remain unmarried, and, at her death or marriage, that it shall become the home of my adopted daughter if in life, or the property of the children of said adopted daughter, if any. At the death or marriage of my said wife, and upon the death of my said adopted daughter without leaving children, then I direct that this property shall revert to my estate and be disposed of as hereinafter provided. I want it distinctly understood that it is my purpose to give this property, first, to my wife as a home under the conditions named; next, to my daughter; and upon the death of both, that no husband of either should control any part of it, but, in the absence of children of the daughter, that the property shall revert to my estate.

"Item 3. I direct that after my debts are paid, and in so far as may be practicable or expedient, that all of my estate remaining after my debts are paid, other than is covered by item 2 of this will, shall be kept intact, invested in the discretion of my executor, and that all income or revenue arising therefrom is bequeathed unto my said wife, Frankie Andrews, and my adopted daughter, Idelia Andrews, under the same terms and conditions and with the same limitations upon the same as provided in item 2 of this will, the final disposition of said property to be determined in accordance with the same directions as given in item 2 of this will. I direct that any and all interests passing unto my said daughter or to her issue, if any, are to be and remain their separate and sole estate free from the control, management, or uses of any husband my said daughter may take.

"Item 4. In the event of the death of my said daughter without issue, and likewise the death or marriage of my wife, Frankie Andrews, I desire and direct as follows: My executor shall sell all of my property both real and personal, and that the proceeds of such sale shall be divided into six shares and the same



to be paid as follows: [Then follow the names of others not necessary to be mentioned.] The distinct purpose and intent of this will is to promote [provide?], first, for my wife and daughter, in the manner and under the conditions set forth in the second and third items of this will, and in the event of the death or marriage of my said wife, thus fulfilling my obligations to her, and in the event of the death of my adopted daughter without children, then to provide for a disposition of my property after paying expenses of administration. Should my daughter, Idelia Andrews, marry and leave children, the disposition of the property set forth in this item of the will not to be of any effect; but should my said daughter die without children, and upon the death or marriage of my wife, the disposition of the estate provided in this item is to take effect.

"Item 5. I hereby nominate and appoint the Central Bank & Trust Corporation of Atlanta, Georgia, as executor of this my will."

Subsequently a codicil to the will was executed, which, so far as material, was as follows:

"In order to insure my wife and daughter named in said will against any possibility of want for the necessities and comforts of life, I hereby authorize and empower them, or the survivor if either of them should die, to sell and convey at public or private sale the fee-simple estate in any of the property owned by my estate at the time of such sale, and to receive and use the proceeds thereof for their or her support and maintenance; provided however that before exercising such power of sale they or she shall first notify the executor of this will in writing that in their or her opinion such sale is necessary in order to raise funds for their or her comfortable support or maintenance, which said notice shall describe the property which it is proposed to sell and shall be filed by the executor with the ordinary as a part of its report."

The will was executed in August, 1914, the codicil in November of the same year, and the testator died shortly thereafter. The will was probated in solemn form in June, 1915. In February, 1918, Idelia, having married and being a minor, instituted an equitable action by her guardian against her mother (the widow of the testator) and the executor. The petition alleged all that is stated above, and, among other things, the following: There came into the hands of the executor the residuum of the estate exclusive of the home place and household furniture, which, after the payment of all debts of the testator, amounted to \$30,000, and was invested by the executor as directed by item 3 of the will. The executor recognized the widow as sole beneficiary of the trust estate created by item 3 of the will, and was continuing to pay to her the entire income of the residuum of

the estate to the exclusion of the plaintiff. Petitioner's guardian has demanded from the executor one-half of the net income from such residuum, which demand was refused. The demand was based on a construction of the will whereby it was contended that all of the income from the residuum held in trust by the executor was bequeathed to the widow while she lived and petitioner jointly, and both should participate equally in such income so long as the widow should live. Such construction had reference to the will in its entirety, and the codicil, considered in the light of certain allegations as to the circumstances confronting the testator at the time the will was executed. Among the prayers of the petition were: (a) That the will be construed by the court as indicated above; (b) that the executor be directed to pay petitioner one-half of the income now on hand, or that may hereafter be received, and that the executor be enjoined from paying to the widow more than one-half thereof; (c) that judgment be rendered against the executor for one-half of the amount of the income already received by him; (d) that the executor make discovery as to the assets of the estate, etc. A general demurrer to the petition was filed by the widow, on the ground that the allegations did not set up a cause of action or any basis of relief, more especially because, there being no ground of equitable relief, the court was without jurisdiction to construe the will, and upon a proper construction of the plain language of the will it should not be construed as contended for by the plaintiff. The demurrer was formally overruled, and no exception was taken to this judgment. The widow also filed an answer. The executor did not file any demurrer to the petition, but filed an answer. At a subsequent term the case came on for trial on its merits, and the plaintiff amended the petition by striking therefrom the allegations as to liability of the executor for one-half of the income already collected by the executor, and the prayer for judgment against the executor for such portion of the income. Upon the conclusion of the plaintiff's evidence the trial judge directed a verdict for the defendants, and entered judgment accordingly. The plaintiff excepted.

Mitchell & Mitchell and Bell & Ellis, all of Atlanta, for plaintiff in error.

Mayson & Johnson, Hewlett & Dennis and Candler, Thomson & Hirsch, all of Atlanta, for defendants in error.

ATKINSON, J. Judgment reversed. All the Justices concur, except GEORGE, J., dissenting.

(149 Ga. 765)

SPEER et al. v. ALEXANDER. (No. 1497.)

(Supreme Court of Georgia. Feb. 11, 1920.)

*(Syllabus by the Court.)*

PLEADING  $\S$ 225(1) — DISMISSAL PROPER WHERE AMENDMENT ALLOWED ON SUSTAINING DEMURRER IS INEFFECTUAL.

Where to a petition seeking injunction, cancellation of a written instrument, etc., general demurrers upon various grounds and special demurrers to various paragraphs of the petition were filed, and upon the hearing the court sustained the general and special demurrers, with leave to amend the petition within a stated period, ordering, further, that, "unless plaintiff amends as allowed within the time specified, the petition of plaintiff will stand dismissed," and petitioners did amend within the stated period, but failed to add to or change materially the allegations of the petition relatively to the questions raised by general demurrer, a dismissal of the suit necessarily followed, without respect as to whether or not the general and special demurrers were properly sustained by the first order. The assignment of error upon the final dismissal of the case raised solely the question as to whether or not the amendments were of such character as to meet the original demurrers.

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Suit for injunction by J. M. Speer and another against John W. Alexander. Motion to dismiss was sustained, and petitioners bring error. Affirmed.

J. M. Speer and Mrs. Maud R. Speer brought their petition against John W. Alexander, and sought injunction and cancellation of a certain promissory note given to the defendant by the plaintiffs for the purchase price of a certain business. It was alleged in the petition as follows: On November 8, 1915, the defendant was conducting and operating a skating rink and a certain business accessory thereto in a building owned by him. On that day the petitioners rented the building from the defendant for a specified period. T. P. Sharp was interested with petitioners in the lease. The lease was continued for one year, and was to terminate and liability for rent was to terminate immediately if at any time the building became unfit for use as a skating rink. Petitioners, contemporaneously with the leasing of the premises from the defendant, purchased from him a half interest in the skating-rink business conducted by the defendant, agreeing to pay him for that interest, including certain accessories, the sum of \$1,500, for which they executed their joint promissory note, payable one year from date. They subsequently made certain payments on the note. This purchase was made upon the defendant's representations that said business was exceedingly profitable. These represen-

tations were false, and were fraudulently made for the purpose of selling to petitioners the business, which was not only worthless, but constantly losing money, and it did lose money continuously, though conducted conservatively and economically until June 9, 1916, on which date the skating-rink building collapsed, and the further operation of the business was rendered impossible. Up to that date the business had been conducted at a loss by petitioners. The collapse of the building was in consequence of defective construction unknown to petitioners. Had the building not collapsed, petitioners might have reaped a fair profit on the business during the remainder of the year 1916. The defendant had given notice that on the first Tuesday in September, 1917, he would sell at public outcry 10 shares of bank stock owned by one of the petitioners, which had been transferred to the defendant as collateral security. By reason of the utter failure of consideration for the promissory note and of the other facts stated in the petition, petitioners are not indebted to the defendant in any sum, but defendant should repay to them the amount paid by them on account of that note and on account of the rental of the premises; and he has injured and damaged petitioners in the sum of \$5,000 by his false and fraudulent representations. They prayed for injunction, and for a judgment in a stated sum as damages, etc. An interlocutory injunction was granted and continued until the hearing of the cause in term. At the appearance term the defendant filed general and special demurrers upon the ground of nonjoinder of parties and numerous other grounds. The petition was divided into 13 paragraphs, and these paragraphs, in consecutive order, were demurred to generally and specially. At the hearing the court passed the following order:

"The within general and special demurrer coming on to be heard, it is ordered that the prayers for injunction be stricken, and the restraining order heretofore granted be dissolved. The remaining grounds of general and special demurrer are sustained, with 20 days' leave granted to the plaintiffs to amend said petition; and unless plaintiffs amend as allowed within the time specified, the petition of plaintiffs will stand dismissed."

Within the time allowed the petitioners amended by striking certain words from specified paragraphs (which are immaterial so far as relates to the question here involved), and by striking paragraphs 7 and 8 and making in lieu thereof certain allegations more clearly showing the amount of the interest of the petitioners in the business, and by adding further allegations as to the profits that might have been made in the latter part of the year after the building had collapsed, that is, in the summer and

fall of 1916, and making a further statement as to the losses; also by striking from the original petition the prayer for \$5,000 damages. After the amendment was submitted, the motion to dismiss was renewed on the ground that the amendment did not remove the objections previously urged. This motion to dismiss was sustained by the court, and the petitioners excepted.

Napier, Wright & Wood and Westmoreland, Anderson & Smith, all of Atlanta, for plaintiffs in error.

R. B. Blackburn and Colquitt & Conyers, all of Atlanta, for defendant in error.

BECK, P. J. (after stating the facts as above). The court did not err in sustaining the motion to dismiss. A general demurrer based upon several grounds had been sustained, and the demurrers that went to the merits of practically every paragraph of the petition had also been sustained. The ruling sustaining the original demurrers became the law of the case, and to this ruling there was no exception. The assignment of error in the bill of exceptions is upon the ruling of the court sustaining the motion to dismiss after the amendment was submitted. The motion to dismiss was properly sustained because of the failure of the plaintiffs to amend in material particulars relatively to the general demurrer. The changes made by the amendment were in no respect material to the character or substance of the suit as it stood before the amendment, so far as related to the statement of a cause of action; and the order that the case should "stand dismissed," unless the plaintiff filed amendments as allowed, automatically dismissed the case, where no amendments were filed that met the general demurrers. Clark v. Ganson, 144 Ga. 544, 87 S. E. 670.

Judgment affirmed.

All the Justices concur.

(149 Ga. 741)

HILL v. HILL. (No. 1874.)

(Supreme Court of Georgia. Feb. 10, 1920.)

(Syllabus by the Court.)

**1. WILLS §=858(2)—ON FAILURE OF CONTINGENCY RULE AS TO LAPSED LEGACIES DOES NOT APPLY, AND RESIDUARY LEGATEE WILL TAKE.**

A devise (in a will executed either before or since the adoption of the Code of 1895), which was obviously and necessarily contingent when the will was made (such as a remainder in behalf of future children), is not, upon failure of the contingency, within the ordinary rule applicable to a void or lapsed devise; and the residuary devisee will take instead of the heir at law, unless the will contains special indication of a con-

trary intention on the part of the testator. The will in this case does not contain special indication of a contrary intention on the part of the testator; and consequently the reversionary and contingent interest not previously devised passed to the residuary devisee appointed by the will, and not to the heir.

(Additional Syllabus by Editorial Staff.)

**2. WILLS §=437—LAW EXISTING AT TESTATOR'S DEATH GOVERNS CONSTRUCTION.**

A will must be construed under the law as it existed at the testator's death.

Error from Superior Court, Cobb County; N. A. Morris, Judge.

Application by E. G. Hill, administrator of John W. Hill, deceased, for an order for sale of land described in an item of the will, with claim thereto by Benjamin H. Hill. Judgment for the administrator on a directed verdict, and claimant excepts and brings error. Reversed.

See, also, 101 S. E. 121.

On May 6, 1884, John W. Hill executed to his son, Edward Young Hill, a writing which all parties to the case treat as a deed. All parties likewise agree, at least for the purposes of this case, that the deed conveyed all the property therein described to Edward Young Hill for his life, with remainder to his children. On May 31, 1884, John W. Hill executed his will, and died soon after the making of it. His will was probated in solemn form on January 5, 1885. By separate items of his will the testator devised to his six children certain lands in severalty, with remainder to their children respectively. To his wife he devised certain lands for life, with remainder to his son, Benjamin H. Hill, with the exception of one tract of land which was devised to Edward Young Hill. Edward Young Hill was named as devisee in item 6 of the will. The land described in this item is the same as that described in the deed from John W. Hill to Edward Young Hill, of date May 6, 1884. Benjamin H. Hill was named as devisee in item 9 of the will. Under this item Benjamin H. Hill took a life estate only in all property devised to him, including the land in which an estate for life or widowhood had first been devised to testator's wife. The tenth item of the will, as far as material here, is as follows:

"The residue of my property both real and personal, whatever and wherever it may be, including that given to my wife in the third article when her estate therein is over, all goes to my son Benjamin, all that has been willed and deed to my wife, both land and Big shanty property, all goes to Benjamin except the little Babb mill place" (devised to Edward Young Hill).

Elvira S. Hill, the wife of testator, and Edward Young Hill were appointed executors

of the will and guardians and trustees for the minor children. The testator was survived by his wife, his daughter (Mrs. May D. Lunsford), and five sons, George, Edward Young, E. G., James M., and Benjamin H. At the time of the execution of the will and at the time of the testator's death, two children were married and four of them were single. None of them had a child or children. The executors named in the will qualified. The testator's wife died in 1892. Edward Young Hill died in 1918. He was survived by his widow, Mrs. Tinnie Hill, as his sole heir at law. He never had any children. He was in possession of all the property mentioned in the deed and in the sixth item of the will at the time of his death. After the death of the surviving executor (Edward Young Hill), E. G. Hill was appointed administrator with the will annexed of the estate of John W. Hill. Upon application of the administrator (in possession) the ordinary granted an order for the sale of the land devised to Edward Young Hill for life and described in item 6 of the will. Benjamin H. Hill claimed the land. On the trial of the issue the court directed a verdict in favor of the administrator. To the direction of this verdict, and to the judgment rendered thereon, the claimant excepted.

D. W. Blair, of Marietta, for plaintiff in error.

J. Z. Foster and Mozley & Gann, all of Marietta, for defendant in error.

GEORGE, J. (after stating the facts as above). The facts upon which the legal rights of the parties depend are not in dispute. Edward Young Hill took only a life estate in the specific land devised to him in item 6 of John W. Hill's will. He married, and his widow survived him, but no children were born to him. The question is whether the remainder or reversionary interest in the specific property devised to him in the sixth item of the will passed under the residuary clause (item 10 of the will) to the residuary devisee, Benjamin H. Hill, the claimant, or whether it descended, as in case of intestacy, to the heirs at law of the testator. If the reversionary interest in the land did not pass under the residuary clause to the residuary devisee, then it necessarily descended to the heirs at law of the testator. Section 3907 of the Civil Code of 1910 provides:

"A lapsed or void legacy of personal property falls into the residuum and goes to the residuary legatee. Ordinarily, real estate described in a lapsed or void devise descends to the heir; but under a devise necessarily contingent when the will was made, on failure of the contingency the residuary legatee will take."

[2] This section appeared first in the Code of 1895 as section 3331. If the will in this case had been executed since the Code of 1895, the question would be without serious

difficulty. But the will was made and the testator died more than 11 years before the adoption of the Code of 1895, and, according to the decisions of this court, the will must be construed under the law as it existed at the time of the testator's death. *Bennett v. Williams*, 46 Ga. 399; *Munroe v. Basinger*, 58 Ga. 118; *Crawford v. Clark*, 110 Ga. 729, 36 S. E. 404; *Sumpster v. Carter*, 115 Ga. 893, 42 S. E. 324, 60 L. R. A. 274. It is insisted on behalf of the defendant in error that the provision contained in section 3907 of the Civil Code of 1910, by way of exception to the general rule that "real estate described in a lapsed or void devise descends to the heir," was not the law of this state prior to the adoption of the Code of 1895. The section of the Code is apparently based upon the decisions in two cases, to wit, *Williams v. Whittle*, 50 Ga. 523, and *Dillard v. Ellington*, 57 Ga. 567. The exception in the statute, or the provision stated by way of exception to the general rule, is based upon the decision in the case last cited. At page 592 of the opinion delivered by Judge Bleckley, it was said:

"It is not certain that aid is needed from the residuary clause of the will to pass the reversion into the surviving sister as to the whole of the specific property. But, if needed, we think that clause may be invoked. The failure of a remainder to become vested, which the testator must have known, and not merely may have known, might never vest is not like the ordinary case of a void or a lapsed devise. When the testator created a remainder in favor of children unborn, he must have known that they might never be born, and hence that the remainder was necessarily contingent. On the state of facts which he knew to exist at the time the will was made, he knew that there was a reversion as to this specific property. But intending to leave none of his estate undisposed of, he proceeded to dispose of this reversion effectually in the residuary clause, if he had not already done so in the previous clause. When a reversion may be incident to a specific devise, the testator may be supposed not to have contemplated it; but when it must be incident, and cannot possibly be otherwise, the presumption should be that he had it in mind, and that language used by him, sufficiently comprehensive to dispose of it, was used with that intent"—citing 1 Jarman on Wills, 591, 593; 1 Mau. & Sel. 800; 1 B. & Adol. 186; Van Kleeck v. Reformed Dutch Church, 6 Paige Ch. (N. Y.) 600.

The ruling of the court in that case is found in the seventeenth headnote, as follows:

"A devise which was obviously and necessarily contingent when the will was made (such as a remainder in behalf of future children) is not, upon failure of the contingency, within the ordinary rule applicable to a void or a lapsed devise; and the residuary devisee will take, instead of the heir at law."

It is said that this ruling and the opinion in support thereof are obiter dicta. In the

sense that it may have been unnecessary to invoke the residuary clause of the will in that case in support of the ruling there made, the language is obiter, but the facts of the case authorized a decision upon the point. We will, however, examine the prior decisions of this court for the purpose of showing, if we can, that the ruling made in *Dillard v. Ellington* is not in conflict with any prior ruling of the court, but on the contrary, was the true law of the state in 1876 and at the time of the death of John W. Hill in 1884. In the case of *Silcox v. Nelson*, 24 Ga. 84 (2), decided in 1853, it was held:

"A legacy lapsed does not fall into the residuum, where it is manifest from the will that the testator did not intend that the residuary legatees, from the nature of the bequests or devises to them, should take any part of a legacy."

At page 90 of the opinion (by Judge McDonald) it was said:

"Where the residuum is given in distinct parcels, as in this case, or to several as tenants in common, it is to be inferred that the testator did not intend that lapsed legacies should fall into the residuum, but it is to be presumed in such case that he had expressed all that each residuary legatee should take."

The will in that case directed the sale of testator's property, both real and personal, except certain property specially bequeathed, and bequeathed a one-third portion thereof to a named school in the county of York, England. This particular legacy, it was contended, had lapsed because of the nonexistence of the legatee named in the will. The decision clearly recognized the general rule that a lapsed legacy (of personal property) falls into the residuum and passes to a residuary legatee; but it was adjudicated that the case did not fall within the general rule because of the contrary intention of the testator plainly manifested in his will. The court made no distinction between a lapsed legacy and a lapsed devise. The ground upon which the decision was made rendered it unnecessary for the court to note the distinction. This case was followed by *Hughes v. Allen* (1860) 31 Ga. 483. The opinion in that case was written by Judge Lumpkin. At page 489 he said:

"The following propositions we hold to be true: That when the general legatee is residuary legatee, he is entitled, not only to what remains after the payment of debts and legacies, but also to whatever may, by lapse, invalid disposition, or other casualty fall into the residue after the date and making of the will. *Roper on Legacies*, 1673; 1 Ves. Sen. 320; *Russell & M.* 258. That a residuary clause passes a lapsed legacy, and that which is intended to be the subject of bounty to another. And this rule laid down by Lord Collingham (*Roper*, 1682) is founded upon the idea, not that it effects, in specie, what the testator intended, but because the residuary clause is understood to be intended to embrace anything, not otherwise effectually

given. Because, as Sir Wm. Grant expresses it, the testator is supposed to give it away from the residuary legatee only for the sake of the particular legatee, or, as it is sometimes expressed, the particular intent of the testator is made to give way to the general intent, to effectuate the plain purpose of the testator—not to die intestate as to anything belonging to him."

That case dealt with a lapsed legacy, and it was adjudged that the personality passed to the heirs at law of the testator, and not to his residuary legatees. The residuary clause in the will there under consideration gave to the legatees "all other property belonging to me not heretofore specified." The court held that a void bequest, or an ineffectual attempt to dispose of personality, which amounts to no disposition at all, would go to the residuary legatee under a clause giving to such legatee "all the rest of my property not heretofore disposed of," but that the term "not heretofore specified" is a term of identification only. The decision was therefore placed upon the ground that the words in the residuary clause so narrowed the title of the residuary legatee as to exclude them from taking the lapsed legacies—much the same principle upon which *Silcox v. Nelson*, supra, was decided. *Hughes v. Allen* was followed by *Word v. Mitchell* (1861) 32 Ga. 623, where it was ruled that—

"A legacy failing, either by lapse or because void at law, falls into the residuum and passes to the residuary legatee, and not to the next of kin."

The will in this case disposed of both real and personal property, but again the distinction between a void devise (of land) and a void legacy (of personality) seems not to have been made. The decisions cited in support of the ruling are all cases dealing with a lapsed legacy, and therefore the case cannot be accepted as holding that a lapsed devise falls into the residuum and passes to the residuary devisee. The next case to which our attention has been directed is that of *Thweatt v. Redd* (1873) 50 Ga. 181, a case of a lapsed legacy. It recognizes the general rule that a legacy failing, either by lapse or because void at law, falls into the residuum and passes to the residuary legatee, and not to the heir, where there is no contrary intention expressed in the will. *Word v. Mitchell*, supra, was cited in support of this ruling. It was accordingly held that there were no words in that will which so narrowed the title of the residuary legatees as to exclude them from taking the lapsed legacies, as in the case of *Hughes v. Allen*. Then followed the case of *Williams v. Whittle* (1874) 50 Ga. 523. This case draws a distinction between the rule in cases of lapsed or void legacies and in cases of lapsed or void devises, and announces the rule to be, in keeping with the general rule recognized by the

English courts and followed almost invariably by the courts in this country, that a lapsed or void legacy (of personalty) falls into the residuum and passes to the residuary legatee, but that a void devise (of realty) descends to the heir. The general rule, codified in section 3331 of the Code of 1895 and carried forward as section 3907 of the Code of 1910, is clearly announced by Judge Triple in the opinion in *Williams v. Whittle*. By the third item of the will in that case the testator devised two lots of land to a trustee for slaves. This devise was held void under the laws of this state. The contest was between the heir at law and the general residuary devisees. The case therefore fell within the ordinary rule applicable to a void or lapsed devise. The court was not called upon to decide whether a devise, necessarily contingent when the will was made, was, upon failure of a contingency, within the general rule applicable to a void or lapsed devise. This is clearly pointed out by Judge Bleckley in *Dillard v. Ellington*, 57 Ga. 593, and we agree with him that the distinction is evident between *Dillard v. Ellington* and *Williams v. Whittle*. At this point we call attention to the case of *Lane v. Patterson* (1912) 138 Ga. 710, 76 S. E. 47, relied upon by counsel for defendant in error. As will be noticed, the case was decided after the adoption of the Code of 1895. However, the will there considered was executed in 1885, and was probated in 1896. By the sixth and seventh items of the will in that case lands were devised to named trustees in trust for Lucinda V. for and during her life and to her children living at the time of her death. The tenth item of the will was as follows:

"I give, devise, and bequeath to my said daughter Lavinia, \* \* \* Josephine, \* \* \* Emma, \* \* \* in trust for Lucinda V., \* \* \* Emma, \* \* \* and to my son, George, \* \* \* all my other lands not hereinbefore disposed of, of which I may die seized and possessed, for and during their natural lives, and at their deaths to their respective children living at the time of their death, to be divided among my said children, share and share alike."

The testator died seized and possessed in fee of other lands than those specifically devised in other items of his will, and which, subsequently to the death of the testator, were partitioned in kind among the devisees of the testator named in item 10 of the will. Lucinda V. died unmarried and without children. It was accordingly held:

"Item 10 in which was devised only all 'other lands' of which the testator might be seized and possessed, 'not hereinbefore disposed of,' did not purport to dispose of, nor dispose of, any of the lands previously devised to Lucinda V. in items 6 and 7, nor any reversionary interest therein."

The decision did not refer to section 3907 of the Code of 1910 (Code of 1895, § 3331), to the case of *Dillard v. Ellington*. The court

was evidently of the opinion that item 10 of the will was in the nature of a special devise, rather than a devise of the residuum of the estate, and that by item 10 of the will the testator intended to devise only lands not previously dealt with in any other item of his will. Judge Bleckley, doubtlessly, and, as we think, correctly, supposed that the rule in force in this state in 1875 was the rule generally recognized by the English courts at the date of our adopting statute. Looking, therefore, to the general authorities we find this statement in 1 *Jarman on Wills* (6th Am. Ed.) 636:

"But as under the old law a testator could only devise the real estate to which he was actually entitled at the time of making his will, it follows that every residuary devise in such a will, however general in its terms, was in its nature specific, being in fact a specific disposition of the lands not before given, or, to speak more accurately, not before expressed to be given by the will. Thus, if a testator, being seized of Blackacre and Whiteacre, and having no other real estate, by a will made before 1838 devised Blackacre to A. in fee and all the rest of the lands to B., B. took exactly that which he would have taken under a specific devise of Whiteacre and no more; and, consequently, if the devise to A. failed, from its being devoted to charity, or from the devisee being dead at the time, or from his subsequent death in the testator's lifetime, B. could no more have taken, by virtue of his residuary devise, the interest so given, or intended to be given, to A. than he could have done under a specific devise of another property. But this general rule admitted of exception in certain classes of cases which will be here very briefly indicated \* \* \* And a contingent remainder being an interest which had an inherent liability to fail, as well through the event upon which it was limited not happening before the determination of the prior particular estate as through its not happening at all, the interest, which upon a failure of the former kind was left undisposed of by the specific devise, was held to pass by a residuary devise in the same will."

The author then adds:

"The points embraced by the preceding positions can scarcely arise under wills which are subject to the act of St. 1 Vic. c. 26, § 25"

—i. e., under wills made after 1838, thus clearly showing that he was dealing with wills made before 1838. In *Van Kleeck v. Reformed Dutch Church* (1837) 6 Paige's Ch. (N. Y.) 600, 610, a leading case, Chancellor Walworth reaches the following conclusion:

"The rule as to reversionary and contingent interests not previously devised, as now settled in England, appears to be that a general residuary clause will carry all such interests to the residuary devisees, unless the will contains special indications of a contrary intention on the part of the testator. In other words, the legal presumption is that the residuary clause was intended to embrace such contingent and reversionary interests, in the absence of any other evidence of the testator's intention appearing

upon the will itself when taken in connection with the situation of the testator's property and family at the date of the will."

As noted, this case itself was decided in 1837, and the English cases reviewed and cited in support of the conclusion there reached by the chancellor are: *Doe v. Weatherby* (1809) 11 East, 322; *Wheeler v. Walroone*, *Alleyne*, 28, 82 Eng. Rep. 898; *Willows v. Lydcot*, 2 Vent. 285, 86 Eng. Rep. 443; *Hogan v. Jackson* (1775) Cowp. 290, 89 Eng. Rep. 1096; *Atkyns v. Atkyns* (1778) 2 Cowp. 808, 98 Eng. Rep. 1373; *Ridout v. Pain* (1747) 3 Atk. 485; *Goodtitle v. Knot* (1774) 1 Cowp. 43, 98 Eng. Rep. 958. Among the American cases cited by the chancellor are *Hayden v. Inhabitants of Stoughton*, 5 Pick. (Mass.) 528; *Brigham v. Shattuck*, 10 Pick. (Mass.) 309. The opinion in *Hayden's Case* was written by Mr. Justice Putnam. Certain lands were devised to the inhabitants of Stoughton, upon condition which the court held to be a condition subsequent. The testator appointed a residuary devisee. It was ruled that the contingent estate upon failure of the devisee to perform the condition subsequent passed to the residuary legatee. The case was decided upon the principle that the contingent estate was one that the testator must have had in contemplation as undisposed of by the previous clause of the will at the time such residuary clause was framed. The opinion in the case last cited was delivered by Chief Justice Shaw, and, with respect to the question here considered, follows the opinion by Mr. Justice Putnam in *Hayden v. Inhabitants of Stoughton*, *supra*. Cases, both English and American, might be multiplied (although cases both English and American may be found which serve to confuse the question) to the effect that the general rule in force at the time of our adopting act was that a residuary devise of real estate carries with it, not only the real estate in which no interest is devised in the previous items of the will, but also every reversionary and contingent interest which, in the events contemplated by the testator as apparent from the will itself, is not wholly and absolutely disposed of, and which would be a proper subject of devise consistently with the declared intent of the testator to adopt the language of the chancellor in *Van Kleeck v. Dutch Reformed Church*, *supra*.

[1] We conclude, therefore, that the exception to the general rule now contained in section 3907 of the Code of 1910, and as stated in *Dillard v. Ellington*, *supra*, was in force in this state in 1885. That the present case is within the exception, and not the general rule, is scarcely open to question. It is in principle the very case stated in *Dillard v. Ellington* as being within the exception. When the testator executed his will he had six children. Two of them were married, but none of them had children either at the time of the execution of the will or at the time

of his death. The testator nevertheless created a remainder in specific property given to each of his children in favor of their children then unborn. The language of Judge Bleckley in *Dillard v. Ellington* is strictly applicable:

"When the testator created a remainder in favor of children unborn, he must have known that they might never be born, and hence that the remainder was necessarily contingent. On the state of facts which he knew to exist at the time the will was made, he knew that there was a reversion as to this specific property. \* \* \* When a reversion may be incident to a specific devise, the testator may be supposed not to have contemplated it; but when it must be incident, and cannot possibly be otherwise, the presumption should be that he had it in mind, and that language used by him, sufficiently comprehensive to dispose of it, was used with that intent."

The language of item 10 is sufficiently comprehensive to dispose of this interest in remainder or reversion, unless the broad and comprehensive language, "the residue of my property both real and personal whatever and wherever it may be," is restricted and qualified by the enumeration of the reversion in the property given by the testator to his wife after her estate therein had ended. Except in the residuary clause, the testator dealt with his estate by piecemeal. In every other item of the will he indicated by name, lot number, and acreage the lands devised. There is little ground to suppose that the testator believed that he had overlooked any particular tract of land. And, so far as appears, he had not. The will itself shows that John W. Hill had already executed a deed to Edward Young Hill, conveying the property devised to him in item 6 of the will, for life, with remainder to his children. The will also shows that similar deeds had been made to all other devisees. Assuming that these deeds were delivered, the undisposed of reversion in the property was all that remained in the testator. It is manifest, however, that the testator at the time of the execution of the will wished to make assurance doubly sure, and this fact strengthens the conclusion that it was his intention to dispose of all his property, and every interest therein. He more than one time expressed the wish that no court or judicial officer should change or alter any provision of the will, authorize the sale or exchange of any property devised, or exercise any jurisdiction whatever over his estate, except "to appoint a better executor or trustee if needed." The statement, therefore, in the residuary clause that the residue of the testator's property included the reversion in the lands devised by him to his wife for life is not sufficient to overcome the legal presumption that the residuary clause was intended to embrace the reversionary interest in the property devised to Edward Young Hill for life, under item 6 of the will.

The fact that the devisee of the life or limited estate specifically devised is also the general residuary devisee will not exclude him from taking the reversion in fee in the latter character. This seems to have been the opinion of the English judges and upon that question we cite only the case of *Hogan v. Jackson*, 1 Cowp. 289, 98 Eng. Rep. 1096. The opinion was delivered by Lord Mansfield, and he observes:

"But I do not think the objection of itself sufficient strong to control the manifest operation of the subsequent words used by the testator in the residuary devise. It would be going a great way, indeed, to lay it down as a general rule that, where a particular estate is given to a person in one part of a will, and the testator afterwards devises to him in more general words, he shall not reap any benefit of such residuary devise. Indeed, as to this objection the case of *Ridout v. Pain*, 3 Atk. 486, is exactly in point. There the testator, in the first instance, gave his wife only an estate for life, in part of his real estate, and afterwards bequeathed her the residue, etc. The objection of inconsistency, now so strongly relied on, was there made; but Lord Hardwicke overruled it, and held the residuary clause carried the inheritance notwithstanding."

Upon writ of error in the House of Lords the judgment in *Hogan v. Jackson* was affirmed.

In view of the foregoing we are of the opinion that the verdict should have been for the claimant.

Judgment reversed.

All the Justices concur.

(149 Ga. 777)

**WRIGHT et al. v. MARTIN.** (No. 1480.)

(Supreme Court of Georgia. Feb. 12, 1920.)

*(Syllabus by the Court.)*

1. NEW TRIAL  $\S$ 73—NEW TRIAL ORDERED WHERE NEGATIVE ANSWERS TO DESIGNATED QUESTIONS ARE UNSUPPORTED BY THE EVIDENCE.

Where, on the trial of an equity case, a number of questions are submitted to the jury, and the jury are instructed that if certain designated questions are answered in the negative the other questions should not be answered, and where the jury answer the designated questions in the negative, and such answers are without evidence to support them, a new trial must be ordered, unless the decree rendered is demanded by the evidence upon other issues covered by the questions to which the jury did not make answer.

2. VENDOR AND PURCHASER  $\S$ 315(3)—NEGATIVE ANSWERS TO QUESTIONS AS TO WHETHER PLAINTIFF'S PREVIOUS CONVEYANCE LESSENED VALUE OF PROPERTY HELD NOT SUPPORTED BY THE EVIDENCE.

The answers to specified questions in this case were contrary to the evidence and without

evidence to support them, and the decree rendered was not demanded by the evidence upon any of the other issues made in the case.

*(Additional Syllabus by Editorial Staff.)*

3. MINES AND MINERALS  $\S$ 54(2)—BOND FOR TITLE CONSTRUED TO GIVE PURCHASER AN ABSOLUTE OR FEE-SIMPLE ESTATE INCLUDING MINERAL RIGHTS.

Under an agreement to sell a certain tract described as a certain numbered lot except four acres in the southeast corner thereof, without other exception or reservation, the purchaser was entitled to an absolute or fee-simple estate in the land, other than that excepted, under Civ. Code 1910, §§ 3657, 3617, including all mines, minerals, and clays in or under the tract.

Error from Superior Court, Walker County; G. E. Maddox, Judge pro hac vice.

Action by Robert Martin against P. A. Wright, in which the Wright Mineral Springs Company was allowed to intervene and become a defendant. Judgment for plaintiff, motion for new trial overruled, and defendants bring error. Reversed.

On November 14, 1913, Robert Martin agreed to sell to Paul A. Wright, for the sum of \$1,900, a certain tract of land in the eighth section and fourth district of Walker county, to wit, lot No. 245, except four acres in the southeast corner thereof. The contract, which was in writing, contained no other exception or reservation. On December 10, 1913, Wright, who had paid \$700 of the purchase money, executed and delivered to Martin, in compliance with the contract, his two promissory notes for the principal sum of \$600 each, due respectively one and two years from date, and received from Martin a bond for title, in the usual form, by which Martin bound himself to execute and deliver to Wright, or his assigns, a "good and sufficient title to the property" as described above, upon the payment of the purchase money evidenced by the notes. Wright transferred the bond for title to the Wright Mineral Springs Company, a corporation, in which he was one of the principal stockholders, agreeing in the assignment to pay the purchase-money notes. Wright failed to pay the purchase-money notes, and Martin brought suit thereon in Walker superior court. Martin resided outside of the state, and had no property in the state except his interest or equity in the land. Wright answered the suit, recited the assignment of the bond to the Wright Mineral Springs Company, and prayed that the assignee be allowed to intervene. He also pleaded, by way of equitable set-off and recoupment, the following: In 1887 Martin by deed conveyed to H. P. Lumpkin, his heirs and assigns:

"All the coal, iron ore and the ores of any and all other metals, and all clays and all the mineral of every kind, except building stone and



umbers, that now are or may hereafter be found on the following lands, viz.: Nos. 245 in the eighth district, fourth section of said county, together with the right and privilege of entering upon said lands and mining and transporting therefrom the coal, ores, clays, and minerals aforesaid, and taking therefrom (provided the timber and cultivatable lands thereon are not injured, used, or molested), and also the right of ingress and egress to and from all parts of the said lands for the purpose of raising, mining, collecting, moving, and transporting therefrom each and every of the articles aforesaid and all the water that may be required for mining purposes."

The deed was duly recorded in 1888. In 1901 Martin granted to the American Telephone & Telegraph Company, its successors and assigns, the right to construct, operate, and maintain its lines over the land described in the bond for title, to place necessary poles and fixtures along the roads, streets, and highways adjoining the property, to trim the trees along the lines, to set necessary guy and brace poles, attach the guy wires to trees, and to cut down all trees that might interfere with its lines, provided the company should pay all damages to valuable timber and growing crops, and that none of its lines should run over inclosed lands. The defendant had no notice of the conveyance to Lumpkin, or of the grant to the telephone company. The defendant purchased the land for the purpose of obtaining the minerals therein. The plaintiff could not convey the land according to the terms of his bond. The land was less valuable by \$2,500 by reason of the sale of the minerals and mineral rights therein and by reason of the grant of the easement to the telephone company. The defendant prayed that he be relieved of the payment of the balance of the purchase money, and that he have judgment for any excess of damages over and above the amount of the purchase-money notes.

The Wright Mineral Springs Company was allowed to intervene and become a party defendant. It averred that it was an innocent assignee, for value, of the bond for title; that at the time of the assignment of the bond it had no notice of the outstanding deed to the mineral interest in the land or of the grant to the telephone company; that it purchased the land primarily for the mineral rights therein and for the purpose of subdividing and selling the same; and that the easement granted to the telephone company prevented the subdivision and sale of that portion of the land along the roads and highways, and especially of that portion lying next to the mineral springs property, which it had also purchased from the obligee in the bond. By amendment to his petition the plaintiff admitted that he had sold the mineral interest in the land, and that he had granted an easement to the telephone company, as above set out; but he averred that

the mineral interest and the easement were of no value; that Wright had actual knowledge of the deed and of the grant to the telephone company at the time of his purchase; that the plaintiff intended to except both the mineral interest and the easement granted to the telephone company from his bond for title, but by mutual mistake these exceptions and reservations were left out of the contract and bond. He denied that the mineral springs company was an innocent assignee for value. He accordingly prayed for the reformation of the contract and bond, and renewed his prayer for judgment on the notes.

The court submitted to the jury a series of ten questions covering the substantial issues made by the pleadings and evidence in the case. The first and third questions submitted were as follows:

"(1) Was the property described in the bond for title less valuable on December 10, 1915, by reason of the previous conveyance of the mineral interest to H. P. Lumpkin than it would have been if the mineral interest had not previously been sold?"

"(3) Was the property less valuable on December 10, 1915, by reason of such previous sale of a right of way to the telephone company?"

The court instructed the jury that, if they should answer these two questions in the negative, they should go no further in their investigation, and should not answer the remaining questions submitted. The jury answered the first and third questions in the negative, and did not answer any of the other questions. Upon questions 1 and 3 and the answers thereto, the court rendered a decree in favor of the plaintiff and against Wright for the amount of the two notes, principal, interest, and attorney's fees; and decreed that upon the payment of the judgment the plaintiff execute and deliver to Wright, or his assigns, a good and sufficient title to the lot of land described in the bond for title, with the exception of the four acres in the southeast corner thereof, the mineral rights theretofore conveyed by the plaintiff to H. P. Lumpkin, and the easement theretofore granted by the plaintiff to the telephone company. The defendants excepted to the decree, and to the overruling of their motion for a new trial.

Henry & Jackson, of La Fayette, Glenn & Napier, of Chattanooga, Tenn., and Rosser & Shaw, of La Fayette, for plaintiffs in error.

Shattuck & Shattuck, of La Fayette, and F. W. Copeland, of Rome, for defendant in error.

GEORGE, J. (after stating the facts as above). [2] In the view we take of this case, the answers made by the jury are contrary to the evidence and without evidence to

support them. A witness for the defendants, Ditt Watts, testified that he and Wright made an agreement to mine the iron ore, prior to the purchase of the land from Martin; that he had had 20 or 30 years' experience in the mining business, and was familiar with the ore formations in Walker county; that he had examined the land in question and had estimated the value of the minerals therein, especially the iron ore; that about two-thirds of the lot contained iron ore; that the ore would run between 40 and 45 per cent.; and that the minerals on the lot were worth between \$3,000 and \$4,000. R. M. W. Glenn was examined as a witness for the defendants, and he testified that iron ore was to be found on 50 to 60 acres of the land in question; that some of the ore could be profitably mined; and that on December 10, 1915, the land with the mineral rights was worth \$5,000 or \$6,000, and without the mineral rights the land was worth four or five hundred dollars. Another witness, J. H. Hill, substantially corroborated the evidence of Watts and Glenn. It is true that Glenn testified that he was not an expert miner; and it is also true that Hill testified that as a miner he would not purchase the mineral interest in the lot upon condition that the timber and cultivatable lands were not to be injured, used, or molested. As the witness himself expressed it:

"It would not be as valuable to me. I would not take it. As a miner, I would not take a sale of land that way. With that clause in it, as a miner I would not take it."

The evidence for the defendant in detail gave the location of the lot of land in question; showed its distance from the railroad, the value of iron ore at the mine, its value on board the cars, and the cost of mining and loading the same. The only evidence offered by the plaintiff for the purpose of showing that the iron ore and other metals, minerals, and clays on the lot of land in question were of no value, was the testimony of John Knox. He testified to the thickness of the iron ore at certain openings on the lot; and with respect to the value of the ore he testified as follows:

"It could be worked to some extent on the south hill-side, although the hill climbs up pretty rapidly, \* \* \* and would be very expensive. That's about all they would have, would be a stripping proposition; it is so narrow it could not be mined by tunnels, etc., under ordinary conditions. Ditts Watts showed me the openings that have been made up there. Whether that lot of land would be a profitable proposition would depend on circumstances. There could be some stripping done on the south hill. I would say that ore could be stripped back until they get off about a 10-foot cover of slate over it, and I don't know the area that would be covered by that; don't know just where the line runs. The ore runs or dips slightly to the south. It apparently, where I saw it,

runs almost level, east and west, and dipping slightly to the south. If that hill is in the southwest corner of the lot, the ore would soon run off of the lot, onto other property. \* \* \* Nobody can tell how much ore there is under there until they actually go in there and mine it."

There was iron ore on the land. This fact was undisputed. This ore had some value. According to the recitals in the plaintiff's deed to H. P. Lumpkin, he received \$300 in money for the mineral interest in the land, more than a quarter of a century before the execution of the bond to the defendant. We are forced to the conclusion that the evidence demanded a finding that the land, by reason of the previous conveyance of the mineral interest and rights therein, was less valuable than it would have been if such interest and rights had not been sold. For reasons that are obvious, the land was rendered less valuable by the grant of the permanent easement to the telephone company.

[3] Under the bond for title as it stood, the defendant, or his assigns, was entitled to an absolute or fee-simple estate in the land.

"An absolute or fee-simple estate is one in which the owner is entitled to the entire property, with unconditional power of disposition during his life, and descending to his heirs and legal representatives upon his death intestate." Civil Code, § 3657.

#### Under our Code—

Real estate "includes all lands and the buildings thereon, and all things permanently attached to either, or any interest therein or issuing out of or dependent thereon. The right of the owner of lands extends downward and upward indefinitely." Civil Code, § 3617.

A conveyance of the absolute or fee-simple estate in a tract of land would, of course, carry with it all mines, minerals, and clays in and under the same. An absolute estate in land carries with it the exclusive and unrestricted right to occupy, use, and dispose of the same. The right to possess, use, and to exclude every one else from interfering with a tract of land is not only right, in all circumstances affecting the value of the land, but it is of the essence of ownership itself. It is precisely the right of exclusive occupancy and use which the plaintiff cannot convey to the defendant. The value of the right is not merely nominal, and cannot, under the circumstances of this case, be so considered.

[1] We have not dealt with other assignments of error made in the bill of exceptions; and we are not to be understood as holding that the jury might not have been authorized to return a verdict for the plaintiff for the balance of the purchase money, upon other issues in the case. None of the other issues were passed upon by the jury.

We have, however, examined the record for the purpose of ascertaining whether a judgment or decree for the plaintiff was demanded by the evidence on any of such issues; and, while we do not pass upon the questions of the sufficiency of the evidence to authorize a finding for the plaintiff upon any of such issues, we are of the opinion that the evidence on none of the other issues demanded a verdict or judgment for the plaintiff. Since therefore the answers to the only questions passed upon by the jury are contrary to the evidence and without evidence to support them, the court erred in overruling the motion for new trial.

Judgment reversed.

All the Justices concur.

(149 Ga. 724)

**HARRIS v. STATE. (No. 1635.)**

(Supreme Court of Georgia. Jan. 16, 1920.  
Rehearing Denied Feb. 14, 1920.)

(Syllabus by the Court.)

**1. HOMICIDE ¶218—SUBMISSION OF DYING DECLARATIONS OF DECEASED TO JURY UNDER PROPER INSTRUCTIONS NOT ERROR.**

The evidence admitted as to dying declarations was sufficient to make out a prima facie case that the declarations were made by the deceased while in articulo mortis, conscious of his condition, as to the cause of his death and the person who killed him; and there was no error in submitting them to the jury under proper instructions. No complaint is made in regard to the instruction of the court on that subject. *Harper v. State*, 129 Ga. 773, 59 S. E. 792; *Hawkins v. State*, 141 Ga. 212, 80 S. E. 711; *Fitzpatrick v. State*, 149 Ga. 96, 99 S. E. 128.

**2. CRIMINAL LAW ¶958(3), 1156(3)—APPLICATIONS FOR NEW TRIALS ON THE GROUND OF NEWLY DISCOVERED EVIDENCE ARE ADDRESSED Largely TO TRIAL JUDGE'S DISCRETION AND DECISION WILL NOT BE REVERSED UNLESS DISCRETION IS ABUSED.**

Applications for new trials on the ground of newly discovered evidence are addressed largely to the discretion of the trial judge, and this court will not reverse his decision refusing a new trial on such ground unless it is abused. *Hall v. State*, 141 Ga. 7, 80 S. E. 307. They are not favored. *Burge v. State*, 133 Ga. 431, 66 S. E. 243 (2). It must also appear by affidavit of movant and each of his counsel that they did not know, and could not by the exercise of ordinary diligence have discovered, the existence of the new evidence. *Smiley v. Smiley*, 144 Ga. 548, 87 S. E. 668.

**3. INSUFFICIENCY OF AFFIDAVITS AS TO DILIGENCE IN DISCOVERING ALLEGED NEWLY DISCOVERED EVIDENCE.**

The affidavits of movant and his counsel in this case do not measure up to this requirement. Furthermore, the state made a counter

showing as to the alleged newly discovered evidence, which is in conflict therewith. *O'Neill v. State*, 104 Ga. 543, 80 S. E. 843. The verdict is supported by evidence. For all of these reasons the judgment refusing a new trial will not be disturbed.

Error from Superior Court, Floyd County; Moses Wright, Judge.

Proceeding by the State against Charlie Harris, and from the judgment and the denial of his motion for a new trial, he brings error. Affirmed.

Len B. Guillebeau, of Augusta, and W. H. Ennis, of Rome, for plaintiff in error.

O. H. Porter, Sol. Gen., of Rome, Clifford Walker, Atty. Gen., and M. C. Bennet, of Atlanta, for the State.

GILBERT, J. Judgment affirmed. All the Justices concur.

(149 Ga. 754)

**WESTER v. EVERETT. (No. 1500.)**

(Supreme Court of Georgia. Feb. 10, 1920.)

(Syllabus by the Court.)

**1. PARTNERSHIP ¶30—JOINT INTEREST IN PROFITS AND LOSSES CREATES "PARTNERSHIP" AS TO STRANGERS.**

"A joint interest in the partnership property, or a joint interest in the profits and losses of the business, constitutes a 'partnership' as to third persons. A common interest in profits alone does not."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Partnership.]

**2. PARTNERSHIP ¶327(1)—SUFFICIENCY OF PETITION TO ALLEGE CAUSE OF ACTION FOR ACCOUNTING.**

The petition set forth a cause of action, and the court erred in dismissing it on demurrer.

(Additional Syllabus by Editorial Staff.)

**3. PARTNERSHIP ¶327(1)—PLAINTIFF AND DEFENDANT, EACH HAVING HALF INTEREST IN SAWMILL AND SHARING PROCEEDS AFTER PAYMENT OF PRICE, WERE PARTNERS.**

Petition alleging that defendant and another received a bond for conveyance of title to sawmill upon payment of purchase price, that plaintiff purchased such other's half interest with money obtained from defendant, and received a bill of sale of a half interest, and after payment of purchase price was to share equally with defendant in profits, and defendant's possession and refusal to account, showed that plaintiff and defendant became partners, though no actual profits had been received directly by either of the parties.

Error from Superior Court, Twiggs County; J. L. Kent, Judge.

Action by J. H. Wester against T. F. Everett for injunction, appointment of a receiver, and other relief. On plaintiff's death pending the suit, his administratrix was made a party. Demurrer to petition sustained, petition dismissed, and plaintiff brings error. Reversed.

J. H. Wester filed a petition against T. F. Everett, praying for injunction, receiver, and other relief. The petition alleged substantially as follows:

A. S. Holland and T. F. Everett bought from Lattimore Bros. a sawmill complete, including necessary equipment for its operation, and agreed to pay therefor \$1,800. Lattimore Bros. executed to Holland and Everett a bond for title, reciting that upon the payment of the balance due good and sufficient title would be made to Holland and Everett jointly. The sawmill was purchased during the first part of the year 1916. On or about May 1, 1916, the plaintiff was approached by Everett, who requested plaintiff to buy Holland's interest in the sawmill, offering to furnish him with the necessary money to make the purchase. Plaintiff did buy the half interest of Holland, giving him therefor \$200, which amount was furnished by Everett. On May 17, 1916, Holland executed to Wester the following instrument:

"Bill of Sale. A. S. Holland to J. H. Wester one-half interest in sawmill owned by A. S. Holland and T. F. Everett, now located on the land of Mrs. Barksdale in the county of Bleckley, state of Georgia. Signed this the 17th day of May, 1916. A. S. Holland to J. H. Wester."

At the time plaintiff bought Holland's interest, one of the reasons stated by Everett why he wanted plaintiff to buy was that plaintiff was a good sawmill man, and that Everett wanted him to take charge of the mill and so operate it that a profit would be realized to both of them. Everett gave the further reason that Lattimore Bros. must be paid the balance due them in order to save what equity Everett had in the sawmill. The agreement with Lattimore Bros. was that plaintiff and defendant were to saw lumber for them and were to pay \$1 per thousand feet on the lumber cut by the mill on the amount due Lattimore Bros. until the entire amount was paid. It was further agreed between plaintiff and defendant that a reasonable compensation for the running of the mill would be paid plaintiff as salary; and that after the \$1 per thousand was paid to Lattimore Bros., plaintiff was to share equally with Everett in the profits of the mill. In pursuance of this agreement plaintiff took charge of the mill on or about May 17, 1916, and worked faithfully for a period of ten weeks. During this period Everett would receive the money and make the settlements. Plaintiff frequently requested Everett to pay him enough money for his support; but Ever-

ett refused to do this, or to pay him anything; at all during the ten weeks he had charge of the mill. Everett neglected and refused to give plaintiff any information whatever as to the condition of the partnership during the entire time that plaintiff was in charge of the mill.

Plaintiff was wholly dependent on his work for his livelihood, and it was impossible for him to continue longer without compensation, and after the expiration of the ten weeks he told Everett that he would be obliged to return to Macon or go elsewhere and secure a job, in order that he might make a livelihood. After returning to Macon he was employed by one Richardson, and on various occasions he would write to or see Everett, asking him the condition of the mill, and requesting him either to buy petitioner's interest or to allow him to buy Everett's interest, and each time Everett would fail and refuse to give him any satisfaction. Everett is insolvent, and, unless plaintiff can conserve his interest in the mill, he will be without remedy to recover against Everett. The affairs of the partnership are in such condition that it is necessary for a receiver to take charge of the property, sell it, and determine the amount of interest the plaintiff may have in the proceeds, and to distribute the balance to the creditors of the partnership and the individual creditors of the partners. It is alleged, on information, that the balance due Lattimore Bros. has been paid, and that it is the intention of Everett for them to make title to the sawmill to one of his sons; and should he do this, and the son should dispose of it to some innocent person, plaintiff, as well as other creditors, would be remediless to realize anything on their claims.

Plaintiff prays that Everett be enjoined from disposing of his equity in the sawmill to any person whatsoever, or, if he has full title, that he be likewise enjoined from disposing of the mill; that Lattimore Bros. be enjoined from making title to Everett or to any other person directed by him; that a receiver be appointed to take charge of the mill and other personal property of the partnership of Wester and Everett, and be directed to sell the personal property of the partnership and determine what interest the plaintiff has in the same; and, after finding the interest, that it be paid over to him, less the cost of this proceeding.

The defendant demurred to the petition on the grounds: (1) That it set forth no cause of action. (2) It does not specify or define any particular property or fund belonging to the defendant. (3) It does not describe or specify any property, rights, equity, or interest which the plaintiff has or claims in any particular property or fund. (4) It shows that the plaintiff has no right, title, or interest whatever in the sawmill, or the proceeds thereof, for the reason that it appears that the plaintiff never completed his contract for

the purchase of any right, title, or interest in the property, or in any way obtained an interest therein.

The demurrer was sustained, and the petition was dismissed, to which judgment the plaintiff excepted. Pending the suit the plaintiff died, and his administratrix was made a party.

E. B. Weatherly, of Macon, for plaintiff in error.

L. D. Moore, of Macon, for defendant in error.

HILL, J. (after stating the facts as above).

The question to be determined is whether the plaintiff has a joint interest or title in the property in controversy. It is insisted on the part of the defendant that Wester had no interest whatever in the sawmill and its equipment; that he did not invest any money in the enterprise, and only contributed ten weeks' work; that the contract was entire, and not divisible; and that before he could obtain any fixed right in the property it was incumbent upon him to complete his contract, which was not done. We do not agree with the conclusions reached by the defendant and by the trial court in dismissing the petition on demurrer. It will be seen from the foregoing statement of facts that Everett and Holland purchased the sawmill from Lattimore Bros., who executed to them a bond for title, conditioned to convey the property to them upon payment of the purchase price. Before the purchase price was paid Wester and Everett entered into a contract by which the plaintiff was to purchase the half interest in the property owned by Holland, and a payment of \$200 was made by Wester, who obtained the money from Everett. Thereupon Holland executed to Wester a bill of sale of a half interest in the property. It thus appears that whatever interest Holland had in the sawmill was conveyed to Wester. Lattimore Bros. were to be paid by Everett and Wester out of the lumber sawed by them, and, after the purchase price should be paid, then Everett and Wester should share equally in the proceeds of the mill.

[1, 3] The plaintiff insists that there existed between Wester and Everett a partnership, and that Everett kept possession of the partnership property and refused to account to Wester for the property or any of the proceeds thereof. On the other hand, it is denied that any partnership existed between them. It becomes material, therefore, to determine whether a partnership existed between Everett and Wester. Our Code of 1910, in section 3158, declares:

"A joint interest in the partnership property, or a joint interest in the profits and losses of the business, constitutes a partnership as to third persons. A common interest in profits alone does not."

Rowley on Modern Law of Partnership, 19, § 25, defines a partnership as:

"The relation existing between two or more individuals or association of individuals, who have associated themselves together for the purpose of sharing the profits and losses arising from a use of capital, labor, or skill, in some common transaction or series of transactions."

In *Camp v. Montgomery*, 75 Ga. 795, it was held:

"Where three parties owned and ran a sawmill jointly, on the agreement that one of them was to conduct the operations of the mill, pay all its expenses from the proceeds, and divide the net profits equally between himself and the other two, the three jointly owning the property from which the income was derived, this constituted a partnership between them."

And see *Taylor v. Billey*, 86 Ga. 154, 12 S. E. 210; *Huggins v. Huggins*, 117 Ga. 151, 43 S. E. 759.

Under the Code section supra, and the decisions of this court, a joint interest in the profits alone will not suffice to constitute a partnership, but a joint interest in the partnership property will, or a joint interest in the partnership property and profits will.

[2] The allegation is that Wester paid \$200 of the purchase price for the mill property, and although he had borrowed this money from his partner, Everett, it nevertheless shows such an interest in the partnership property as to constitute a partnership between Everett and Wester. Under the arrangement between Everett and Wester they were to share in the profits after the purchase price had been paid for the mill property. It seems to us that the elements of a partnership existed in this agreement, although no actual profits have been received directly by either of the parties. Each had an interest in the mill property. They had for ten weeks sawed lumber, a part of the proceeds of which had presumably been paid, under the agreement between the partners, to Lattimore Bros. as a part of the purchase price of the mill. We do not think that one partner, under such circumstances, could withhold from the other partner his right to one-half of the property, or whatever profits there might be in the partnership. Under such circumstances, where one partner falls and refuses to account to his copartner, and withholds the entire partnership property from him, a court of equity has jurisdiction of the case, and a receiver may be appointed to wind up the affairs of the partnership, pay off whatever indebtedness there exists against the partnership, have an accounting between the partners, and pay the profits, if any, to each partner entitled thereto. From what has been said, it will be seen that the court below erred in dismissing the petition on demurrer.

Judgment reversed. All the Justices concur.

(149 Ga. 688)

**COPELAN et al. v. KIMBROUGH et al.**  
(No. 1415.)

(Supreme Court of Georgia. Jan. 15, 1920.  
Rehearing Denied Feb. 14, 1920.)

*(Syllabus by the Court.)*

1. EXECUTORS AND ADMINISTRATORS ¶349  
(2), 388(5)—ORDER OF COURT OF ORDINARY GRANTING LEAVE TO SELL DECEDENT'S REALTY CANNOT BE COLLATERALLY ATTACKED; SALE DIVESTS TITLE OF HEIRS.

The order of the court of ordinary granting leave to an administrator with will annexed to sell land belonging to the estate he represents is a judgment of a court of competent jurisdiction. It imports legally a necessity for the sale, and such judgment, apparently regular, cannot be collaterally attacked. It represents the authority for the sale of real estate, and when sold to an innocent purchaser, in accordance with the statute, such sale divests the title of the heirs, although there may be irregularities.

2. EXECUTORS AND ADMINISTRATORS ¶347  
—JUDGMENT GRANTING ADMINISTRATOR LEAVE TO SELL NOT VOID FOR INSUFFICIENT DESCRIPTION.

Where the petition of such administrator for leave to sell land of the estate he represents recites that "the testator [died], leaving a tract of land in said county, on which he resided," containing a designated number of acres, upon which the court of ordinary rendered a judgment granting leave to sell the land upon the administrator's "proceeding in the premises as required by statutes in such cases made and provided," such judgment is not void for lack of a legally sufficient description of the land.

3. EXECUTORS AND ADMINISTRATORS ¶397—  
ADMINISTRATOR'S DEED VALID ALTHOUGH NOT RECITING TIME OF SALE.

Where the deed of an administrator with will annexed recites that the land was exposed for sale under and by virtue of an order of the court of ordinary, and the order of said court required that the administrator "proceed in the premises as required by the statutes in such cases made and provided," the deed will be held valid, although it does not recite that the sale took place between the hours required by the statute, in the absence of anything to show the contrary.

4. EXECUTORS AND ADMINISTRATORS ¶346—  
JUDGMENT FOR LEAVE TO SELL REALTY ON PETITION RECITING "DUE NOTICE" NOT VOID FOR LACK OF NOTICE AND SERVICE.

The judgment of the court of ordinary, referred to in the preceding headnotes, is not void for lack of notice or service upon the owners of the land, where the petition to the court of ordinary for leave to sell alleges that the petitioner "has given due notice of his intended application" and the judgment of the court of ordinary is based on such petition. "Due notice," nothing appearing to the contrary on the face of the record, will be held to mean a full com-

pliance with the law in regard to notice and service.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Due Notice.]

5. EXECUTORS AND ADMINISTRATORS ¶349  
(1)—ORDER OF SALE ASSUMED TO HAVE BEEN RENDERED ON SUFFICIENT GROUNDS IN VIEW OF AVERMENTS OF PETITION.

Where the petition of such administrator to the court of ordinary for leave to sell, referred to in the preceding headnotes, recites that "such is the situation of the land that no fair division can be made amongst the heirs at law," it must be assumed that legally sufficient reasons were shown to the court authorizing a judgment granting leave to the administrator to sell the land.

6. SALE OF DECEDENT'S REALTY.

The foregoing rulings control the decision of the case before us. Other rulings of the court upon which errors are assigned and authorities cited are not decided, because they are only pertinent where a direct attack is made on the judgment.

Error from Superior Court, Hancock County; J. B. Park, Judge.

Proceedings by Hattie Copelan and others against Alex Kimbrough and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

Samuel R. Walker, as administrator de bonis non cum testamento annexo, filed in the court of ordinary of Hancock county a petition for leave to sell land, viz.:

"Georgia, Hancock county. To the court of ordinary of said county: The petition of Samuel R. Walker, administrator with the will annexed of Irby Hudson, sheweth the said Irby Hudson [died], leaving a tract of land in said county, on which he resided, and such is the situation of the land that no fair division can be made amongst the heirs at law, four in number; and that he has given due notice of his intended application. Wherefore he prays the judgment of the court of ordinary granting an order to sell the land of said estate. September 1, 1862. S. R. Walker, Administrator, with will annexed."

Upon which the following order was passed:

"On reading and filing the petition of Samuel R. Walker, administrator of, etc., of the estate of Irby Hudson, deceased, it is ordered by the court that the prayer of the petitioner be granted, and that he have leave to sell the tract or parcel of land upon his proceeding in the premises as required by the statutes in such cases made and provided."

The administrator de bonis non cum testamento annexo exposed said land for sale, executing to the purchaser a deed which contained, among other recitals, the following:

"Whereas the ordinary for the court of said county, on the 4th day of August in the year

1862, upon the application of Samuel R. Walker, administrator with the will annexed of Irby Hudson, late of said [county], deceased, did pass an order for the sale of the real estate of said deceased, hereafter described, legal notice of said application having been first given in one of the public gazettes of this state two months previous to the granting of the order aforesaid; whereas the said Samuel R. Walker, administrator of Irby Hudson, as aforesaid, having first given 40 days' notice of said sale and of the time and place thereof in one of the public gazettes of this state, to wit, the Chronicle and Sentinel, and at the door of the courthouse in the county of Hancock, did on the first Tuesday in November in the year 1862, at the place of public sales in the county of Hancock aforesaid, expose to sale at public outcry under and by virtue of the order aforesaid the premises hereinafter mentioned; and whereas the said premises were then and there knocked off to Samuel C. Hitchcock, of the county of Sumter and state aforesaid, who was the highest bidder for the same, at and for the sum of \$8,900.50."

In 1917 Irby Hudson, Jr., one of the devisees under the will of Irby Hudson, Sr., died, and his children brought ejectment against the person in possession of a portion of the land conveyed by the administrator in 1862. Upon the trial the plaintiffs introduced evidence of the possession of Irby Hudson, Sr., the will, its probate, and evidence tending to show assent by the executrix and administrator *de bonis non cum testamento annexo* to the devise, and offered other evidence tending to show such assent, which was rejected. The defendants offered the application of the administrator *de bonis non cum testamento annexo*, the order of the court of ordinary authorizing the sale of the land in dispute, and the deed executed by the administrator as aforesaid. The plaintiffs objected to the deed on the ground that it did not appear that the prerequisites of a valid sale had been complied with, especially in regard to the sale within the lawful hours prescribed by statute; there being no recital in the deed in regard thereto. The order of sale was objected to on the ground that it was void, in that—

"It did not appear that any lawful service or notice was had, but the order purported to the contrary; also that the land to be sold was not described with sufficient definiteness to authorize a sale of that in dispute; and, further, that it appeared from the evidence in the case that the title to the land had vested under the will of Irby Hudson in his devisees, and could not be sold by the administrator with the will annexed; the ordinary having no jurisdiction to partition land by sale, certainly not without personal notice and service upon the owners."

The court held that the order was not void and could not be collaterally attacked and admitted the evidence. A verdict was directed for the defendants, and the plaintiffs excepted.

John B. Gamble, of Athens, and Sam'l H. Sibley, of Atlanta, for plaintiffs in error.

Burwell & Fleming, T. M. Hunt, and R. L. Merritt, all of Sparta, for defendants in error.

GILBERT, J. [1] 1. The controlling question is whether the order of the court of ordinary granting leave to sell the land is void. If it is void, it may be attacked collaterally. If valid on its face, it cannot be collaterally attacked. In the latter event many of the contentions raised and elaborately discussed are immaterial. They could only become pertinent in the event of a direct attack. The court of ordinary has general jurisdiction of estates, testate and intestate.

"The order of the court of ordinary granting leave to an administrator to sell the lands belonging to the estate he represents is his authority for so doing. The authority being shown, the law 'presumes the court of ordinary required all the law requires to have been done before granting the order to sell, and we will not go behind that judgment.' *Clements v. Henderson*, 4 Ga. 154 [48 Am. Dec. 216]. \* \* \* The order to sell, being a judgment of a court of competent jurisdiction, imports legally a necessity for the sale, and such judgment cannot be attacked and set aside collaterally. It is not only leave to sell, but it is a judgment of the court that such sale will be for the benefit of the heirs and creditors of the estate. In favor of this judgment we are to presume the court did its duty." *Davie v. McDaniel*, 47 Ga. 195, 202; *Roberts v. Martin*, 70 Ga. 196; *Park v. Mullins*, 124 Ga. 1072, 1075, 53 S. E. 568; *Gann v. Runyan*, 184 Ga. 49, 51, 67 S. E. 435; *Schulze v. Schulze*, 149 Ga. —, 101 S. E. 183; *Civil Code 1910*, § 5968; *Doolittle v. Holton*, 28 Vt. 819, 69 Am. Dec. 745; *Stuart v. Allen*, 16 Cal. 473, 76 Am. Dec. 551.

The sale of real estate at public sale by an administrator who is duly authorized to sell by an order of the court of ordinary to an innocent purchaser divests the title of the heirs, although there may be irregularities. *Civil Code 1910*, § 4039; *Davie v. McDaniel*, supra; *Merritt v. Jones*, 136 Ga. 618, 71 S. E. 1092. The date of the petition for order to sell and the date recited in the deed show on their face a mistake in one or the other of these dates. This is insufficient to invalidate the title.

[2] 2. It is insisted that the order of sale is void because it did not contain a legally sufficient description of the land to be sold. The petition for leave to sell the land, upon which the order allowing the sale was based, recited that "the said Irby Hudson [died], leaving a tract of land in said county, on which he resided," containing a designated number of acres. It was competent to determine by aliunde evidence what tract of land containing the designated acreage was left by the testator upon which he resided; consequently the petition and the order of sale based thereon were not void because of an insufficient description of the land. *Davie v. McDaniel*, *Merritt v. Jones*, supra.

[3] 3. It is also argued that the deed is insufficient to divest title, because it did not appear that the sale of the land was conducted within the hours required by law; the deed failing to contain any recital in regard thereto. The deed executed by the administrator pursuant to a sale under the order of the court of ordinary does recite the order for the sale, legal notice of the application for same, notice of such sale in a named public gazette, of the time and place thereof, at the door of the courthouse in the county of Hancock on the first Tuesday in November, 1862, at the place of public sales in the county aforesaid, and that "the land was exposed for sale under and by virtue of the order aforesaid"; such order containing a requirement that the land be sold upon the administrator's proceeding in the premises as required by the statutes in such cases made and provided. The recital will be held sufficient to show that the administrator, in making the sale, complied with the requirements of the order, in the absence of anything on the record of the proceedings to the contrary. Civil Code 1910, § 4030. An administrator is an officer of the law; and, nothing appearing to the contrary, it must be presumed that he has performed his duty as required by law. *Clements v. Henderson*, 4 Ga. 155, 48 Am. Dec. 216; 11 R. C. L. 333, § 389.

The absence of a recital in the administrator's deed to the effect that the sale took place within the hours required by law, when considered in connection with the judgment of the court of ordinary ordering the sale, will not void the deed. At most it would constitute an irregularity. In the absence of such a recital it should be assumed that the administrator complied with the law, rather than the contrary. Where a sale is based upon a valid order of the court of ordinary, and there is not a strict compliance with the requirements of the law, such sale is only voidable, and innocent purchasers are protected. *Whitehurst v. Mason*, 140 Ga. 148, 151, 78 S. E. 938. In *Clements v. Henderson*, supra, there is a ruling apparently in conflict. In that case the deed recited that "in obedience to an order of the honorable the inferior court of Harris county, sitting for ordinary purposes." That court was a court of limited jurisdiction, and its judgments were not entitled to the same presumptions in their favor as are the judgments of courts of general jurisdiction. Subsequently to that decision the rule was somewhat relaxed in the case of *Worthy v. Johnson*, 8 Ga. 236 (11), 52 Am. Dec. 399, in favor of bona fide purchasers, and the holding in the last-named case is found in the Civil Code 1910, § 4039. See, also, *Tucker v. Harris*, 13 Ga. 1 (11), 58 Am. Dec. 488. By statute in the year 1856 (Acts 1855-56, p. 147), the court of ordinary was made a court of general jurisdiction in regard to estates, testate and intestate, since which time its judgments in ordering sales

or granting leave to sell real estate stand upon the same plane as do judicial sales. The purchaser at judicial sales is not required to see that the officer has complied fully with all of the regulations prescribed in such cases. Irregularities create questions of liability between the officer and parties interested in the sale. The innocent purchaser is bound only to see that the officer has competent authority to sell, and that he is apparently proceeding to sell under the prescribed forms. Civil Code 1910, § 6059; *Saunders v. Register*, 149 Ga. 286, 99 S. E. 857.

[4] 4. It is contended by the plaintiffs that the judgment of the court of ordinary granting leave to sell the land is void because there was no notice or service on the owners of the land. The petition to the court of ordinary for leave to sell alleges that the petitioner "has given due notice of his intended application." Nothing else appearing on the face of the record, it must be assumed that "due notice" means a compliance with the law, and that whatever notice and service the law required was given.

"A recital in an administrator's deed of a compliance with all the requisites of the law necessary to be done after the order of sale is granted is prima facie evidence that those requisites were complied with." *Davie v. McDaniel*, supra.

The deed made to the purchaser recites:

"Legal notice of said application having been first given in one of the public gazettes of this state two months previous to the granting of the order aforesaid."

The deed therefore furnishes ample prima facie evidence of its own validity in this respect. In favor of the judgment of the court of ordinary we are bound to presume that the court did its duty; "that notice of the application was given as the statute directs; and that it plainly and fully was made to appear that the sale would be for the benefit of the heirs and creditors." *McDade v. Burch*, 7 Ga. 562, 50 Am. Dec. 407; *Davie v. McDaniel*, *Schulze v. Schulze*, supra. When the *Clements* and the *McDade* Cases were decided the statute making courts of ordinary courts of general jurisdiction as to estates had not been enacted. In considering judgments the rule is, "and has been, at least since the days of Charles II, 'that nothing shall be intended to be out of the jurisdiction of a superior court (i. e., a court of general jurisdiction), but that which specially appears to be so.'" *Davie v. McDaniel*, supra.

[5] 5. Counsel for the plaintiffs lay their greatest stress upon the contention that the administrator de bonis non has no power to sell the land of the decedent for the purpose of distribution; that the court of ordinary was without jurisdiction to order such a sale; that such was the effect of the order



granted in this case, no mention having been made of the necessity for selling the land for the purpose of paying debts; and that for these reasons the judgment of the court of ordinary was void on its face and could be collaterally attacked. We are aware that this is an issue which is fundamental in character, and have accordingly given it serious consideration and investigation. The Civil Code 1910, § 4026, declares:

"If at any time it becomes necessary, for the payment of the debts of the estate or for the purposes of distribution, to sell the land of the decedent, the administrator shall, by written petition, apply to the ordinary for leave to sell, setting forth in the petition the reason for such application."

It must be conceded that real estate descends directly to the heirs, subject only to the payment of debts and for distribution. It is so provided in the Code of Georgia, § 3657. In *Park v. Mullins*, 124 Ga. 1072, 53 S. E. 568, it was said:

"As the title to land vests in the heirs immediately upon the death of the decedent, the heirs, by agreement, may divide the land in kind if the rights of other parties are not affected by the transaction. If there are no debts, and none of the heirs are minors or laboring under other disability, a division of the land may be had by agreement among them."

It was further said, however, in the same connection:

"They are, however, not compelled to agree upon a division, and any heir may insist upon a sale and distribution of the proceeds. In order to defeat the right of an administrator to recover the land for distribution, it is therefore necessary for the heir in possession not only to show that the land can be divided in kind but that it is the purpose and intention and desire of all of the heirs that it shall be so divided."

That was a case where the administrator was endeavoring to recover the land from an heir who was in possession. Here the land has been sold to an innocent purchaser whose successor was in possession, and the suit is in ejectment by the heirs to recover possession. In *McCook v. Pond*, 72 Ga. 150, 153, the court said:

"It would seem that, as the real estate descends to the heirs in this state, it would be the policy of the courts to favor the heirs by a division of the lands of their ancestor in kind, rather than to have a sale of them. They should not be sold except to pay debts and have distribution. If no debts to be paid and distribution in kind can be made, this policy should be carried out by the courts."

And see *Johnson v. Hall*, 101 Ga. 687, 29 S. E. 37; *Finch v. Du Bignon*, 117 Ga. 113, 115, 43 S. E. 423. We are aware that in the case of *Beaty v. Stapleton*, 110 Ga. 590, 35 S. E. 770, it was held that—

"An administrator *cum testamento annexo* cannot lawfully sell lands for the purpose of paying debts, or for distribution when there are no debts, and such administrator has no authority to make, and is under no duty of making, a distribution of the estate among legatees or devisees."

But this was said in a case where the heirs filed an equitable petition before the sale, seeking to enjoin the same, alleging that there were no debts; that it was unnecessary to sell the land for the purpose of paying debts or for distribution; that the petitioners were remaindermen under the will; and that a sale of the lands would have the practical effect of depriving them of their interest in the estate. On the hearing it was admitted and agreed by the parties that all of the debts of the estate had been paid, and that there was no necessity to sell the lands to pay debts. The administratrix claimed the right to sell both under the will and the order of court. No contention appears in that case that a proper and fair division of the estate in kind could not be made, and this issue was not mentioned. Clearly, therefore, that decision cannot be urged as an authority denying the power of the court of ordinary to order the sale of real estate of a decedent in a proper case. Nor can it support the contention that when a sale is made pursuant to such an order the title of an innocent purchaser will fall. Indeed, in the case of *Park v. Mullins*, supra, it was said:

"If the defendant had filed an equitable plea alleging that it was for the best interest of the minors that the land should be divided in kind, and they had been made parties to the case and served, and a guardian \* \* \* appointed for them, it may be that the court would have had jurisdiction to render a decree declaring that a sale was unnecessary and providing for a division of the land in kind between the defendant and his children. But certainly the defendant cannot defeat the suit of the administrator by simply showing that he desired a division in kind, and thus be left in possession of the property."

As stated above, in that case the defendant was the heir in possession of the land, and the administrator was seeking to recover possession from him. So in *McCook v. Pond*, supra, an injunction was granted to restrain the administrator from selling the land upon the ground that no sale was necessary.

It would seem from what has been said above that the contention of the plaintiffs to the effect that the administrator cannot in any case sell land for the purpose of distribution is untenable, and that, upon the contrary, he may in some instances lawfully make such a sale under proper order. Neither the statutes of this state nor the decisions of this court have clearly defined where the limit may be found. It is sufficient to say that in some cases, as where a

fair division in kind cannot be made and a sale is for the benefit of the heirs, the court of ordinary may lawfully pass a judgment ordering the sale of real estate of a decedent for the purpose of division among the heirs. Apparently this was done in the present case; but whether that was the sole reason or whether there were other reasons cannot be said from the record before us. The petition filed in the court of ordinary by the administrator de bonis non cum testamento annexo recited, as a reason for the sale, that "such is the situation of the land that no fair division can be made amongst the heirs at law," and no other reason was alleged. On this petition the court ordered "that the prayer of the petitioner be granted, and that he have leave to sell the tract or parcel of land upon his proceeding in the premises as required by the statutes in such cases made and provided." It must be assumed, where the petition alleged that the land was incapable of a fair division, that legally sufficient reasons were shown to the court that a sale of the land was for the benefit of heirs, and that all other necessary things were shown to the court.

The plaintiffs cite the case of *Moore v. Turner*, 148 Ga. 77, 95 S. E. 935, as authority for the proposition that a court of ordinary has no jurisdiction to order a sale of real estate for the purpose of distribution among the heirs, and that a judgment of the court of ordinary granting leave for such a sale may be treated as void and be collaterally attacked. The objection that the judgment in that case was not open to collateral attack does not appear, from the report, to have been directly made, and no express ruling was made upon that question. It affirmatively appears that the executors had assented to the devise and had "permitted the life tenant to take the property (222 acres of land) devised." It was accordingly held that—

"A sale of the land by the executors, subsequently to the death of the life-tenant, under order from the ordinary, was void and passed no title to the purchaser."

Even if the order granting leave to sell could not be attacked collaterally upon the ground that the executors had assented to the devise and that the devisees had taken possession of the devised real estate, the attempted sale by the executors of the land held adversely to them by the devisees was void and passed no title to the purchaser. It should be observed that in the present case the order granting leave to sell and the sale took place in the early '60's, and that more than half a century has elapsed between the date of the sale and the attack made upon it.

"The presumptions in favor of the regularity of a judgment increase with the lapse of years.

It has been said that almost any reasonable presumption of fact will be conclusively indulged in order to sustain rights asserted under a decree which is 20 years old. To sustain an ancient judgment time may authorize the presumption of an extraneous fact which the record does not contradict and which it was not indispensable to the validity of the judgment that the record should exhibit." 15 R. C. L. 879.

[§] 6. For the reasons above stated, we hold that the trial court did not err in adjudging that the judgment of the court of ordinary granting leave to sell the land was not void, and that it could not be collaterally attacked. Obviously it follows that this conclusion is controlling in the case before us, because the suit is an indirect attack on the judgment. So long as the judgment of the court of ordinary stands unreversed and not set aside, the plaintiffs cannot recover. Other rulings of the court upon which errors are assigned and authorities cited, such as whether or not the executrix and administrator had assented to the legacies, and whether evidence to that effect should have been admitted, as well as allunde evidence to the effect that the estate owed no debts, and other evidence, are not decided, because they are pertinent only where a direct attack is made on the judgment.

Judgment affirmed.

All the Justices concur.

(149 Ga. 703)

FANNIN COUNTY v. PAOK. (No. 1400.)

(Supreme Court of Georgia. Jan. 16, 1920.)

(Syllabus by the Court.)

1. TAXATION  $\S$ 568(1) — ORDINARY CANNOT ISSUE EXECUTION ON BOND OF TAX RECEIVER MADE TO GOVERNOR AND CONDITIONED FOR FAITHFUL DISCHARGE OF HIS DUTIES.

Under section 1195 of the Civil Code 1910, tax receivers are required to give bond and security in a sum equal to one-fourth of the amount of the state tax (not, however, to exceed \$10,000) supposed to be due from the county for the year in which the bond is to be given; the bond to be made payable to the Governor. By section 1196 of the Civil Code 1910, "receivers and their sureties are liable on their bonds for all penalties or forfeitures they may incur under the law, and for all losses, or damage, or expense the State may sustain by reason of their conduct." By section 291 of the Civil Code 1910, "every official bond executed under this Code is obligatory on the principal and sureties thereon, \* \* \* for the use and benefit of every person who is injured, as well as by any wrongful act committed under color of his office as by his failure to perform, or by the improper or neglectful performance of those duties imposed by law." The duties of receivers are enumerated in Civil Code 1910, § 1197. Those duties do not include the duty to collect or handle any county

(102 S.E.)

funds. No bond is required of a receiver payable to the county or to the ordinary of the county. Where no bond was given by the receiver to the ordinary or to the county, but the bond payable to the Governor as required by section 1195 was given, conditioned generally for the faithful discharge of all the duties required of the receiver, and where the receiver, in his settlement with the ordinary, by mistake or otherwise, obtained a warrant on the county treasurer for a sum in excess of his legal commissions and received payment thereof out of county funds and retained that sum, and where the surety himself had never received any county funds, the ordinary was not authorized to issue an execution against the surety on the bond of the receiver (made to the Governor and conditioned as aforesaid), under sections 522 and 523 of the Civil Code 1910, which provide that "ordinaries shall also have authority to compel all persons, their heirs, executors or administrators, who have or may have in their hands any county money, collected for any county purpose whatever, to pay over the same," and, "on failure to pay the same, such ordinaries shall issue executions against such persons and their securities, if any, for the full amount appearing to be due, as the comptroller general issues executions against defaulting tax collectors."

## 2. CERTIFIED QUESTIONS NOT REQUIRED TO BE ANSWERED.

In view of the ruling made in the preceding note, it is unnecessary to answer the other questions certified in this case.

### Certified Questions from Court of Appeals.

Proceeding by Fannin County against A. H. Pack. Judgment for defendant, and plaintiff brings error, and the Court of Appeals certifies questions. Questions answered.

See, also, 102 S. E. 167.

Wm. Butt, of Blue Ridge, for plaintiff in error.

Thos. A. Brown and B. L. Smith, both of Blue Ridge, for defendant in error.

GEORGE, J. Ruling as stated in head-notes. All the Justices concur.

(24 Ga. App. 767)

## FANNIN COUNTY v. PACK. (No. 9936.)

(Court of Appeals of Georgia, Division No. 2.  
Feb. 18, 1920.)

(Syllabus by the Court.)

### AFFIDAVIT OF ILLEGALITY.

In accordance with the answers made by the Supreme Court to the questions certified to it in this case (102 S. E. 166), the ruling of the court below sustaining the defendant's affidavit of illegality is affirmed.

Error from Superior Court, Fannin County; N. A. Morris, Judge.

Proceedings by Fannin County against A. H. Pack. Defendant's affidavit of illegality sustained, and plaintiff brings error, and the Court of Appeals certified questions. Affirmed in conformity with answers to certified questions (102 S. E. 166).

Wm. Butt, of Blue Ridge, for plaintiff in error.

Thos. A. Brown and B. L. Smith, both of Blue Ridge, for defendant in error.

JENKINS, P. J. Judgment affirmed.

STEPHENS and SMITH, JJ., concur.

(24 Ga. App. 738)

## BUCKEYE COTTON OIL CO. v. EVERETT. (No. 10550.)

(Court of Appeals of Georgia, Division No. 2.  
Feb. 7, 1920.)

(Syllabus by the Court.)

### 1. MASTER AND SERVANT ⇨189(2) — NEGLIGENCE OF "VICE PRINCIPAL" IMPUTED TO MASTER.

A person employed by the master as a superintendent or foreman, having authority to supervise the master's business and to employ and discharge employees and direct them in their work, is the vice principal, or alter ego, of the master, and the negligence of such superintendent or foreman in the discharge of such duties may be imputed to the master.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Vice Principal.]

### 2. MASTER AND SERVANT ⇨149(1), 190(3)—ORDER OF FOREMAN PROXIMATE CAUSE OF INJURY FROM LIFTING WITH INSUFFICIENT HELP.

"A master is negligent and responsible to the servant for injuries resulting proximately therefrom, if by his order he caused the servant to do an act which exposes him to a danger known to the master but unknown to the servant." Southern Cotton Oil Co. v. Gladman, 1 Ga. App. 259, 58 S. E. 249.

(a) From the petition in this case it appears that the plaintiff was employed by the defendant company to do general utility and repair work in its mill, and that it was his duty to carry out the instructions and commands of a named foreman or superintendent, who was the alter ego of the defendant; that the defendant, through the foreman or superintendent, directed the plaintiff to assist another servant in repairing a certain attachment belonging to a piece of machinery, and in order to carry out such instruction it became necessary for him to detach this attachment from the machinery and carry it aside, which the master, through such foreman or alter ego, ordered him to do, and while in the performance of this latter duty, which was done with the assistance of such foreman, the attachment, on account of its excessive weight and the consequent inability of the

foreman or superintendent to guide it, swerved and fell upon the plaintiff and injured him; that the attachment was deceptive in appearance as to its weight, weighing considerably more than, from its peculiar structure, it appeared to an inexperienced eye to weigh, and was entirely too heavy to be lifted with reasonable safety by two persons; and that its excessive weight and the consequent danger which attended lifting and carrying it with only one assistant were known to the master and unknown to the plaintiff. Under these allegations the proximate cause of the injury may be regarded as the wrongful act of the master, through its superintendent or foreman as its alter ego, causing the servant to do an act which exposed the latter to a danger known to the master but unknown to the servant, and which the latter did not have equal means with the master of knowing and could not have known by the exercise of ordinary care. The fact that the foreman may be regarded as a fellow servant while assisting the injured servant will not affect the above ruling, even though his negligence as a fellow servant may in some degree have contributed to the injury, although not the proximate cause thereof. *Beard v. Georgian Mfg. Co.*, 8 Ga. App. 618, 70 S. E. 57.

### 3. MOTION TO DISMISS PETITION PROPERLY OVERRULED.

The trial judge did not err in overruling defendant's motion to dismiss the petition upon the ground that it failed to set out a cause of action.

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

Action by G. F. Everett against the Buckeye Cotton Oil Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Miller & Jones, of Macon, for plaintiff in error.

Sibley & Sibley, of Milledgeville, and Hall & Grice, of Macon, for defendant in error.

STEPHENS, J. Judgment affirmed.

JENKINS, P. J., and SMITH, J., concur.

(24 Ga. App. 716)

### CENTRAL OF GEORGIA RY. CO. v. MOORE.

### MOORE v. CENTRAL OF GEORGIA RY. CO.

(Nos. 10216, 10217.)

(Court of Appeals of Georgia, Division No. 2. Feb. 7, 1920.)

(Syllabus by the Court.)

### 1. RAILROADS — 324(3)—DRIVER OF UNLICENSED MOTORTRUCK NOT TRESPASSER AT A CROSSING.

"Where a person driving a motortruck on a public highway over a railroad crossing is struck by a passenger train and injured, the

mere fact that the vehicle has not been registered in the office of the secretary of state, and a license obtained and a license fee paid, as required under Georgia Laws (Ex. Sess. 1915) p. 107, will not render the person so injured a trespasser, and bar his right of recovery against the railroad company for negligence." *Central of Georgia Railway Co. v. Moore*, 101 S. E. 668, decided December 9, 1919. This ruling was made by the Supreme Court in answer to a question certified to that court by this court, and overrules the holding in *Knight v. Savannah Electric Co.*, 20 Ga. App. 314, 93 S. E. 17.

### 2. OVERRULING OF MOTION FOR NEW TRIAL.

Those grounds of the amended motion for a new trial not specifically abandoned contain no reversible error, and, there being evidence to support the verdict, the trial judge did not err in overruling the motion for a new trial.

Error from City Court of Blakely; R. H. Sheffield, Judge.

Action by A. H. Moore against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error, and plaintiff takes a cross-bill of exceptions. Judgment on main bill of exceptions affirmed and cross-bill dismissed, in conformity to answer of Supreme Court (101 S. E. 668).

Pottle & Hofmayer, of Albany, and A. H. Gray, and L. M. Rambo, both of Blakely, for plaintiff in error.

Glessner & Collins, of Blakely, for defendant in error.

SMITH, J. Judgment on main bill of exceptions affirmed; cross-bill dismissed.

JENKINS, P. J., and STEPHENS, J., concur.

### (24 Ga. App. 742) SOUTHERN EXPRESS CO. v. BASS. (No. 10556.)

(Court of Appeals of Georgia, Division No. 2. Feb. 7, 1920.)

(Syllabus by the Court.)

### 1. CARRIERS — 134 — EVIDENCE FAILING TO SHOW EXTENT OF DAMAGE TO SHIPMENT INSUFFICIENT TO SUPPORT VERDICT.

Where, in a suit by a shipper against a common carrier for loss or damage to goods in transit, it appears from the evidence that some of the goods were not totally damaged or destroyed, but were of some value, and the evidence failing to furnish sufficient data from which a jury might infer the value of the damaged articles, the verdict is without evidence to support it.

(a) Plaintiff brought suit against the defendant, a common carrier, for failure to deliver in good condition a shipment of eggs, alleging a total destruction of a part of such shipment; and, it appearing from the evidence that some

of the eggs, for the value of which suit was brought, were totally destroyed, and others partially destroyed, but retaining some value, the evidence failing to show how many were totally destroyed or how many partially destroyed, and failing further to show the value of such partially damaged eggs, which should be credited against plaintiff's claim for a total damage, the evidence is insufficient to support a verdict covering damages for eggs both totally and partially destroyed.

**2. CARRIERS  $\S$ 187—BURDEN DOES NOT REST ON CARRIER TO SHOW VALUE OF SHIPMENT PARTIALLY DESTROYED.**

It was error on the part of the trial judge to instruct the jury that the burden was upon the defendant carrier to prove the value of the eggs partially destroyed.

**3. DAMAGES  $\S$ 62(3)—CREDIT TO CARRIER FOR VALUE OF UNDAMAGED PART OF SHIPMENT NOT AFFECTED BY SHIPPER'S FAILURE TO CONVERT IT INTO MONEY.**

A failure or inability on the part of the shipper to convert into money such partially damaged eggs would not affect the defendant's right to have credit for their value.

**4. CARRIERS  $\S$ 135—VERDICT AGAINST CARRIER FOR INJURY TO SHIPMENT CANNOT INCLUDE INTEREST.**

Properly construed, plaintiff's suit was one in tort, and a verdict for interest on the amount found was contrary to law. *Western & Atlantic Railroad Co. v. McCauley*, 68 Ga. 818.

Error from City Court of Carrollton; James Beall, Judge.

Action by E. O. Bass, against the Southern Express Company. Judgment for plaintiff, and defendant brings error. Reversed.

Robt. C. & Philip H. Alston, of Atlanta, and Sidney Holderness, of Carrollton, for plaintiff in error.

Boykin & Boykin and H. O. Strickl, all of Carrollton, for defendant in error.

STEPHENS, J. Judgment reversed.

JENKINS, P. J., and SMITH, J., concur.

(24 Ga. App. 720)

**GILSTRAP v. LEITH.**

LEITH v. GILSTRAP et al.

(Nos. 10638, 10639.)

(Court of Appeals of Georgia, Division No. 2.  
Feb. 7, 1920.)

(Syllabus by the Court.)

**1. NEW TRIAL  $\S$ 8—JOINT VERDICT AGAINST TWO CHARGED WITH CONSPIRACY TO SLANDER MUST STAND OR FALL IN ITS ENTIRETY AS TO BOTH DEFENDANTS.**

While, in an action of tort against two defendants, based upon an alleged conspiracy to

slander the plaintiff, a joint verdict finding both defendants liable in the same amount must stand or fall in its entirety as to both of them, an order setting the verdict aside as to one defendant only is, nevertheless, a valid order to that extent. It therefore follows that, having been set aside as to one defendant, the verdict must, on motion of the other defendant, be also set aside as to him. See, in this connection, *Hunter v. Wakefield*, 97 Ga. 543, 25 S. E. 347, 54 Am. St. Rep. 438; *McCalla v. Shaw*, 72 Ga. 458; *Simpson v. Perry*, 9 Ga. 509.

**2. LIBEL AND SLANDER  $\S$ 112(3), 124(7)—TRIAL  $\S$ 296(8)—BURDEN IS ON DEFENDANT TO SUSTAIN PLEA OF TRUTH BY PREPONDERANCE OF EVIDENCE; CHARGE AS TO BURDEN OF PROOF IN SUCH CASE HELD NOT ERRONEOUS.**

In such a case, where a defendant filed a plea of justification, admitting the use of the alleged slanderous language charged by the plaintiff, but alleging in justification thereof the truth of such charge, the burden is upon the defendant to sustain the plea by a preponderance of the evidence. A charge of the court that in order to sustain such plea the defendant must prove the plaintiff "actually" guilty, while standing alone and disconnected from the entire charge, is subject to the criticism that by the use of the word "actually" the court placed too heavy a burden upon the defendant, yet when taken in connection with the entire charge, where the jury were clearly instructed that it was only necessary to sustain the plea of justification by a preponderance of the evidence, such charge was not error.

**3. TRIAL  $\S$ 252(21), 255(15)—WITHOUT SPECIAL REQUEST, FAILURE TO CHARGE ON WEIGHT OF IMPEACHING TESTIMONY NOT ERROR; FAILURE TO CHARGE ON METHODS OF IMPEACHMENT NOT ERROR WHERE EVIDENCE WOULD NOT AUTHORIZE SUCH CHARGE.**

Where the trial judge in his charge called the attention of the jury to several methods of impeaching witnesses, it was not error, in the absence of a special request, to fail to instruct the jury as to the rules governing the weight to be given to testimony; nor was it error, in the absence of such a request, to fail to instruct them as to other methods of impeachment of witnesses, where there was no evidence which would authorize such instruction.

**4. CHARGE OF COURT.**

The trial judge having given in charge to the jury substantially the provisions of Civil Code 1910, § 5884, respecting the impeachment of witnesses, there was no error in the charge complained of in the ninth and tenth grounds of the amendment to the motion for new trial.

**5. TRIAL  $\S$ 193(2)—TRIAL CHARGE CONSTRUED AS NOT TO EXPRESS OPINION THAT OBJECTS OF ALLEGED CONSPIRATORS WERE UNLAWFUL.**

In charging the law upon the subject of conspiracy, an opinion that the objects of the alleged conspirators were unlawful was not expressed by the use of the following language: "In order to show a conspiracy, it will not be necessary to show that the parties met together or entered into any specific or formal agreement, or that by words or writings they formulated

their unlawful objects." "To declare the law applicable to a given state of facts is not an expression or intimation of an opinion as to whether any of the facts referred to do or do not exist in the case on trial." *Yarborough v. State*, 86 Ga. 396, 12 S. E. 650.

#### 6. OTHER ASSIGNMENTS.

The rulings complained of in the remaining assignments of error, not abandoned, were either harmless or are not likely to occur on another trial of the case.

#### 7. APPEAL AND ERROR $\S$ 14(4)—EXCEPTIONS, BILL OF $\S$ 43(1)—CROSS-BILL OF EXCEPTIONS PRESENTING ISSUE AS TO ONE NOT A PARTY TO MAIN BILL OF EXCEPTIONS, OR ONE NOT PRESENTED WITHIN STATUTORY TIME, MUST BE DISMISSED.

The cross-bill of exceptions filed by the defendant in error does not assign any error respecting any issue between the defendant in error and the plaintiff in error, but assigns error respecting only an issue between the defendant in error and one not a party to the main bill of exceptions. For this reason, it cannot be maintained as a cross-bill of exceptions; and, not having been presented within the statutory period, it cannot be entertained as a main bill of exceptions. Whether considered as a main bill of exceptions or as a cross-bill of exceptions, the alleged cross-bill of exceptions must be dismissed. *McMullen v. Butler*, 117 Ga. 845, 45 S. E. 258.

Error from City Court of Hall County;  
A. O. Wheeler, Judge.

Action by Leona Leith against Armendia Gilstrap and one Carter. Verdict for plaintiff against both defendants, motion for new trial sustained as to defendant Carter, and overruled as to defendant Gilstrap, and she excepts and brings error; and plaintiff takes a cross-bill of exceptions. Reversed on main bill of exceptions, and cross-bill dismissed.

Mrs. Leith sued Carter and Mrs. Gilstrap, alleging that they conspired together to slander the plaintiff. A verdict was rendered against both defendants. Their motion for a new trial was sustained as to the defendant Carter, upon the ground that one of the jurors was disqualified, but it was overruled as to Mrs. Gilstrap, and on January 11, 1919, within the time allowed by law, she excepted to the order overruling the motion as to her, and in her bill of exceptions named Mrs. Leith as defendant in error. Mrs. Leith, on January 17, 1919, more than 30 days after the date of the order overruling the motion for new trial, filed a cross-bill of exceptions, complaining only of the grant of a new trial to Carter, and naming him and Mrs. Gilstrap as defendants in error. Carter moved to dismiss the cross-bill of exceptions, on the ground that, as he was not a party to the main bill of exceptions, a cross-bill of exceptions could not be maintained as to him.

C. R. Faulkner, of Bellton, Oscar Brown, of Lula, and W. N. Oliver and W. A. Charters, both of Gainesville, for plaintiff in error.

Sloan & Sloan, of Gainesville, for defendants in error.

STEPHENS, J. Judgment reversed on the main bill of exceptions. Cross-bill dismissed.

JENKINS, P. J., and SMITH, J., concur.

(24 Ga. App. 729)

#### SMITH v. FISHER. (No. 10519.)

(Court of Appeals of Georgia, Division No. 2.  
Feb. 7, 1920.)

(Syllabus by the Court.)

EVIDENCE  $\S$ 441(9), 442(1)—WHEN NOTE IN SUIT RECITES PRICE OF PERSONAL PROPERTY AS CONSIDERATION, BUT DOES NOT INTEGRATE THE SALE CONTRACT, BUYER MAY PLEAD AS FAILURE OF CONSIDERATION BREACH OF CONTEMPORANEOUS ORAL WARRANTY.

Smith brought his action against Fisher upon an ordinary promissory note for the sum of \$185, which contained the recital that "this note is for purchase money of one mule name Tobe and more fully described in a mortgage this day executed to secure the payment of this note." The defendant interposed his plea setting up a partial failure of consideration by reason of the breach of a contemporaneous parol warranty made by the plaintiff as to the soundness of the mule. The plaintiff moved to strike the plea, upon the grounds: (1) That it set forth no defense; and (2) that it affirmatively appears that the suit is upon a contract in writing, and the defense set up is an alleged parol agreement made contemporaneously therewith; that, the contract being in writing and appearing to be complete and certain, it will be presumed that it contains the whole agreement of the parties, and no facts are set forth in the defense to take the same out of the presumption above set forth. The court sustained this motion, dismissed the defendant's plea, and entered up judgment for the plaintiff for the full amount sued for, and to these rulings the defendant excepted. *Held*:

Since the decision of the Supreme Court in *Pryor v. Ludden & Bates*, 134 Ga. 288, 67 S. E. 654, 28 L. R. A. (N. S.) 267, it has become settled that the maker of a promissory note which recites that its consideration is the purchase price of described personal property, but does not purport to integrate the sale contract, may, in defense to a suit on the note by the seller, plead as failure of consideration a breach of a contemporaneous oral warranty. See, also, *Anthony v. Cody*, 135 Ga. 329, 69 S. E. 491; *International Harvester Co. v. Morgan*, 19 Ga. App. 716, 92 S. E. 35; *Anderson v. Rheney*, 22 Ga. App. 417, 418, 96 S. E. 217. It is only where the parties have entered into such a written contract which appears to be complete within itself that it will, in the absence of fraud, accident, or mistake, be conclusively presumed that the writing contains the whole of the agree-

ment between them, and parol evidence of prior or contemporaneous conversations, representations, or statements will not be received for the purpose of adding to or varying the written instrument. Thus, if such writing contains a warranty of some kind or to some extent, parol evidence will not ordinarily be admitted to extend, enlarge, or modify that which the writing specifies. *Case Threshing Machine Co. v. Broach*, 137 Ga. 602, 73 S. E. 1063. While the note sued on in the instant case recites that its consideration is the purchase price of described personal property, it does not in any way purport to integrate the sale contract, nor does it purport to contain or exclude a warranty of any kind. The court therefore erred in striking the plea upon motion, and in thereafter entering up judgment for the plaintiff.

Error from City Court of Floyd County;  
W. J. Nunnally, Judge.

Action between J. M. Smith and L. M. Fisher. Motion to strike a plea granted, and judgment entered for plaintiff, and defendant excepts and brings error. Reversed.

See, also, 98 S. E. 96.

M. B. Enbanks, of Rome, for plaintiff in error.

Maddox & Doyal, of Rome, for defendant in error.

JENKINS, P. J. Judgment reversed.

STEPHENS and SMITH, JJ., concur.

(24 Ga. App. 719)

McINTOSH LAND & TIMBER CO. v. MIDDLETON. (No. 10311.)

(Court of Appeals of Georgia, Division No. 2.  
Feb. 7, 1920.)

(Syllabus by the Court.)

1. CONTRACTS ¶9(2)—WRITTEN AGREEMENT TO PERFORM CERTAIN ACTS FOR MONEY CONSIDERATION VALID, IF PROMISES ARE SUFFICIENTLY DEFINITE FOR PERFORMANCE.

A written agreement between two persons, which provides that, in consideration of a certain sum having been paid by the promisee to the promisor, the latter obligates himself to perform certain promises and undertakings stipulated therein, constitutes a valid contract, provided such promises and undertakings are sufficiently certain and definite to render them capable of performance.

2. LOGS AND LOGGING ¶21—UNDERTAKINGS OF PROMISOR TO MANUFACTURE LUMBER SUFFICIENTLY DEFINITE TO BE CAPABLE OF ENFORCEMENT.

Where such a contract, dated the 25th day of January, 1917, and entered into and executed by both parties, provides that the promisee, called therein the party of the first part, is to furnish timber from certain lands described as

"the Thicket," to the promisor, called therein the party of the second part, and that "the party of the second part is to cut all timber into lumber and load on cars" at a certain stipulated price per thousand, and of certain dimensions, that "the party of the second part also agrees to cut and furnish to the party of the first part 10,000 cross-ties" by a certain date mentioned, and of certain dimensions specifically set out, and for which "the party of the first part agrees to pay to the said party of the second part 25 cents per tie," that for "all ties cut on other lands the party of the first part agrees to pay the market price to the said party of the second part," that "all ties cut from the party of the first part is to be loaded" at a certain named price per tie, that "all ties cut on lands not belonging to the party of the first part is to be loaded on cars at the market price delivered in Brunswick," and that "the party of the second part agrees to have a mill in operation to cut said timber not later than 20 days from the date of the contract," and "to cut not less than 100,000 feet of lumber per month from date of said contract," such contract sets out promises and undertakings made by the promisor sufficiently certain and definite as to be capable of enforcement. A description of the lands from which is to be furnished the timber which the promisor agrees to cut into lumber, by designating them as "the Thicket," is sufficiently definite and certain by way of identification of the timber. While the contract is indefinite as to the amount of timber to be thus furnished by the promisee, such indefiniteness is immaterial to the definiteness of the promises and undertakings on the part of the promisor. The promise and undertaking to cut not less than a certain number of feet of lumber per month from the timber upon such definitely ascertained premises, and also to furnish by a certain time a stipulated number of cross-ties, whether from such timber furnished by the promisee or from timber obtained by the promisor from other lands, constitute promises and undertakings sufficiently certain and definite to be capable of ascertainment and enforcement.

3. LOGS AND LOGGING ¶21—PETITION IN ACTION FOR BREACH OF CONTRACT TO CUT AND FURNISH TIMBER FROM PLAINTIFF'S LAND HELD TO STATE CAUSE OF ACTION.

In a suit upon such a contract by the promisee against the promisor, the petition alleging that the lands of the former, from which the promisee was to furnish lumber, contained thereon approximately 2,000,000 feet of timber, which fact the defendant knew, and from which timber the defendant could have cut and furnished to the plaintiff lumber under the terms of the contract, and that the defendant failed to cut and furnish to petitioner the cross-ties contracted for, that the plaintiff performed all of its obligations under the contract, and that by reason of the breaches by defendant as set out, the latter damaged the plaintiff in a certain sum prayed for, a cause of action was set out and the petition was good against the general and special demurrers interposed.

Error from City Court of Darien; O. M. Tyson, Judge.

Action between the McIntosh Land & Timber Company and F. L. Middleton. Judgment for the latter, and the former brings error. Reversed.

Edwin A. Cohen, of Savannah, for plaintiff in error.

W. B. Stubbs, of Savannah, for defendant in error.

STEPHENS, J. Judgment reversed.

JENKINS, P. J., and SMITH, J., concur.

(24 Ga. App. 758)

PAULK et al. v. BERRIEN COUNTY et al.  
(No. 10992.)

(Court of Appeals of Georgia, Division No. 2.  
Feb. 9, 1920.)

(Syllabus by the Court.)

1. COURTS  $\S$ 488(1)—TRANSFER OF CASE FROM SUPREME COURT TO COURT OF APPEALS CONSTITUTES HOLDING THAT NO CONSTITUTIONAL QUESTION IS INVOLVED.

The transfer of this case to this court by the Supreme Court is equivalent to a holding that no constitutional question is involved.

2. CONTINUANCE  $\S$ 7, 9—REFUSAL WITHIN DISCRETION OF TRIAL COURT.

The trial judge did not abuse his discretion in overruling the motion for a continuance.

3. COUNTIES  $\S$ 173 — JUDGE OF SUPERIOR COURT CANNOT VALIDATE BONDS IN AMOUNT OTHER THAN THAT VOTED.

Where the commissioners of roads and revenues of a county notify, by advertisement in a newspaper for 30 days, the qualified voters of that county that a bond election will be had on a fixed date, to determine whether or not the county shall issue bonds in the sum of \$500,000, and the taxpayers by their vote authorize the issue of this sum in bonds, the judge of the superior court has no authority to validate, upon the request of the commissioners and over the objection of a number of taxpayers, bonds in the sum of \$350,000.

Error from Superior Court, Berrien County; W. E. Thomas, Judge.

Proceedings by the State against Berrien County, wherein J. J. Paulk and others intervened. A postponement of hearing was denied, and interveners bring error. Reversed.

The state of Georgia filed a petition against Berrien county, praying that the county show cause why an issue of \$500,000 "road bonds," alleged to have been duly authorized by the voters of the county, should not be confirmed and validated. The county filed an answer, alleging that its assessed value of taxable property was insufficient to authorize the amount of bonds which had been voted on by the people, and that the commissioners de-

sired to issue only \$350,000 in bonds, and prayed that the court pass an order confirming and validating bonds in this sum. At the hearing the plaintiffs in error, taxpayers of said county, intervened and were made parties along with the county. The interveners, through their counsel, requested a postponement of the hearing, which request was denied by the court, and that ruling is now complained of. They then filed an answer, attacking the legality of the election, and denying the authority of the court to confirm and validate the bonds in an amount other than the amount voted upon. The court, after hearing evidence, passed an order confirming and validating bonds in the sum of \$350,000, as prayed by the county authorities. To this order the interveners duly filed their bill of exceptions.

Quincey & Rice, of Ocilla, for plaintiffs in error.

Clifford E. Hay, Sol. Gen., of Thomasville, J. D. Lovett, Sol. Gen., and W. D. Bule, both of Nashville, and King & Spalding, of Atlanta, for defendants in error.

SMITH, J. (after stating the facts as above). [1] 1. The transfer of this case to this court by the Supreme Court is equivalent to a holding that no constitutional question is involved.

[2] 2. The trial court, in passing upon the motion for a continuance, probably and rightly took the view that this case affected, not only the several interveners, but all the taxpayers of the county; and, it appearing from the motion and the subsequent evidence that the interveners were properly notified by advertisement of the time set for the hearing, and had collected all of their testimony and witnesses, and were as well prepared for trial as they would have been at a later date, there was no abuse of discretion in overruling the motion to continue. The mere fact that the solicitor general, the county attorney, and counsel for the interveners had agreed that the case be continued is entirely insufficient, in the absence of any approval by the judge of such an agreement, to change our ruling. Civil Code (1910), § 5724.

[3] 3. Section 440 of the Civil Code provides that 30 days' notice of a bond election shall be given in the newspaper in which the sheriff's advertisements for the county are published, notifying the qualified voters that on a day named an election will be held to determine whether bonds shall be issued by the county. This section concludes with the statement that said notice "shall specify what amount of bonds are to be issued, for what purpose, what interest they are to bear, how much principal and interest to be paid annually, and when to be fully paid off." It is well settled that these provisions are



mandatory and must be strictly complied with. "When a county or municipality undertakes to incur a debt, and tax the people for the purpose of paying the interest and principal of that debt, they must comply with the law *strictly*. [Italics ours.] Nor does it matter with how great a unanimity the action of the mayor and council is approved by the people, still, if there are four taxpayers, or even one, objecting to incurring the debt, he or they have a right to appeal to the courts to prevent the illegal issuance of bonds as evidence of that debt." Bowen v. Greensboro, 79 Ga. 709, 714, 715, 4 S. E. 159, 162. That ruling was followed in the case of City of Dawson v. Waterworks Co., 106 Ga. 732, 32 S. E. 921, where it was held:

"The policy of the Constitution is against the incurring of municipal debts, and therefore the constitutional provision prescribing the manner in which debts must be incurred is to be strictly construed. It has been the uniform ruling of this court that, not only the constitutional provision must be strictly construed, but that the act of the General Assembly, prescribing the manner in which an election shall be held on the question of bonded indebtedness, shall be also strictly construed."

See numerous cases there cited in support of this statement. In the case of Smith v. Dublin, 113 Ga. 833, 39 S. E. 327, the Supreme Court held that a bond election notice which did not state the exact amount to be used for several designated purposes was insufficient at law. The notice under review in that case contained these words:

"Said bonds to be known as 'school and city improvement bonds,' and to be issued to the aggregate amount of \$25,000, in denominations of from \$1,000 to \$5,000 each, as purchasers may desire, and not more than \$20,000 of the amount realized therefrom to be used for the purpose of building and erecting a schoolhouse, and not more than \$5,000 for the purpose of enlarging and improving the light and water plant of said city, and the surplus, if any, to be used by the mayor and council in such other manner as they may see fit."

Clearly, therefore, under the settled law of our state, had the commissioners of Berrien county passed a resolution submitting to the voters of the county the question as to whether or not bonds in an amount not exceeding \$500,000 should be issued, such a notice would have been invalid. This being true, it follows as a natural conclusion that where voters have authorized the issuance of \$500,000 in bonds, neither the commissioners nor the judge of the superior court has any right to determine that a lesser amount shall be confirmed and validated. To illustrate, suppose the commissioners should decide to build a concrete dike or levee 100 feet high, in order to prevent the overflow of a nearby river, which project would, of course, be of

unlimited benefit to the public. Competent engineers advise that the construction of such a dike will cost \$100,000, and it is proposed by the commissioners to the taxpayers that \$100,000 in bonds be issued for construction. The taxpayers at an election duly advertised and held authorize the issuance of \$100,000 in bonds for the purpose intended. After the election and before the validation of the bonds the commissioners determine that they will build a crude brick structure only 10 feet high, and consequently entirely inadequate to withstand the pressure of the stream during the rainy seasons; and of their own volition they ask the court to validate only \$5,000 of bonds. Surely, the commissioners are not vested with any such right or discretion. Otherwise, it would be legally sufficient to advertise a bond issue not to exceed a certain amount, and then permit the commissioners to fix the amount. This the Supreme Court has repeatedly held cannot be done. Smith v. Dublin, supra.

After a careful examination of the books we have been unable to find any case in Georgia adjudicating the exact question now under consideration. In making this statement we are not unaware of the case of Hellbron v. Cuthbert, 96 Ga. 312, 317, 23 S. E. 203, 207, where Justice Lumpkin said:

"It was insisted in the argument for the plaintiffs in error that the published notice of the election to be held in Outhbert for the purpose stated specified a larger amount of bonds than the municipal authorities could constitutionally issue in any event. Be this as it may, the petition for injunction presented no such objection as this to the legality of the notice; and therefore, even if the proposed issue of bonds as stated in the notice would have been greater than the Constitution authorizes, the trial judge was not, for this reason, necessarily constrained to grant an injunction restraining the issue of bonds to a lesser amount, and undoubtedly within the constitutional limit. *If the point insisted upon here was meritorious, it ought to have been made in the petition presented to the trial judge.*" (Italics ours).

This quotation clearly shows that the point made in the present case was not made, and consequently not decided, in that case. Also, the facts in that case are clearly distinguishable from the facts in this case. In that case an injunction was sought after a solemn judgment had been rendered validating the bonds, whereas in this case the plaintiffs in error intervened at the proper time and before any judgment was had validating the bonds.

This is not a case where the rights of a bona fide holder have become involved, and it might not be amiss to state in conclusion that where proceedings are brought to prevent the issuance of bonds, the law will be more strictly construed than where bonds

have already been issued and have passed into the hands of bona fide purchasers.

Judgment reversed.

JENKINS, P. J., and STEPHENS, J.,  
concur.

(24 Ga. App. 762)

EMINENT HOUSEHOLD OF COLUMBIAN  
WOODMEN v. EPPES. (No. 10292.)

(Court of Appeals of Georgia, Division No. 2  
Feb. 10, 1920.)

*(Syllabus by the Court.)*

1. INSURANCE §719(1)—ADOPTION OF AMENDMENTS TO CONSTITUTION OR BY-LAWS OF FRATERNAL ORDER CANNOT DEFEAT SUBSTANTIAL RIGHTS UNDER ITS CERTIFICATE.

A fraternal beneficial order, by the adoption of amendments to its constitution or by-laws, cannot defeat or abridge essential and substantial rights created by a covenant previously entered into in a certificate of insurance issued by it. And this is true despite the covenant holder's agreement to a stipulation in the covenant that the certificate was accepted by him subject to the laws of the order then of force or which might thereafter be enacted.

2. INSURANCE §719(1)—CERTIFICATE PROVISION THAT PROPORTIONATE PART WILL BE PAID AS ACCIDENT BENEFIT CREATES SUBSTANTIAL RIGHT NOT SUBJECT TO CHANGE BY AMENDMENT OF CONSTITUTION OR BY-LAWS.

A provision in the certificate that a certain proportionate part of the value of the covenant will be paid to the assured as an accident benefit creates an essential and substantial right in the assured; and a reduction of this benefit by a subsequent change in the constitution or by-laws of the order is such a material change in the certificate as defeats or abridges this right.

3. INSURANCE §719(1)—FUTURE CHANGES IN BY-LAWS WILL BE CONSTRUED AS PROSPECTIVE.

Though a member of an order in his original covenant or certificate agrees to be bound by future changes in the by-laws, an alteration made subsequently to issuance of covenant will be given a prospective operation, in the absence of a clear intent that it shall operate retrospectively.

4. OVERRULING OF CERTIORARI.

The judge of the superior court did not err in overruling the certiorari.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by E. B. Eppes against the Eminent Household of Columbian Woodmen to recover premiums paid on a certificate and interest. Judgment in the municipal court of Atlanta for plaintiff, certiorari overruled, and defendant brings error. Affirmed.

Brewster, Howell & Heyman, and Mark Bolding, all of Atlanta, for plaintiff in error.  
Branch & Howard, of Atlanta, for defendant in error.

STEPHENS, J. This was a suit instituted in the municipal court of Atlanta in October, 1918, by a policy or "covenant" holder against the above-styled fraternal beneficial association to recover premiums paid by him upon a certificate of insurance issued to him in January, 1909, and for interest upon each payment, and was based upon a breach of the contract by the insurer through a large increase in the rate of premium demanded and a decrease in certain substantial benefits under the certificate or "covenant."

[1, 2] A principal and substantial element of the contract of insurance here involved was its feature of accident protection, wherein the assured was protected against the loss of one or both eyes. If both eyes were lost, then the full accumulated value of the covenant would be paid to him at once, in certain periodical installments. If one eye was destroyed, one half of the then accumulative value of the covenant was payable to the assured; the remainder of the policy being payable to his estate upon his death.

The attempt of the defendant fraternal order to continue the covenant of insurance in force, at the increased rate, conditionally upon a reduction in the material accident benefit to the covenant holder, among other benefits, of one-quarter of its cumulative value, upon the loss of one eye, amounted to a repudiation of a main and substantial element of the insurance contemplated in the contract, and not merely the avoidance of a collateral or incidental benefit. The cumulative value of the covenant at the time of this action taken by the order was \$5,000. Half of this amount, or \$2,500, must be considered a very substantial part of the consideration, and a 50 per cent. reduction of this amount, to be paid the assured upon the contingency of the destruction of one of his eyes, would necessarily be a great impairment of the insurance contemplated in the original contract. The contention of the insurance company that there was no reduction in the benefit to the covenant holder, but that there was only a change in the method of payment, and that the full benefit would be paid, the only change being that a part of such benefit would be paid in installments and the balance would be deferred until the death of the assured, is untenable. To assert that, under the policy as changed, part of the benefit was only deferred until the death of the assured is only another way of asserting that the benefit has been reduced.

It follows that, the defendant having re-

pudiated its contract as to a principal element of insurance provided therein, the plaintiff was entitled to recover the amounts paid in by him as premiums, with interest thereon from the time that each was paid. Supreme Council, A. L. of H. v. Jordan, 117 Ga. 808, 45 S. E. 33 (1), and authorities cited. This holding is not in conflict with the decision in Farrow v. State Mutual Life Ins. Co., 22 Ga. App. 540, 96 S. E. 448. See, in this connection, L. R. A. 1917E, 1035, note; 1 Bacon on Life & Accident Insurance (4th Ed.) 420, § 234, and authorities cited.

[3] Even though the member of the order, in his original covenant, agrees to be bound by future changes in the by-laws, an alteration made subsequent to the issuance of the covenant will be given prospective operation, in the absence of a clear intent that it shall operate retrospectively. Civil Code (1910), § 6; Ancient Order United Workmen v. Brown, 112 Ga. 545, 37 S. E. 890 (2); Sovereign Camp, etc., v. Thornton, 115 Ga. 798, 800, 801, 42 S. E. 236; 29 Cyc. 72, note 50.

Since the ruling above is controlling in the case, it is unnecessary to pass upon the right of the defendant order to increase the premium rates to preserve the life of the order and to comply with the provisions of the act of 1914 (Ga. Laws 1914, p. 99, Park's Ann. Code, §§ 2564q, 2564w, 2564x).

[4] The evidence authorized the verdict, and the judge of the superior court did not err in overruling the certiorari.

Judgment affirmed.

JENKINS, P. J., and SMITH, J., concur.

(24 Ga. App. 732)

**NATIONAL SURETY CO. v. CITY OF ATLANTA.** (No. 10533.)

(Court of Appeals of Georgia, Division No. 2.  
Feb. 7, 1920. Adhered to on Re-hearing Feb. 23, 1920.)

*(Syllabus by the Court.)*

**1. CONTRACTS §=10(4)—AGREEMENT BINDING ONLY ONE PARTY IS NUDUM PACTUM.**

An instrument in writing purporting to be a bilateral contract, as set out in the first count of the petition, wherein only one of the parties promises to perform, there being no obligation on the part of the other party, lacks mutuality and is a nudum pactum.

**2. MUNICIPAL CORPORATIONS §=244(2)—UNILATERAL AGREEMENT TO FURNISH COAL BECOMES BINDING ON CITY'S ACCEPTANCE.**

The promise, however, may be regarded as an offer to contract, and when accepted before withdrawal, as set out in the second count of the petition, it becomes a binding contract, and a failure afterwards to perform the promise is a breach of the contract.

**3. MUNICIPAL CORPORATIONS §=245 — BOND TO SECURE UNILATERAL CONTRACT BINDING UPON ACCEPTANCE OF CONTRACT BY CITY.**

Where, at the time of the execution of such an instrument, a bond referring to it as a "con-

tract" and guaranteeing performance of the promise of the first party is executed, and at a subsequent time the offer of the promisor is accepted by the other party, the bond should be construed as guaranteeing the performance of the contract completed by such acceptance, and a subsequent failure to perform would constitute a breach of the bond.

**4. MUNICIPAL CORPORATIONS §=245 — PETITION IN SUIT ON CONTRACTOR'S BOND NEED NOT NEGATIVE VIOLATION OF DEBT LIMIT.**

In a suit by a municipal corporation to recover for a breach of a bond guaranteeing the performance by a third party of a contract with the municipality, it is not necessary for the petition to allege a compliance by the city with the constitutional provision governing the creation of an indebtedness by counties and municipalities contained in article 7, section 7, paragraph 1, of the Constitution of Georgia.

**5. MUNICIPAL CORPORATIONS §=255—BOND VALIDATED BY CITY'S ACCEPTANCE VALIDATED CONTRACT.**

The present case being an action against the surety on such a bond, and it appearing that a cause of action was set out in the second count of the petition, the court did not err in overruling the demurrer.

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by the City of Atlanta against the National Surety Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The city of Atlanta brought suit against the National Surety Company, alleging a breach on the part of the defendant as guarantor upon a bond guaranteeing to the plaintiff the performance of certain obligations assumed by the Tennessee & Southeastern Coal Company under an alleged contract between the coal company and the city of Atlanta, whereby the coal company promised to furnish and deliver to the city of Atlanta coal in certain carload quantities at certain intervals during a period of 12 months. The alleged contract provided that the coal company would furnish the coal upon orders of a designated officer of the city, and contained a provision as follows:

"After a verbal or written notice to suspend deliveries under this contract, a further notice may be served in writing to suspend deliveries of coal, and the city will be at liberty to refuse to accept any coal delivered after forty-eight hours from date of such written notice."

The petition set out the bond and the alleged contract between the coal company and the city, which was executed by both parties, and alleged a failure upon the part of the coal company to carry out its promises and undertakings therein contained, and that by reason of such failure the defendant breached the bond sued on, to the damage of the plaintiff. The petition contained two counts. The first count alleged the existence of a contract between the coal company and the

city of Atlanta by the terms of which the coal company was obligated to furnish coal to the city of Atlanta as above stated, and alleged a breach of the same by reason of the failure on the part of the coal company to perform, to the damage of the city, thereby constituting a breach of the bond. The second count alleged written communications from the city to the coal company from time to time throughout the year, ordering coal in piecemeal lots, in accordance with the promises and obligations of the coal company as contained in the alleged contract, and also the refusal and failure on the part of the coal company to furnish coal in compliance with such orders to the damage of the city, thereby constituting a breach of the bond. The defendant demurred to the petition, upon the ground that the alleged contract attached thereto was void for want of consideration, that it was lacking in mutuality, and fixed no binding obligation upon the city, and, there being no contract to be performed, there appeared no breach of the bond, which had been given to secure the performance of a contract which did not exist, and that the petition failed generally to set out a cause of action.

Little, Powell, Smith & Goldstein, of Atlanta, for plaintiff in error.

Jas. L. Mayson and S. D. Hewlett, both of Atlanta, for defendant in error.

STEPHENS, J. (after stating the facts as above). Was there a contract between the parties as set out in either count of the petition? If there was no contract, there was no breach of the bond given to guarantee the performance of the contract.

[1] 1. The alleged contract which was attached to the petition contained certain promises and obligations on the part of the coal company, but did not contain any executed consideration or promise or undertaking on the part of the city. It purported to be a bilateral contract; i. e., a contract executory on both sides. The city not being obligated to the performance of any promise, and there being no mutual promises as a consideration for each other, the alleged contract is lacking in mutuality and therefore void. After reciting that the city of Atlanta had accepted a bid of the coal company to furnish coal to the city, which bid was attached to the instrument as an exhibit, and contained promises by the coal company only and the terms upon which the coal company would for a period of one year furnish coal to the city of Atlanta, the instrument provided:

"That for and in consideration of the promises and the acceptance of the bid of said contractor by said city, as above set out, and in consideration of the promise on the part of the said city to pay said contractor the sum of

\$2.50 per ton, said Tennessee & Southeastern Coal Company, contractor aforesaid, hereby agrees as follows."

There is then set out the promises of the Tennessee & Southeastern Coal Company and the terms and conditions under which it will furnish coal to the city of Atlanta, subject to certain directions as to quantities and times of delivery by the city. Nowhere therein does the city obligate itself to take the coal or any part thereof. The past acceptance of the bid by the city, and the promise on the part of the city to pay for the coal at so much per ton, recited as a consideration for the promise of the coal company, cannot be regarded as a consideration. A past consideration or an existing contractual obligation between the parties generally does not support a promise. The stipulation that the city agrees to pay so much per ton for the coal which it orders does not obligate the city to take any coal or to pay for any coal except that which it does order. The city not being bound to order or accept any coal, both parties were not bound, and there was no contract as set out in the first count of the petition.

[2] 2. The promises and undertakings of the coal company must therefore be considered as amounting only to an offer by the coal company to contract with the city, which promises and undertakings would become binding as a contract between the parties only upon acceptance by the city. There being, as a part and condition of the offer, a provision allowing the city to suspend deliveries of coal, the action of the city in ordering coal under the terms of the offer in installments from time to time, without at once in the beginning obligating itself to make further orders, amounted to an acceptance of the offer of the coal company, which action by the city created a binding contract with the coal company respecting the coal actually ordered by the city. The right of the city to suspend deliveries of coal did not apply to any order for coal made by the city when delivered by the coal company before the expiration of 48 hours from the date of notice by the city to the coal company to suspend deliveries. The city therefore became bound for all coal which it actually ordered under the terms of the offer, and could not relieve itself of such obligation by any notice to the coal company to suspend the delivery of the coal so ordered unless the coal company delayed the delivery until after 48 hours from the date of notice to it by the city to suspend the delivery. Both parties therefore became bound as respects orders actually made by the city; the coal company being bound to make, and the city being bound to accept, deliveries. There was therefore a contract as set out in the second count of the petition, and it follows that the

(102 S.E.)

failure of the coal company to make deliveries of coal actually ordered by the city constituted a breach of this contract, for which the coal company was liable to the city in damages.

[3] S. Properly construed, the bond executed by the coal company with the defendant, the National Surety Company, as surety, guaranteeing to the city the faithful performance of the so-called "contract" by the coal company, also guaranteed the performance of whatever contract arose out of the instrument executed between the coal company and the city. This is true whether such contract arose immediately upon the instant of the execution of the instrument by both parties, or upon an acceptance afterwards by the city of the promises and undertakings of the coal company, considered as an offer. There was no necessity for any notice to the guarantor of acceptance by the city of the offer of the coal company, or of the failure of the coal company to perform. See *Peck v. Precision Machine Co.*, 20 Ga. App. 429, 98 S. E. 106; *Sheffield v. Whitfield*, 6 Ga. App. 762, 65 S. E. 807; *Sanders v. Etcherson*, 36 Ga. 405, 409.

[4] This being a suit by a municipal corporation to recover for the breach of a bond guaranteeing the performance by a third party of a contract with the municipality, and not being a suit against a county or municipal corporation to recover for an indebtedness due by a county or municipal corporation, it is not necessary for the petition to allege a compliance by the city with the constitutional provisions governing the creation of an indebtedness by counties and municipalities, contained in article 7, § 7, par. 1, of the Constitution of Georgia (Civil Code 1910, § 6563).

[5] A cause of action for a breach of the bond was set out in the second count of the petition. The trial judge therefore properly overruled defendant's demurrer.

Judgment affirmed.

SMITH, J., concurs.

JENKINS, P. J., concurs in the judgment.

(24 Ga. App. 764)

**FALLIN v. LOCOMOTIVE ENGINEERS'  
MUT. LIFE & ACCIDENT INS.  
ASS'N. (No. 11043.)**

(Court of Appeals of Georgia, Division No. 2.  
Feb. 10, 1920.)

(Syllabus by the Court.)

**INSURANCE §527 — COLOR BLINDNESS NOT  
WITHIN POLICY COVERING "TOTAL AND PER-  
MANENT BLINDNESS."**

Where a certificate or policy of insurance issued by the Locomotive Engineers' Mutual Life & Accident Insurance Association contains

the following: "Any member of this association \* \* \* sustaining the total or permanent loss of sight in one or both eyes shall receive the full amount of his insurance. \* \* \* This association will not recognize a claim for the insurance of any certificate holder for impaired eyesight, but for total and permanent blindness only, in one or both eyes"—and a suit is brought against such association seeking to recover for total and permanent blindness, the petition alleging that the plaintiff had become color blind in both eyes, under the terms of the policy or certificate the company is not liable, as color blindness does not amount to total and permanent blindness within the meaning of the policy. The court did not err in sustaining the general demurrer and dismissing the case.

Error from Superior Court, Fulton County;  
J. T. Pendleton, Judge.

Action by G. L. Fallin against the Locomotive Engineers' Mutual Life & Accident Insurance Association. Judgment for defendant, and plaintiff brings error. Affirmed.

Mayson & Johnson, of Atlanta, for plaintiff in error.

Reuben R. Arnold, of Atlanta, for defendant in error.

SMITH, J. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J.,  
concur.

(24 Ga. App. 736)

**COMMERCIAL BANK OF JASPER v.  
DASHER. (No. 10639.)**

(Court of Appeals of Georgia, Division No. 2.  
Feb. 7, 1920.)

(Syllabus by the Court.)

**APPEAL AND ERROR §1066, 1068(3)—GIVING  
OF INAPPLICABLE INSTRUCTION HARMFUL  
ONLY WHERE JURY IS DRAWN AWAY FROM  
ISSUES.**

Instructions, even though presenting correct principles of law, if not authorized by the pleadings or evidence, should not be presented; and if by so doing the jury might reasonably be drawn away from the true issues in dispute, to the prejudice of parties, then and in such a case the giving in charge of such inapplicable principles would amount to reversible error (*Long v. Gilbert*, 133 Ga. 691, 66 S. E. 894; *Lazenby v. Citizens' Bank*, 20 Ga. App. 53, 59, 92 S. E. 391 [5]); but where, as in this case, the irrelevant charge could not reasonably be said to have possibly prejudiced the rights of the complaining party, and could not have misled the jury from the true issue involved, and where, too, the evidence demanded a finding that the property in dispute belonged to the claimant, the mere fact that the judge gave instructions as to what would be the legal effect in case the jury should believe the property was owned by the claimant and the defendant

in *fi. fa.* jointly and as partners, would not authorize setting aside the verdict as demanded in favor of the claimant. See cases cited in *Ency. Dig. Ga. Reports*, vol. 7, p. 656(c).

Error from City Court of Valdosta; J. G. Cranford, Judge.

Proceeding between the Commercial Bank of Jasper and J. A. Dasher. Judgment for the latter, and the former brings error. Affirmed.

Dan R. Bruce and E. K. Wilcox, both of Valdosta, for plaintiff in error.

Whitaker & Dukes, of Valdosta, for defendant in error.

JENKINS, P. J. Judgment affirmed.

STEPHENS and SMITH, JJ., concur.

(24 Ga. App. 746)

BAILEY v. MILLER COUNTY. (No. 10628.)

(Court of Appeals of Georgia, Division No. 2  
Feb. 7, 1920.)

*(Syllabus by the Court.)*

1. PAUPERS  $\S$  9—RENTING AND MAINTAINING POOR FARM IS WITHIN POWERS OF COUNTY.

It is within the legitimate powers of a county to rent a farm for the purposes of maintaining and working paupers chargeable against the county, and to furnish live stock and food products necessary to maintain such farm and carry out such purposes. Civ. Code 1910,  $\S$  542.

2. COUNTIES  $\S$  124(1)—LIABILITY FOR RENTAL VALUE OF POOR FARM UNDER VOID CONTRACT STATED.

Where a county, in the exercise of such powers and for such purposes, and acting through the proper authorities, obtains possession of land, with crops growing thereon, belonging to another, under a contract of purchase, which contract is void for the reason that it is an attempt to create a debt beyond the constitutional power of the county, the county is nevertheless liable to the owner of the land for its rental value for the time during which the land was actually occupied and used by the county, and for the value of the crops thereon consumed for the maintenance of such farm and the live stock of the county necessary for the purposes above mentioned, or other legitimate county purposes. *Butts County v. Jackson Banking Co.*, 129 Ga. 801, 807, 60 S. E. 149, 15 L. R. A. (N. S.) 587, 121 Am. St. Rep. 244; *Harris County v. Brady*, 115 Ga. 767, 42 S. E. 71 (1).

3. EVIDENCE  $\S$  83(4)—MAINTENANCE OF POOR FARM PRESUMED FOR LEGITIMATE COUNTY PURPOSE.

The petition shows that, under a resolution of the board of county commissioners authorizing the purchase of a "farm for the paupers of said county and to furnish food products to the convicts of said county as well as the live

stock used in building roads in said county," the county of Miller purchased from petitioner certain land "to be used as a county farm," and went into possession of the same, placing thereon a caretaker and a large number of cattle and hogs, which consumed the crops on the place, which had belonged to petitioner. A "county farm," purchased under a resolution authorizing its purchase for a legitimate county purpose, is presumably purchased for such purpose; and the maintenance of the live stock by a county is presumably for a legitimate county purpose. The petition as amended set out a cause of action against the county, and the trial judge erred in sustaining the general demurrer thereto.

Error from Superior Court, Miller County; W. C. Worrill, Judge.

Action by J. W. Bailey against Miller County. Judgment for defendant, and plaintiff brings error. Reversed.

N. L. Stapleton, of Colquitt, for plaintiff in error.

P. D. Rich, of Colquitt, for defendant in error.

STEPHENS, J. Judgment reversed.

JENKINS, P. J., and SMITH, J., concur.

(24 Ga. App. 737)

MALSBY & CO. v. WIDINCAMP.  
(No. 10548.)

(Court of Appeals of Georgia, Division No. 2  
Feb. 7, 1920.)

*(Syllabus by the Court.)*

1. SALES  $\S$  234(1), 263—VENDOR IMPLIEDLY WARRANTS TITLE.

A vendor of personal property impliedly warrants the title thereto, and a bona fide purchaser thereof for value, without notice of any infirmity in the vendor's title, will be protected against loss on account of the same.

2. SALES  $\S$  240—RIGHTS OF BONA FIDE PURCHASERS STATED.

"If one with notice sell to one without notice, the latter is protected, or, if one without notice sell to one with notice, the latter is protected, as otherwise a bona fide purchaser might be deprived of selling his property for full value." Civ. Code 1910,  $\S$  4535.

3. JUDGMENT  $\S$  675(2)—SELLER HELD PROPERLY VOUCHERED INTO COURT BY PURCHASER TO DEFEND TITLE WHERE REPRESENTED BY ATTORNEY FOR PURCHASER.

Where in a suit against the purchaser of personal property instituted by a third party for the purpose of enforcing a lien against the property arising prior to the sale the purchaser vouched the seller into court to defend the title, by notifying the latter's attorney of the pendency of the suit, if the attorney so notified did not at the time represent the seller,

(103 S.E.)

and the seller was not by the notice served upon such attorney properly vouched into court, yet if the attorney did, with authority from the seller, appear and defend against the attempt to establish the lien, and, though apparently representing the purchaser, the nominal party to the suit, the attorney was in fact representing the seller, the action of the seller in thus appearing and defending the title may be considered as a ratification by the seller of the act of the attorney in receiving and accepting the original notice from the purchaser, and the seller will be considered as having been vouched into court by the purchaser and called on by him to defend the title.

**4. SALES ¶348(1)—PAYMENT OF LIENS BY PURCHASER OF PERSONAL PROPERTY MAY BE SET OFF AGAINST PURCHASE PRICE.**

The instant case being a suit by the original seller against the purchaser to recover the purchase price of the personal property in question, as evidenced by a promissory note, the purchaser will, after having so vouched his vendor into court, be entitled to set off against the balance due on the purchase price the amount of such judgment establishing the liens which the purchaser may have paid off.

**5. PRINCIPAL AND AGENT ¶22(2)—DECLARATIONS OF AGENT TO PROVE AGENCY ADMISSIBLE TO CORROBORATION OF OTHER EVIDENCE.**

While the declarations of an agent are incompetent to prove agency, yet, where there is testimony otherwise to establish this fact, such declarations may be admitted as corroborative of such testimony. Where there is evidence to the effect that such attorney represented the seller at the time when the former was notified by the purchaser of the pendency of the suit to establish a lien upon the property, and that such attorney, when appearing in such suit for the purpose of resisting the effort to establish such lien, was acting for and under authority of the seller, it was not error to admit in evidence declarations made by such attorney as to the fact of agency, or as to other matters relative thereto, made at the time of such notice or during the pendency of the litigation.

**6. EVIDENCE ¶355(2)—MEMORANDA AS TO EXPENSES BY PURCHASER ADMISSIBLE IN SUIT BY THIRD PARTY TO ENFORCE LIEN.**

The defendant in his evidence having particularly described certain items of expense incurred by him, it was not error to fail to exclude from evidence certain written memoranda containing the amounts of these items, upon the ground that in such memoranda these items were not particularly described.

**7. EVIDENCE ¶213(1)—OFFER OF COMPROMISE INADMISSIBLE IN SUIT TO ESTABLISH LIENS.**

Evidence that the plaintiff made an offer to the defendant to credit against the purchase money the amount which the defendant may have paid on the judgments obtained by the lienors, upon condition that the defendant would pay the balance then due on the purchase money with interest, amounted to an offer to compromise by the plaintiff, and was therefore prejudicial to plaintiff's case and inadmissible.

Georgia Railway & Electric Co. v. Wallace, 122 Ga. 547, 50 S. E. 478 (1).

**8. TRIAL ¶242 — CONFUSING INSTRUCTIONS ARE ERRONEOUS.**

The charge of the court was calculated to confuse the jury as to the law applicable to the case, and for this reason was error, as set out in the eleventh and twelfth grounds of the amendment to the motion for new trial.

**9. NEW TRIAL GRANTED FOR ERRORS AT TRIAL.**

The determination of the case having depended upon issues of fact, and the trial judge having admitted certain testimony prejudicial to the plaintiff in error, and having erred in his charge respecting matters material to the issues, a new trial must be granted.

Error from Superior Court, Tattnall County; W. W. Sheppard, Judge.

Proceedings between Malsby & Co. and E. Widincamp. A decision was rendered for the latter, and the former brings error. Reversed.

W. T. Burkhalter, of Reidsville, and A. M. Brand, of Atlanta, for plaintiff in error.

H. C. Beasley, of Reidsville, and Hines, Hardwick & Jordan, of Atlanta, for defendant in error.

STEPHENS, J. Judgment reversed.

JENKINS, P. J., and SMITH, J., concur.

(24 Ga. App. 746)

**SOUTHERN STATES LIFE INS. CO. v. MORRIS. (No. 10647.)**

(Court of Appeals of Georgia, Division No. 2  
Feb. 7, 1920.)

(Syllabus by the Court.)

**1. INSURANCE ¶258(2), 668(6, 7) — AVOIDANCE OF POLICY BY FALSE STATEMENTS IN APPLICATION; QUESTIONS FOR JURY.**

Where an applicant for life insurance covenants in his application that the statements made to the medical examiner are true, and these statements are made a part of the contract of insurance and form the basis of the contract, any variation in any of them which is material, whereby the nature or extent or character of the risk is changed, will void the policy, whether the statements are made in good faith or fraudulently. Civ. Code 1910, § 2479; Aetna Life Insurance Co. v. Conway, 11 Ga. App. 562, 75 S. E. 915; Supreme Conclave v. Wood, 120 Ga. 328, 47 S. E. 940; Empire Life Ins. Co. v. Jones, 14 Ga. App. 647, 82 S. E. 62 (1).

(a) Generally the question of whether any such variation is material or whether the nature or extent or character of the risk is changed is a question of fact to be determined by the jury. Empire Life Ins. Co. v. Jones, supra (3).

(b) Irrespective of whether an osteopath who attended and treated the insured about a year prior to his death was a physician under the statute law of Georgia, the materiality and truth of the negative answers of the insured to the questions in his application for insurance, (1) "Have you consulted a physician within the past five years?" and (2) "Have you now or have you ever had epilepsy?" were, under the facts in this case, questions for determination by the jury, since the evidence was in sharp conflict both as to whether the insured in fact had ever had epilepsy, and as to whether he knew the osteopath treated him for epilepsy rather than for some slight temporary ailment which the law does not consider in determining what constitutes attendance by or consultation of a physician. *Empire Life Ins. Co. v. Jones*, supra.

**2. APPEAL AND ERROR ¶1033(5)—ERRONEOUS INSTRUCTIONS, WHERE FAVORABLE, CANNOT BE ASSIGNED AS ERROR.**

The excerpt from the charge complained of in the first ground of the amendment to the motion for a new trial is error in the use of the following language: "If you believe from the evidence in the case that within five years prior to May 10, 1917, the date of the medical examiner's report, that Eugene Morris had consulted an osteopath or other physician, and had failed to disclose such information to the company, such information was material to have in passing upon the application for life insurance. Upon his failure to do that it would prevent a recovery upon the policy." The question, as already ruled above, as to whether the information was material or not, is generally an issue for the jury, but the plaintiff in error will not be heard to complain of this excerpt as it was in his favor.

**3. SUFFICIENCY OF INSTRUCTIONS.**

There is no merit in the complaint in the fourth ground of the amendment to the motion for a new trial that the court erred in its charge taken as a whole, in that nowhere in the charge did the court outline to the jury the specific issues of fact raised by the pleadings in the case, or instruct them as to what were the points of actual controversy between the parties as they were defined by the pleadings. With the exception of the excerpt set out above, the charge of the court substantially and fully submitted to the jury all the issues in the case, and, if any criticism could be made of the charge, it would be that it was more favorable to the plaintiff in error than to the defendant in error.

**4. SUFFICIENCY OF EVIDENCE.**

Although there is conflict in the evidence, there was evidence to support the finding of the jury as to the liability of the insurance company; but, from a careful review of the evidence in the case, this court is of the opinion that there was no evidence to support the verdict finding damages and attorney's fees. The judgment of the court below is therefore affirmed upon the condition that at the time the remittitur is entered as a judgment of the trial court the defendant in error will write off from

the verdict the amount given as damages and attorneys' fees; otherwise the judgment is reversed.

Error from Superior Court, Colquitt County; W. E. Thomas, Judge.

Proceeding between the Southern States Life Insurance Company and Ethel Morris. Decision in favor of the latter was rendered, and the former brings error. Affirmed on condition.

A. J. Orme, of Atlanta, and Shipp & Kline and Donald P. Starr, all of Moultrie, for plaintiff in error.

J. J. Hill, of Pelham, and Parker & Gibson, of Moultrie, for defendant in error.

SMITH, J. Judgment affirmed on condition.

JENKINS, P. J., concurs. STEPHENS, J., disqualified.

(34 Ga. App. 726)

NATIONAL UNION FIRE INS. CO. v. MACON HARDWOOD LUMBER CO.

MACON HARDWOOD LUMBER CO. v. NATIONAL UNION FIRE INS. CO.

(Nos. 10496, 10497.)

(Court of Appeals of Georgia, Division No. 2. Feb. 7, 1920.)

(Syllabus by the Court.)

**1. INSURANCE ¶229(3), 668(3) — INSURER'S NOTICE OF CANCELLATION TO BROKER AUTHORIZED TO PROCURE INSURANCE FOR OWNER INEFFECTIVE, UNLESS SUCH BROKER WAS CONTINUING AGENT OF INSURED, WHERE THERE WAS A DISPUTED ISSUE OF FACT AS TO AGENCY FOR INSURED TO RECEIVE NOTICE OF CANCELLATION, A DIRECTED VERDICT WAS ERROR.**

The question in this case is whether the policy of fire insurance sued on remained of force at the time of the fire, or whether it had been canceled by virtue of the company's notice to that effect given to White, as plaintiff's agent, and the acceptance by him of such notice of cancellation. Under the evidence in the case it was a disputed question of fact as to whether White, as the broker of the plaintiff, had been authorized merely to procure insurance for the owner (in which event the notice of cancellation given to such an agent would be ineffective and the defendant would be liable under the policy), or whether the owner had constituted White as his continuing agent, not only to insure, but to keep the property insured, with power to select the insurer (in which event the notice of cancellation given to such an agent would bind the owner). 14 R. O. L. 1010, § 189; McGraw Woodenware Co. v. German Fire Ins. Co., 126 La. 32, 52 South. 183, 38 L. R. A. (N. S.) 614, 623, 20 Ann. Cas. 1229. Since, under the evidence of the plaintiff, on the one hand, and the course



of dealings which it was sought to set up by the evidence submitted for the defendant, on the other hand, the nature and character of the agency was thus made a disputed issue of fact, the judge erred in directing a verdict in favor of the plaintiff.

**2. EVIDENCE**  $\S$ 241(1) — **ADMISSIBILITY OF CONVERSATIONS WITH AGENT.**

In view of the ruling made in the foregoing paragraph, the assignment of error in the cross-bill of exceptions, to the effect that the judge erred in not also entering up judgment for attorney's fees and damages, is, under the present status of the case, necessarily without merit. The cross-bill of exceptions also assigns error upon the admission in evidence of certain conversations had between certain agents of the defendant company and White, with reference to the cancellation of the policy sued on. If, however, the continuing agency of White should, under the evidence, be taken as having been established by virtue of the proven circumstances, the apparent relations, and the conduct of the owner in reference to his course of dealings with White as such agent, then the evidence objected to could not properly be accounted irrelevant, and for this reason the exception taken to its admission is without merit. *Cable Co. v. Walker*, 127 Ga. 65, 56 S. E. 108. The other exceptions taken in the cross-bill, not being argued by counsel, will be treated as abandoned.

Error from Superior Court, Bibb County.

Action by the Macon Hardwood Lumber Company against the National Union Fire Insurance Company. Judgment for plaintiff, and defendant brings error, and plaintiff takes a cross-bill of exceptions. Judgment on main bill of exceptions reversed, and on cross-bill affirmed.

King & Spalding, of Atlanta, and Miller & Jones, of Macon, for plaintiff in error.

I. D. Moore, of Macon, for defendant in error.

JENKINS, P. J. Judgment on main bill of exceptions reversed; on the cross-bill affirmed.

STEPHENS and SMITH, JJ., concur.

(24 Ga. App. 717)

ELLIS v. FLOYD COUNTY. (No. 10305.)

(Court of Appeals of Georgia, Division No. 2  
Feb. 7, 1920.)

(Syllabus by the Court.)

**1. COUNTIES**  $\S$ 208—**NOT LIABLE TO SUIT UNLESS SO MADE BY LAW EXPRESSLY OR BY NECESSARY IMPLICATION.**

A county is not liable to suit, unless so made by law, expressly or by necessary implication. *Millwood v. De Kalb County*, 106 Ga. 743, 82 S. E. 577.

**2. WATERS AND WATER COURSES**  $\S$ 168—**COUNTY NOT LIABLE FOR INJURIES FROM DEFECTIVE DRAIN UNDER BRIDGE.**

Under the provisions of Civ. Code 1910,  $\S$  748, which provides that "in every case the county shall be primarily liable for all injuries caused by reason of any defective bridges, whether erected by contractors or county authorities," the county was not liable for such damages as set out in the petition, as the same were not caused by reason of any defective bridge within the meaning of this section, but caused by reason of an alleged defective drainway or passage under such bridge.

**3. WATERS AND WATER COURSES**  $\S$ 168—"BRIDGE," AS USED IN STATUTE GIVING ACTION AGAINST COUNTY FOR DEFECTIVE CONSTRUCTION, DEFINED.

The word "bridge," in the statute of this state giving a right of action against a county for defective construction, means a bridge used as an instrumentality for travel along a highway and for crossing streams or ravines. In this sense a bridge does not include a drain or opening under the bridge, although a part of the structure.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Bridge.]

**4. WATERS AND WATER COURSES**  $\S$ 168—**COUNTY NOT LIABLE FOR DAMAGES TO CROPS BY FAILING TO SO CONSTRUCT DRAIN UNDER BRIDGE AS TO PREVENT AN ACCUMULATION OF WATER OR DÉBRIS.**

A county is not liable for damage to the crops or temporary use of the land, caused from water backing up and injuring an adjacent landowner, by reason of a failure upon the part of the county to so construct the drain under the bridge as to prevent an accumulation of water or debris from the stream.

**5. NATURE OF CAUSE OF ACTION STATED AGAINST A COUNTY.**

The petition in this case as amended shows an action for damages against the county, not for an injury to plaintiff's land by reason of the erection of the bridge, and the consequent diminution in the value of his land, but for an alleged nonfeasance of the county authorities in the maintenance of the excavation under the bridge and a consequent nuisance maintained, viz. that in the winter and spring of 1917 the county negligently and carelessly permitted the space under the bridge to become filled up with debris which prevented the passage of water under the bridge and caused it to back and overflow the plaintiff's fields, damaging the latter's crops and preventing him from cultivating part of his land during that year, and that the sole reason of such injury and damage was the damming up of the water and causing it to overflow his land. There is no element of damage to the land, or depreciation in its value, or the taking of private property for public use without compensation. See, in this connection, *Barfield v. Macon County*, 109 Ga. 883, 34 S. E. 596; *Howard v. Bibb County*, 127 Ga. 291, 56 S. E. 418.

**6. DEMURRER PROPERLY SUSTAINED.**

There being no authority, either express or implied, for the bringing of such a case against a county as set out in plaintiff's petition, the general demurrer thereto was properly sustained.

Error from Superior Court, Floyd County; Moses Wright, Judge.

Action by D. F. Ellis against Floyd County. General demurrer to petition sustained, and plaintiff brings error. Affirmed.

W. B. Mebane, of Rome, for plaintiff in error.

Denny & Wright, of Rome, for defendant in error.

STEPHENS, J. Judgment affirmed.

JENKINS, P. J., and SMITH, J., concur.

(24 Ga. App. 725)

**MARIETTA ICE & COAL CO. v. WESTERN & A. R. CO.** (No. 10446.)

(Court of Appeals of Georgia, Division No. 2  
Feb. 7, 1920.)

*(Syllabus by the Court.)*

1. **BAILMENT**  $\Leftrightarrow$  35—**BAILEE IN HIS OWN NAME MAY SUE THIRD PARTY FOR LOSS OR DESTRUCTION OF PROPERTY, NOTWITHSTANDING BAILEE'S PAYMENT TO BAILOR.**

A bailee, who is entitled to the possession of the property bailed, has such a special interest therein as entitles him to maintain in his own name a suit against a third party for the loss or destruction of the property. Such recovery, however, is for the use or benefit of the owner. *Schley v. Lyon*, 6 Ga. 530(5), 537, 538, and cases there cited; 6 C. J. 1194; *Van Zile on Bailments & Carriers* (2d Ed.) § 57; *Schouler on Bailments* (1st Ed.) pp. 151, 152; *United States v. Atlantic Coast Line R. R. Co.* (D. C.) 206 Fed. 190, 202, 203. The fact that the bailee has paid the bailor the value of the property destroyed does not affect the right of action against the tort-feasor. *Cornell Steamboat Co. v. Jersey City*, 51 Fed. 527, 2 C. C. A. 365.

2. **BAILMENT**  $\Leftrightarrow$  35—**BAILEE HAS RIGHT OF ACTION FOR INJURY TO HIS RIGHT OF POSSESSION.**

A bailee may maintain a right of action for loss or damage resulting from injury to his right of possession or other special property right in the property bailed.

3. **ANIMALS**  $\Leftrightarrow$  27—**HIRE OF MULE MAY RECOVER AGAINST THIRD PERSON FOR INJURIES TO IT.**

A bailee of a mule for hire, who has the possession of the animal under the contract of bailment from day to day, but returns it every night to the owner for keeping overnight, has such a special interest in the bailment as

entitles him to maintain a suit against a third party for the animal's death. In such a suit the bailee may recover the full value of the animal for the use of the owner, and also, for his own use, any damage to his right of possession or to his special property right, including expenses incurred by him for medical treatment to the animal made necessary by the injuries resulting from the tortious act of the defendant.

**4. CASE EXPLAINED.**

The above rulings are not in conflict with *Lockhart v. W. & A. R. R. Co.*, 78 Ga. 472, 54 Am. Rep. 883. In that case it was held that the plaintiff was a mere depository or borrower, and had no right of possession or special interest in the property, and for that reason could not maintain an action for its loss.

**5. ASSIGNMENTS OF ERROR.**

In view of the above rulings, it is not necessary to pass upon the assignment of error excepting to the exclusion by the trial judge of the amendment offered by the plaintiff. The petition, without the amendment, set out a cause of action. The demurrer, therefore, was improperly sustained.

Error from Superior Court, Cobb County; N. A. Morris, Judge.

Action by the Marietta Ice & Coal Company against the Western & Atlantic Railroad Company. Demurrer to petition sustained, and plaintiff brings error. Reversed.

J. Z. Foster, of Marietta, for plaintiff in error.

Tye, Peeples & Tye, of Atlanta, and D. W. Blair, of Marietta, for defendant in error.

STEPHENS, J. Judgment reversed.

JENKINS, P. J., and SMITH, J., concur.

(24 Ga. App. 748)

**SEABOARD AIR LINE RY. CO. v. PRUITT.** (No. 10588.)

(Court of Appeals of Georgia, Division No. 2  
Feb. 9, 1920.)

*(Syllabus by the Court.)*

1. **APPEAL AND ERROR**  $\Leftrightarrow$  882(12)—**PARTY OBTAINING ERRONEOUS INSTRUCTION AT HIS REQUEST IS ESTOPPED FROM EXCEPTING THERETO.**

In a suit by a shipper against a carrier to recover damages for failure to deliver a shipment of live stock promptly and in good order, the trial judge, in compliance with a request by the carrier, instructed the jury that a special contract of shipment, which relieves the carrier of all damage resulting from the carrier's negligence other than gross negligence, was binding on the shipper unless the shipper showed that the carrier was guilty of negligence. The carrier, having made such request to charge, is estopped from excepting to the charge upon the ground that the judge failed to charge that the

carrier would not be liable under such special contract unless the carrier was guilty of gross negligence.

**2. CARRIERS**  $\S$ 229(1)—**LIVE STOCK SHIPPER MAY RECOVER SPECIAL EXPENSES INCURRED IN CARING FOR SHIPMENT BECAUSE OF CARRIER'S GROSS NEGLIGENCE.**

A shipper of live stock under a special contract may recover from the carrier any damage sustained by him as a result of any extra expense which he may have incurred in feeding and caring for such live stock by reason of any unreasonable delay caused by the gross negligence of the carrier in failing to transport and deliver the shipment at the point of destination.

**3. CARRIERS**  $\S$ 218(2), 229(2)—**SPECIAL CONTRACT CANNOT RELIEVE CARRIER FROM MEASURE OF DAMAGES LAID DOWN BY STATUTE.**

"Where a carrier fails to deliver goods in a reasonable time, the measure of damage is the difference between the market value at the time and place they should have been delivered and the time of actual delivery" (Civ. Code 1910, § 2773); and a common carrier cannot by special contract relieve itself from this measure of damage, where the goods are damaged by reason of its negligence.

**4. APPEAL AND ERROR**  $\S$ 302(3)—**EXCEPTION FAILING TO SHOW GROUND OF OBJECTION WILL NOT BE CONSIDERED.**

The first ground of the amendment to the motion for new trial, wherein the admission of certain evidence is excepted to, failing to show upon what ground objection was urged to such testimony, cannot be considered.

**5. SUFFICIENCY OF EVIDENCE.**

The evidence authorized the inference that the plaintiff's loss was due to the negligence of the defendant company in failing to deliver promptly the shipment of live stock, rather than to any negligence upon the part of the plaintiff to properly feed and care for the live stock while in transit.

**6. APPEAL AND ERROR**  $\S$ 719(1), 752 — **EXCEPTION PENDENTE LITE CANNOT BE CONSIDERED IN ABSENCE OF ASSIGNMENT OF ERROR; RECITAL IN BILL OF EXCEPTION NOT SUBSTITUTE FOR ASSIGNMENT OF ERROR.**

There being neither in the bill of exceptions nor in this court before argument begun any assignment of error upon the exceptions pendente lite, the latter will not be considered. A bare recital in the bill of exceptions that exceptions pendente lite were taken, without more, does not amount to an assignment of error upon the exceptions pendente lite.

**7. SUFFICIENCY OF EVIDENCE.**

The evidence authorized the verdict, and no error of law was committed.

Error from City Court of Americus; W. M. Harper, Judge.

Action by F. A. Pruitt against the Seaboard Air Line Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

W. W. Dykes and R. T. Hawkins, both of Americus, for plaintiff in error.

Shipp & Sheppard, of Americus, for defendant in error.

STEPHENS, J. Judgment affirmed.

JENKINS, P. J., and SMITH, J., concur.

(24 Ga. App. 731)

**PLANTERS' GIN & WAREHOUSE CO. v. PITTS BANKING CO. (No. 10524.)**

(Court of Appeals of Georgia, Division No. 2. Feb. 7, 1920.)

(Syllabus by the Court.)

**1. PRINCIPAL AND AGENT**  $\S$ 143(2)—**UNDISCLOSED PRINCIPAL MAY CLAIM BENEFITS OF CONTRACT.**

"When an agent makes a contract for his principal, but conceals the fact that he is an agent, contracting as if he were principal, the principal may at any time appear in his true character, and claim all the benefits of the contract from the other contracting party, so far as he can do so without injury to that other by the substitution of himself for his agent." Woodruff v. McGehee, 30 Ga. 158. See, also, Spain v. Beach, 52 Ga. 494; Watertown Steam Engine Co. v. Palmer, 84 Ga. 368, 10 S. E. 969, 20 Am. St. Rep. 368; Dodd Grocery Co. v. Postal Tel. Co., 112 Ga. 685, 688, 37 S. E. 981.

**2. CUSTOMS AND USAGES**  $\S$ 10—**CUSTOM AS TO PAYMENT OF WAREHOUSE CHARGES ADMISSIBLE IN ACTION TO COLLECT.**

Where a warehouseman delivers to a purchaser several warehouse receipts which stipulate that certain cotton bought is subject to fixed and specified charges for ginning, bagging, and ties, a ginner, who at the request of the owners stored such cotton, attaching to each bale a tag showing the charges due him, with the warehouseman, who is the agent of the ginner to collect these charges, may assert, in an effort to collect such charges from the purchaser, that it was the universal custom in that particular community for the owner of the cotton so stored, or the holder of the warehouse receipt, to pay the charges due thereon at the time the cotton was sold or removed from the warehouse. See, in this connection, Rochelle Gin & Cotton Co. v. Fisher, 13 Ga. App. 621, 79 S. E. 584; Farmers' Ginney, etc., Co. v. Thrasher, 144 Ga. 598, 87 S. E. 804(2).

**3. CUSTOMS AND USAGES**  $\S$ 10—**CHARGES AGAINST GOODS STORED MAY BE COLLECTED IN ACCORDANCE WITH KNOWN CUSTOM.**

Where a ginner delivers to a warehouseman, alleged to be his duly constituted and appointed agent to collect certain ginner's charges, a number of bales of cotton, the property of various persons, and attached to each bale is a tag showing the charges due him, and the warehouseman, without first collecting the charges, delivers to a purchaser the cotton, together with a warehouse receipt containing a statement of

these charges, and it is alleged that there was in that particular community a universal custom for the owner of the cotton so stored in a warehouse, or the holder of a warehouse receipt for such cotton, to pay the ginning charges when the cotton was sold or removed from the warehouse, which custom was well known to the purchaser at the time of becoming the owner of the cotton, and that the purchaser was fully aware that these charges had not been paid, and that the purchaser was bound to pay the same, but refused to do so after demand, although the purchaser had deducted and retained from the purchase price of the cotton a sum sufficient to cover these charges, and not only recognised the ginners' claim, but actually promised before receiving the cotton from the warehouse to pay the same, a petition against the purchaser, alleging the above facts in three separate and distinct counts, and asking a recovery of the ginners' charges, set out a cause of action, and the trial judge erred in dismissing the suit on general demurrer.

Error from Superior Court, Wilcox County; O. T. Gower, Judge.

Action by the Planters' Gin & Warehouse Company against the Pitts Banking Company. Suit was dismissed on general demurrer, and plaintiff brings error. Reversed.

M. B. Cannon, of Abbeville, for plaintiff in error.

Hal Lawson, of Abbeville, for defendant in error.

SMITH, J. Judgment reversed.

JENKINS, P. J., and STEPHENS, J., concur.

(24 Ga. App. 722)

USRY v. AUGUSTA SOUTHERN R. CO.  
(No. 10434.)

(Court of Appeals of Georgia, Division No. 2.  
Feb. 7, 1920.)

(*Syllabus by the Court.*)

1. EVIDENCE  $\S$  118, 123(11), 123½, New, vol. 17 Key-No. Series—STATEMENTS OF FOREMAN TO INJURED EMPLOYÉ A HALF HOUR AFTER ACCIDENT AS TO ITS CAUSE NOT RES GESTÆ; TEST OF EVIDENCE AS RES GESTÆ STATED.

Where one who was engaged in work underneath a flat car was injured by reason of the car falling upon him, and afterwards was removed some 6 or 8 feet from the car, in a suit by him against the railroad company it was not error to refuse to allow him to testify that about an hour or half an hour after his injury he had a conversation with the foreman in charge of the work as to where he would rather be carried for treatment, and at that time and in that conversation the foreman told him that the injury was due to the breaking of the chain, and "that he [the foreman] had been after the company for a year to furnish him with new chains, and they would not do it." This was not admissible as a part of the res

gestæ. At the most, the statements of the foreman, made an hour or half an hour after the plaintiff's injury, were a mere narrative of a past occurrence, coupled with a declaration as to requests made by him to the company during the past year. The statements were made deliberately. It cannot be said that they were exclamatory and proceeded from him as a part and parcel of the catastrophe. Moreover, the foreman had not been hurt; he was suffering no pain, and no shock had deadened his reflective faculties so as to make his utterances spontaneous and unreflecting. Generally, "whether statements claimed to be a part of the res gestæ are really such is a question of law to be determined by the court" (Southern Ry. Co. v. Brown, 126 Ga. 1, 54 S. E. 911 [5]); and "it is well settled that there can be no definite and fixed limit of time, but that each case must depend upon its own circumstances; for what is the res gestæ of a given transaction must depend upon its own peculiarities of character and circumstances. Courts must be allowed some latitude in this matter." *Mitchum v. State* [11 Ga. 615] 623." *Standard Oil Co. v. Reagan*, 15 Ga. App. 571, 580, 84 S. E. 69, 73. Under these circumstances, we are constrained to sustain the ruling of the trial judge in rejecting the proffered testimony above referred to. See, in this connection, *Civ. Code* 1910, § 5766; *Southern Railway Co. v. Sewell*, 18 Ga. App. 544, 90 S. E. 94 (4); *Carswell v. State*, 10 Ga. App. 32, 72 S. E. 602; *White v. Southern Ry. Co.*, 123 Ga. 353, and cases cited on page 358, 51 S. E. 411, 414; *Western & Atlantic R. Co. v. Beason*, 112 Ga. 553, 557, 37 S. E. 863, and cases there cited.

2. EVIDENCE  $\S$  241(1) — STATEMENTS OF AGENT ARE ADMISSIBLE AGAINST PRINCIPAL ONLY ON THEORY THAT THEY ARE PART OF THE RES GESTÆ.

The foregoing ruling that the statements of the foreman were not a part of the res gestæ disposes of the contention that they were admissible as admissions made by him as the alter ego of the defendant company concerning the business which he was employed to look after, and while he was engaged in the performance of his duties, since, "under the rule governing in this state, the sayings of an agent are admissible against the principal only upon the theory that they are a part of the res gestæ." *Atlantic Coast Line R. Co. v. Williams*, 21 Ga. App. 453, 455, 94 S. E. 584, 585. "The declarations or admissions of an agent, unless part of the res gestæ, do not bind the principal, and in a suit against the principal have no probative value." *Georgia Railway & Electric Co. v. Harris*, 1 Ga. App. 714, 57 S. E. 1076 (2). See, also, *Civ. Code* 1910, § 3606.

3. EVIDENCE  $\S$  155(1) — STATEMENT DISCONNECTED FROM CONVERSATION ELICITED BY DEFENDANTS INADMISSIBLE.

Neither was the statement of the foreman that "he had been after the company for a year to furnish him with new chains, and they would not do it," admissible on the ground that it was part of the same conversation between the plaintiff and his foreman which had been brought out on cross-examination by defendant's counsel, as this statement was disconnect-

(103 S.E.)

ed from that part of the conversation elicited, which was as follows: "After I was hurt, Mr. Phillips [the foreman] offered to bring me to Gibson to some physician or to Avera. He said it was not far from train time. I said: 'I want to go home. If I have to go to a doctor, I want Dr. Kelly.' Mr. Phillips wanted to help me all he could. I was treated by Dr. Kelly, who is my family physician." It is true that "where one litigant offers in evidence an admission, in a conversation or document, of a fact disadvantageous to the other, he thereby makes admissible all such other parts of the conversation or document as may tend to explain or qualify the part first introduced in evidence," but "matters in such conversations or documents otherwise irrelevant, and wholly disconnected with the part first offered, are not thereby made admissible." *Brown v. State*, 119 Ga. 572, 46 S. E. 833 (4, 5). "Matters wholly disconnected from the admission first offered are not admissible, even though they may be a part of such conversation." *Crawford v. Citizens & Southern Bank*, 20 Ga. App. 576, 93 S. E. 173 (2).

#### 4. MASTER AND SERVANT ⇐270(7)—EVIDENCE OF SUBSEQUENT PRECAUTIONS INCOMPETENT.

Testimony, to the effect that supporting pillars were put under the derailed car when it was again jacked up after plaintiff was injured, was incompetent and was properly rejected by the trial judge. "Evidence in behalf of the plaintiff that, after the collapse of a scaffold, resulting in the death of her son, the defendant took additional precautions in the rebuilding of the scaffold, to prevent others from being likewise injured, was properly rejected, although offered in rebuttal of the contention that the defendant had provided him with a scaffold 'equal to those in general use and reasonably safe.' Such evidence cannot logically be considered as in effect an admission that the defendant was negligent in not sooner observing such precautions." *Mitchell v. Schofield's Sons Co.*, 19 Ga. App. 201, 91 S. E. 275 (2). See, also, *Georgia Southern & Florida Ry. Co. v. Cartledge*, 116 Ga. 164, 42 S. E. 405, 51 L. R. A. 118; *Central Ry. Co. v. Price*, 121 Ga. 651, 658, 49 S. E. 683.

#### 5. MASTER AND SERVANT ⇐245(1), 289(37)—RAILWAY EMPLOYE OBEYING COMMAND IMPROPERLY UNSUITED FOR CONTRIBUTORY NEGLIGENCE.

"A servant is bound to obey a command, when given as such, by one occupying the relation of vice principal to the master, if it pertains to the duties of the servant's employment and does not involve a violation of the law, and if the act required is not one which is of itself so obviously dangerous that no person of ordinary prudence could be expected to perform it. If, under the circumstances existing at the time of its issuance, the giving of such an order constitutes an act of negligence, but the servant, acting under the duty and obligation thus resting upon him, proceeds to execute the command, and is injured as a consequence, the master is liable in damages to the servant for the injuries so sustained." *Whiters v. Malloy S. S. Co.*, 23 Ga. App. 47, 97 S. E. 453. See, also, *Moore v. Dublin Cotton Mills*, 127 Ga.

609, 616, 56 S. E. 839, 10 L. R. A. (N. S.) 772; *Holsey v. Macon, D. & S. Railroad Co.*, 6 Ga. App. 637, 641, 65 S. E. 690, and cases there cited; *Grant v. Royster Guano Co.*, 15 Ga. App. 758, 84 S. E. 161 (2).

(a) It appearing from the petition and the evidence that the plaintiff, who was known to the alter ego of the defendant as an inexperienced laborer at the time he was employed to assist in rerailling a derailed flat car, the weight of which was resting upon two jacks only, one on each side thereof, and that he was nevertheless ordered by the alter ego in charge of the work to go under the car for the purpose of shoveling out dirt, and that while so engaged the car fell off the jacks and injured the plaintiff, it cannot be held as a matter of law that the dangers incident to such work were so obvious to an inexperienced man as to preclude a recovery. Whether or not the car was negligently propped or jacked up, and whether or not the giving of the order constituted an act of negligence, were, under the evidence, questions for determination by the jury, and the court erred in granting a nonsuit.

Error from Superior Court, Glascock County; B. F. Walker, Judge.

Action by M. L. Usry against the Augusta Southern Railroad Company. Judgment of nonsuit, and plaintiff brings error. Reversed.

L. D. McGregor, of Warrenton, and Hill & Adams, of Atlanta, for plaintiff in error.

Barrett & Hull, of Augusta, and M. B. Rogers, of Gibson, for defendant in error.

SMITH, J. Judgment reversed.

JENKINS, P. J., and STEPHENS, J., concur.

(24 Ga. App. 765)

#### HAYNES-HENSON SHOE CO. v. BROWN & BROWN. (No. 11062.)

(Court of Appeals of Georgia, Division No. 2. Feb. 10, 1920.)

(Syllabus by the Court.)

#### 1. SALES ⇐23(3)—ORDER BY TRAVELING SALESMAN SUBJECT TO APPROVAL IS UNILATERAL.

"If a traveling salesman, who has no authority to close a sale, takes from a prospective purchaser a written contract agreeing to buy an article on named terms and conditions, but by stipulations in the writing the contract is subject to the approval of the agent's principal, the writing amounts to a mere offer, and is unilateral, until the approval contemplated has been duly made." *Cable Co. v. Hancock*, 2 Ga. App. 73, 58 S. E. 819.

#### 2. FRAUDS, STATUTE OF ⇐116(10)—APPROVAL OF SALESMAN'S ORDER MUST BE IN WRITING IF FOR MORE THAN FIFTY DOLLARS.

"In such a case, if the contract relates to goods, wares, or merchandise to the amount of \$50 or more, and is therefore within the

purvieu of the statute of frauds, the approval contemplated must be in writing before the contract becomes mutual." *Id.*

**3. FRAUDS, STATUTE OF §129(1)—EFFECT OF FAILURE TO APPROVE ORDER FOR DELIVERY OF GOODS STATED.**

"A. signed a writing agreeing to deliver to B., at a time and place stated, and at a price named, goods exceeding in value \$50. B. did not agree in writing or otherwise, either at the time the above paper was signed or thereafter, to pay for the goods. The time for delivery passed without B. doing anything to bind himself to pay for the goods. After that date B. tendered the price and demanded the goods. *Held*, that B. could not maintain against A. an action for damages for failure to deliver at the time and place fixed in the writing. The right of B. to demand an enforcement of the obligation depended upon his doing some act, prior to the time fixed for delivery, which would bind him to pay in the event of delivery." *Sivell v. Hogan*, 119 Ga. 167, 46 S. E. 67 (4).

**4. FRAUDS, STATUTE OF §85—COMPLIANCE WITH STATUTE OF FRAUDS NECESSARY IN SALE OF GOODS.**

From undisputed evidence in this case it clearly appears that the defendants never signed any written agreement for the purchase of the goods in dispute, so as to bring the transaction within the requirements of the statute of frauds, nor does it appear that the plaintiff ever entered into any written agreement to sell the goods. Under these circumstances, there was no legal binding contract, and a verdict was demanded in favor of the plaintiff. The court therefore erred in overruling the motion for a new trial.

Error from Superior Court, Fayette County; W. E. H. Searcy, Jr., Judge.

Action by the Haynes-Henson Shoe Company against Brown & Brown. Judgment for defendants, a new trial was denied, and plaintiff brings error. Reversed.

Haynes-Henson Shoe Company sued Brown & Brown for a balance alleged to be due on an open account. The defendants admitted that they owed the account sued upon, but pleaded that they were entitled to damages in the sum of \$320 for the breach of an alleged contract for the sale of goods amounting to \$800. This alleged contract was in the form of an order given by the defendants to one Buchanan, a traveling salesman for the plaintiff. The uncontradicted evidence discloses that the plaintiff's salesman had no authority to close a sale, but that all orders taken by him were subject to approval by his principal. The order, which was in the form of a memorandum, was introduced in evidence, and was not signed. The traveling salesman testified that he did take an order from the defendants for a bill of shoes, and that he sent it to his house for approval, and that the order was returned to him with the

word "declined" marked across its face. The documentary evidence showed this to be true.

The only witness for the defendants testified, among other things, as follows:

"I did not do anything else after I gave the order to Mr. Buchanan. I did not sign any agreement in writing, either at the time the shoes were bought or thereafter, agreeing to take the goods or pay for them. I did not answer any card or letter they sent me about the goods."

There was also introduced in evidence a letter from the plaintiff to the defendants which referred to a past-due indebtedness of the defendants; but this letter, although it mentioned in an indefinite way an order for fall goods, did not contain a promise or agreement to sell any particular goods or merchandise.

The jury returned a verdict in favor of the defendants. The plaintiff made a motion for a new trial, based on general grounds only, which was overruled, and it excepted.

J. W. Oulpepper, of Fayetteville, for plaintiff in error.

H. A. Allen, of Atlanta, for defendant in error.

SMITH, J. Judgment reversed.

JENKINS, P. J., and STEPHENS, J., concur.

(24 Ga. App. 750)

WILLIAMS et al. v. WESTERN & A. R. CO.

WESTERN & A. R. CO. v. WILLIAMS et al.

(Nos. 10651, 10652.)

(Court of Appeals of Georgia, Division No. 2  
Feb. 9, 1920.)

(Syllabus by the Court.)

**1. MASTER AND SERVANT §286(3)—WHERE THERE WAS EVIDENCE FROM WHICH JURY MIGHT FIND DEFENDANT'S NEGLIGENCE, NON-SUIT IMPROPER.**

Questions as to diligence and negligence, including contributory negligence, are questions peculiarly for the jury, and, there being sufficient evidence in this case from which the jury might infer acts of negligence on the part of the defendant such as constituted the proximate cause of the injury, the court erred in granting a nonsuit. *White v. Atlanta Consolidated Street Ry. Co.*, 92 Ga. 494, 17 S. E. 672; *Carey v. East Tenn., etc., Ry. Co.*, 95 Ga. 547, 22 S. E. 299; *International Cotton Mills v. Webb*, 22 Ga. App. 309, 96 S. E. 16; *Moore v. Dixie Fire Ins. Co.*, 19 Ga. App. 800, 804, 92 S. E. 302. In view of the new and additional facts and circumstances disclosed by the evidence adduced upon the trial of the case now under review, the decision rendered by this court in *Williams v. Western & Atlantic R. Co.*, 20 Ga.

App. 726, 93 S. E. 555, affirming the grant of a nonsuit in an action between the same parties and involving the same subject-matter as the one now before this court, is not controlling.

**2. DEATH — 39—“CAUSE OF ACTION ACCRUES” WHEN ADMINISTRATOR IS APPOINTED.**

“A cause of action to recover damages for death under the federal Employers’ Liability Act [U. S. Comp. St. §§ 8657-8665] accrues when an administrator is appointed, and not at the time of death, within the meaning of the section providing that no action shall be maintained unless commenced within two years from the day the cause of action accrued.”

**3. AMENDED PETITION IN ACTION UNDER FEDERAL EMPLOYERS’ LIABILITY ACT HELD NOT SUBJECT TO DEMURRERS.**

The petition, as amended, was not subject to the demurrers interposed.

Smith, J., dissenting.

Error from City Court of Atlanta; H. M. Reld, Judge.

Suit by Mrs. Jennie L. Williams, administratrix, and C. L. Williams, administrator, of Chester A. Williams, deceased, against the Western & Atlantic Railroad Company. Demurrer to petition overruled, and judgment of nonsuit, and plaintiffs except and bring error, and defendant takes a cross-bill of exceptions. Reversed on main bill of exceptions, and affirmed on cross-bill.

This is a suit under the federal Employers’ Liability Act, instituted by Mrs. Jennie L. Williams, administratrix, and C. L. Williams, administrator, of the estate of Chester A. Williams, deceased, against the Western & Atlantic Railroad Company, to recover for the homicide of the decedent (son of the plaintiffs), which occurred while he was in the employ of the defendant and in the discharge of his duties; his death having been occasioned by the wrecking of a building brought about by the alleged explosion of escaping gas from a gasoline engine belonging to the defendant. The explosion and the decedent’s death occurred on January 25, 1912. The suit was filed more than two years thereafter (January 24, 1917), but within two years after the appointment of the plaintiffs (September 29, 1915) as representatives of the decedent’s estate. The petition was demurred to on the ground that the suit was barred, since it is provided in the act under which the action arose that—

“No action shall be maintained under this act unless commenced within two years from the day the cause of action accrued.”

The demurrer was overruled, and the defendant filed exceptions pendente lite. The case proceeded to trial and resulted in a nonsuit. The plaintiff in the main bill of exceptions excepts to the granting of a nonsuit,

while the defendant in a cross-bill of exceptions excepts to the overruling of its demurrer, both general and special.

Westmoreland, Anderson & Smith, of Atlanta, for plaintiffs in error.

Tye, Peeples & Tye, of Atlanta, for defendant in error.

PER CURIAM (after stating the facts as above). [1] 1. The judgment rendered by this court in 20 Ga. App. 726, 93 S. E. 555, affirming the grant of a nonsuit, was a suit between the same parties and upon the same subject-matter as the one now before us brought under the federal Employers’ Liability Act (U. S. Comp. St. §§ 8657-8665). We do not consider that the former decision is now controlling upon the question as to whether or not there was an issue of fact as to the defendant’s negligence as constituting the proximate cause of the injury, which should have been submitted to the jury, since the new and additional evidence submitted by the plaintiffs in this, the present suit, very materially strengthens the contention of the plaintiffs that the explosion was caused by gasoline alleged to have escaped from the engine and pipes of the defendant. D. G. Hicks (or Hix), a witness for the plaintiff, testified at both of the trials in part substantially as follows:

“The engine room was not provided with ventilators. There were three windows in the engine room. Those windows were kept closed in cool weather. There was nothing in the engine room to cause an explosion in case somebody went into that room with a lighted lantern, except the gasoline. If that engine had been running for several hours and the room closed up, and there was gasoline leaking into the room, the heat caused by the motion of the wheels would be sufficient to volatilize that gasoline and cause an explosion when it came in contact with flame. I have never heard of anything else except a flame that would cause gasoline to be exploded. If the room had been closed up for several hours, and the engine was running, and there was leaking gasoline in the room, and the door opened and a party entered with a lighted lamp, with a flame, that air that was let in would be sufficient to volatilize that gasoline and cause an explosion.”

Another expert witness, C. E. Freeman, testified at both of the trials in part substantially as follows:

“If there was a room 15 by 18 feet with a ceiling anywhere from 12 to 18 feet high, built of brick with a cement floor (such as in this case), with two Fairbanks-Morse gasoline engines in it, with windows in the room, and the windows closed, and the door closed, and a party entered that room with a lighted lantern, and after the door was opened there was an explosion, which wrecked that building and caught that party under the debris, there is only one form of gas that would enter this building; it

is evident that a light would cause this explosion only from coming in contact with a gas; if those were gasoline engines, there was gasoline coming in the building; gas will not explode until it volatilizes, which it will do at any temperature from zero up. This explosion could only have been caused from the volatilization of some amount of gasoline, that could have gotten into this building somehow, being exploded or ignited from this lantern. If the engine had been running three or four hours, and the gasoline had been leaking, \* \* \* if this engine was running three or four hours in a room of the dimensions given, I would say it would raise the temperature of that room to from 80 to 90 degrees, and that would cause the gasoline to volatilize very rapidly. If the door was opened, and a party went in from the outside, and had gone from 4 to 6 feet, and an explosion took place from the lantern that he carried in his hand, the opening of the door and the letting in of the air would volatilize the gasoline sufficiently to cause the explosion. If the temperature was from 80 to 90 degrees, and gasoline leaking or dropping one drop a second, it would take from three to six hours for that room to become sufficiently charged with gas to cause an explosion of sufficient violence to wreck the building. The volatilization that would ordinarily take place would not be in sufficient quantities to be dangerous in the absence of a leak in some gasoline pipe or pump in any standard make gasoline engine that I have ever had any experience with."

Besides the evidence adduced on the former trial, the following additional evidence was submitted on the trial of the case now before us:

G. F. Pfisterfer, an employé of the defendant, sworn in behalf of plaintiff, testified:

"After an investigation I ascertained the cause of the blowing up and made a report on it. As well as I remember I made the report to my superior officer. \* \* \* It [the explosion] was caused by the house being closed up for a considerable period, making it air-tight, and in the escaping gases from the engine accumulating there and having no chance to mix with the air, and that when a lighted lantern was taken into the compartment and the fresh air was let into the room, the proper mixture of gas with the air and the lighted lantern caused the explosion. \* \* \* The cause of the explosion was gasoline having impregnated the room, the windows down, some one opened the door with a lighted lantern, a flame, and the building blew up. \* \* \* This examination was made within 24 hours after the accident. \* \* \* I base it [the statement that the windows were shut] on the reports made to me as to the condition in which the power house was left for 3 hours or more. The chief maintainer and others made that report, made the report that the engine was left running and the windows and doors down and shut."

It will be recalled that in the former decision this court based its holding partly upon the fact that there was then nothing to indicate that the ventilating windows were closed.

C. L. Williams, who qualified as an expert

on gasoline engines, testified with reference to the pump on the engine which was running the night of the explosion as follows:

"This pump on No. 1 engine the knoll nut was very badly scarred, showing marks of violence caused by a chisel or something used on the knoll nut to tighten it. \* \* \* The knoll nut presses down on it, pressing the packing down like that. If this knoll nut is screwed down all the way against the shoulder, the nut and shoulder would be in contact, leaving no space for the packing between the nut and the shoulder. \* \* \* There were places indicating marks where oil had been deposited on the nut down on the barrel of the pump where the gasoline running down on the side of the pump left marks when it cut the oil. Gasoline will remove oil, and it left a streak showing that the pump had been leaking. \* \* \* In my opinion that condition had existed for some time, had been in that condition for some time. \* \* \* The gasoline that I speak of as being on the side of the pump could not have got there any other way except the way I have described. \* \* \* This knoll nut that I examined was on engine No. 1. It looked like somebody had used a chisel in order to make it fit tight. It did fit tight. If it did fit tight, gasoline could come out between the plunger and the barrel, as there was no packing there, nothing to seal it. There was no packing there to seal the joint, and therefore the gasoline could come through there. It would come out from the barrel of the gasoline pump."

The italicized portion of the evidence was not submitted at the former trial. There is no evidence going in any way to show that this particular leak in the pump, here testified to for the first time, had ever been remedied, or in any way sought to be remedied.

D. G. Hicks, who qualified as an expert gasoline engine man, testified for the first time at the second trial that without proper packing in the gasoline pump, and with the knoll nut in the condition described by the witness Williams, gasoline would leak therefrom.

It will thus be seen that on this trial, but not at the former trial, there was evidence showing that the windows were down and the door closed, and new circumstances were adduced for the purpose of showing that gas was leaking from the pump on the engine, as well as from the pipes. Furthermore, the witness Read, in addition to his testimony at the former trial, now swears that two or three of the threads on the gasoline pipe had "worked out," and Misenheimer, who was not sworn on the former trial, testified that in repairing the leak in the pipe he did not think that he "turned it over a quarter around." It would thus seem from all of the testimony submitted on the present suit (that is, the evidence which was new, taken in connection with the evidence which was also presented in the former case, and which was in substance repeated) that a jury might have been reasonably authorized to infer that the



plaintiff had established by sufficient proof the fact that negligence on the part of the defendant did exist, and that such negligence constituted the proximate cause of the injury. Not only was evidence submitted for the first time for the purpose of showing that the ventilating windows of the room were closed, but new evidence was submitted for the purpose of showing a new and independent leak; the evidence being not only to the effect that gasoline might have leaked from such new source, the pump on the engine, but that it was actually doing so. Even in regard to the alleged leak in the pipe, while the same evidence appears now as at the former trial tending to show that such admitted defective joint had been remedied, still in this case there is new evidence to the effect that certain threads on this pipe had worked out, and the jury on the last trial, had they been permitted to do so, could have weighed and considered for themselves the nature and character of the work done in the repairing of such leaking and defective pipe by the defendant's mechanic, since on the last trial it was testified to by the mechanic for the first time, "I don't think I turned it over a quarter around;" he then having reference to the same joint that had as many as two or three of its threads worked out. In our opinion, the evidence is entirely sufficient to have authorized the submission to the jury of the question of the defendant's negligence, made by all of this testimony, irrespective as to any issue as to contributory negligence on the part of the decedent, and that the court erred in refusing to permit the jury to pass upon this question, by granting a nonsuit.

[2] 2. The case being reversed on the main bill of exceptions, it becomes necessary to pass upon the cross-bill of exceptions, wherein the defendant excepts to the overruling of its demurrer, both general and special, insisting that the plaintiffs' suit is barred by reason of not having been "commenced within two years from the date the cause of action accrued," as the act requires. The defendant insists that the cause of action accrued on the decedent's death, which occurred on January 25, 1912, and that, as the suit was not commenced until January 24, 1917, more than two years thereafter, it is therefore barred. On the contrary, the plaintiff insists that the cause of action accrued on the appointment of the plaintiffs as representatives of the estate of the deceased, which appointment was made on September 28, 1915, and the suit, having been commenced within two years from that date, is not barred.

The authorities are conflicting on the question as to when a cause of action under this act accrues. Some hold that the right accrues upon the appointment of an administrator of the estate of the person for whose homicide a suit is brought, while others hold that

it accrues upon the death of the decedent. The weight of authority seems to support the view that the cause of action accrues with the appointment of the administrator.

Without attempting any lengthy discussion or elaboration of the authorities pro and con, we are content to rest our decision on the authority of the recent well-considered and exhaustively treated case of *American R. Co. of Porto Rico v. Coronas*, decided by the United States Circuit Court of Appeals, First Circuit, 230 Fed. 545, 144 C. C. A. 599, L. R. A. 1916E, 1095. It is there held:

"A cause of action to recover damages for death under the federal Employers' Liability Act accrues when an administrator is appointed, and not at the time of death, within the meaning of the section providing that no action shall be maintained unless commenced within two years from the day the cause of action accrued." L. R. A. 1916E, 1095.

We adopt the conclusion reached in that case, and hold that the cause of action in this case accrued with the appointment of the administrators.

[3] The petition was not subject to general demurrer, and, as finally amended, was not subject to any of the grounds of the special demurrer.

Judgment reversed on the main bill of exceptions. Affirmed on cross-bill.

JENKINS, P. J., and STEPHENS, J., concur.

SMITH, J. (dissenting). The majority of the court are of the opinion that the trial judge erred in granting a nonsuit, and that therefore the case should be reversed on the main bill of exceptions. I cannot concur with my Colleagues in this judgment. I am of the opinion that the action of the court in granting a nonsuit was proper, for the following reasons:

When this case was previously here for review the evidence was thoroughly studied and considered, and the following ruling made:

"That the cause of action, if any, arises under the federal Employers' Liability Act, and under the petition as filed 'the case pleaded was not proven and the case proven was not pleaded,' and the court properly granted the nonsuit." *Williams v. W. & A. Railroad Co.*, 20 Ga. App. 728, 729, 93 S. E. 555, 556.

On motion for rehearing this court held that the doctrine of *res ipsa loquitur* did not apply, and quoted with approval the following:

"Negligence cannot be inferred merely from the fact of disaster; the burden being on plaintiff to establish by proof that negligence did exist. \* \* \* A case may not be submitted to the jury where there is at most only a balanced probability that actionable negligence existed. \* \* \* Manifestly a presumption of negligence

does not arise upon mere evidence of an injury sustained. \* \* \* The maxim *res ipsa loquitur* does not apply where the accident might have been due to improper handling as well as to improper furnishing the thing causing the accident." 20 Ga. App. 730, 731, 732, 98 S. E. 557.

The record now before us in this case discloses that, although there was an effort made to add to the testimony introduced on the former trial and to introduce new features into the case, the evidence is substantially the same as it was when this court made the ruling above referred to. No material changes have been made in the case as a whole, and though two new witnesses were introduced, their testimony, at most, does not amount to more than suggestions or inferences as to possibilities. It is my opinion, therefore, that since there is no material or substantial change in the record now under review and the record reviewed by this court in *Williams v. W. & A. R. Co.*, 20 Ga. App. 726, 98 S. E. 555, the rulings then and there made are controlling.

It is unnecessary, under the view I take of the case, to pass upon the questions raised by the cross-bill of exceptions.

(24 Ga. App. 743)

**FISHER et al. v. SHANDS et al.** (No. 10613.)

(Court of Appeals of Georgia, Division No. 2.  
Feb. 7, 1920.)

*(Syllabus by the Court.)*

**1. APPEAL AND ERROR §1068(1)—PRINCIPAL AND SURETY §97—CREDITOR'S ACT INCREASING SURETY'S RISK DISCHARGES SURETY; INSTRUCTION HELD HARMLESS IN VIEW OF JURY'S FINDING.**

Any act of the creditor which increases the risk of the surety or exposes him to greater liability will discharge the latter, whether such act is done with intent to defraud the surety or not. The jury having found by their verdict that the notes were not altered, and therefore that the surety's risk was not increased and that he was not exposed to greater liability, the charge that an alteration which increases the risk of the surety must be made with intent to defraud, if error, was immaterial and harmless.

**2. PLEADING §36(3)—WHERE PLEAS IN ACTION ON NOTES ADMITTED PLAINTIFF'S COMPLIANCE WITH NOTICE OF INTENT TO SUE AND CLAIM ATTORNEY'S FEES DEFENDANTS COULD NOT THEREAFTER COMPLAIN THAT NOTICE WAS NOT SUFFICIENT.**

The defendants, having in their pleas admitted that the plaintiffs had complied with all the requirements of the statute in regard to giving 10 days' notice of intention to bring suit and claim 10 per cent. attorney's fees upon the notes sued upon, cannot afterwards be heard to complain that the notice served upon them

failed to properly describe the notes, by incorrectly reciting the rate of interest called for therein, or that the trial judge erroneously charged the jury to find a verdict for such attorney's fees.

**3. TRIAL §234(7)—DEFENDANT ADMITTING PRIMA FACIE CASE AND SETTING UP AFFIRMATIVE DEFENSE MUST PROVE DEFENSE BY PREPONDERANCE OF EVIDENCE.**

Where the defendant admits a *prima facie* case and sets up an affirmative defense, it is not error upon the part of the trial judge to charge the jury that the defendant must prove his defense by a preponderance of the evidence.

**4. APPEAL AND ERROR §843(3)—WHERE ADMISSION OF EVIDENCE COULD NOT PREJUDICE RESULT OF TRIAL COURT OF APPEALS NEED NOT PASS ON ITS ADMISSIBILITY.**

Where certain evidence which could not in any way prejudice the result of the trial was admitted, it is unnecessary for this court to pass upon an assignment of error objecting to the admissibility of such evidence upon the ground that it was secondary and that the foundation for its introduction had not been laid.

**5. TRIAL §255(2)—FAILURE TO CHARGE ON PHASES OF CASE OTHER THAN THOSE CHARGED WAS PROPER IN ABSENCE OF TIMELY REQUEST.**

Where the trial judge properly charged the jury the law relative to all substantial issues made by the pleadings and the evidence, it was not error to fail to charge other phases of the case, in the absence of a timely request properly made.

**6. APPEAL AND ERROR §1001(1), 1140(5, 6)—VERDICT SUPPORTED BY EVIDENCE WILL BE SUSTAINED; JUDGMENT AFFIRMED WITH DIRECTION TO CORRECT MISCALCULATION IN VERDICT.**

There being an issue of fact whether or not the notes sued upon had been altered after execution by the maker and the indorser, and the jury having found against such contention, and there being evidence otherwise to support the verdict, and no error of law appearing, the verdict will be sustained. There being, however, clearly a miscalculation as to the interest and attorney's fees, the judgment is affirmed, with direction that the verdict be corrected.

Error from Superior Court, Liberty County; W. W. Sheppard, Judge.

Action by T. W. Shands and others against A. B. Fisher and others. Judgment for plaintiffs, and defendants bring error. Affirmed, with directions.

Melville Price, of Ludowici, and Edwin A. Cohen, of Savannah, for plaintiffs in error.

Oliver & Oliver, of Savannah, for defendants in error.

**STEPHENS, J.** This was a suit upon several promissory notes by the payees thereof against the maker and the indorser. Both defendants in their pleas alleged that the notes

ATLANTA JOURNAL CO. v. KNOWLES.  
(No. 10620.)

(Court of Appeals of Georgia. Feb. 7, 1920.)

*(Syllabus by the Court.)*

1. EVIDENCE  $\S$  376(9)—TESTIMONY THAT ACCOUNT SUED ON WAS JUST PROPERLY EXCLUDED WHERE WITNESS HAD NO KNOWLEDGE EXCEPT FROM DUPLICATE ORDER SENT TO HIM BY ANOTHER.

The complaint that the court erred in excluding the testimony of the witness George T. Johnson that "the account sued on is just, true, due, and unpaid, to the best of my knowledge," is without merit, since it appears from the testimony of this witness that he had no knowledge of the account other than that obtained from duplicate orders sent to him by another. "The correctness of an account cannot be lawfully proved by the testimony of a witness that the same is 'a correct copy of the charges made on the books' kept by her, when the witness further testified that 'she knew nothing of her own knowledge' with respect to the account, and 'only copied in the book entries given to her by [another] on slips.'" *Dougan v. Dunham*, 115 Ga. 1012, 42 S. E. 890 (1).

2. EVIDENCE  $\S$  250—ADMISSION OF PRINCIPAL WAS NOT ADMISSIBLE AGAINST SURETY WHERE MADE AFTER RELATIONSHIP WITH OBLIGEE HAD EXPIRED.

There was no error in excluding the testimony of the witness Coyle as to admissions made by J. L. Davenport as follows: "When I went to Mr. Davenport about this account which I have sued him on here, he said the account was correct, due, and unpaid." This witness further testified: "This conversation took place after Davenport was dismissed as our agent." The admission of Davenport, the principal, was not admissible in the suit against the surety, W. A. Knowles; the admissions having been made after the principal had been dismissed as the plaintiff's agent. "The admissions of a principal are prima facie evidence against his sureties if made pending the relationship and concerning the transaction as to which the suretyship exists." *Chicago Portrait Co. v. O'Neal*, 6 Ga. App. 425, 65 S. E. 161. See, also, *Stephens v. Crawford*, 1 Ga. 574, 44 Am. Dec. 680; *Dobbs v. Justices*, 17 Ga. 625.

3. APPEAL AND ERROR  $\S$  692(1)—TO REVIEW EXCLUSION OF CONTENTS OF BOOK BILL OF EXCEPTIONS MUST SHOW WHAT EVIDENCE WAS CONTAINED IN BOOK.

The exception that the court erred in excluding as evidence contents of a book referred to by the witness Johnson "as the book of original entries containing a statement of the account of J. L. Davenport and W. A. Knowles, security," cannot be considered by this court, inasmuch as nowhere in the bill of exceptions does it appear what evidence was contained in the book.

4. PROPER GRANT OF NONSUIT.

Under the above rulings, the court did not err in granting a nonsuit.

as originally made and executed called for interest at the rate of 10 per cent. per annum, and after having been so executed were altered by the plaintiffs so as to call for interest at the rate of 8 per cent. per annum. Both defendants contended that as the notes originally called for 10 per cent. interest per annum, they constituted a usurious contract, and that they operated as a contract drawing interest at the rate of 7 per cent. per annum. The maker alleged that such alteration was material and was made by the plaintiffs, who claimed a benefit thereunder, with intent to defraud him, and that the notes sued upon did not constitute the same contract originally entered into by him with the plaintiffs, and that he was not liable thereon. The indorser alleged that he was a mere surety upon the notes, and that such alteration had been afterwards made by the plaintiffs without his consent and with intent to defraud him; that his risk as surety was thereby increased; and that this act upon the part of the plaintiffs operated to release him from his contract of suretyship. There was evidence on these issues. The jury found for the plaintiffs against both defendants for the principal sum sued for, with interest at the rate of "8 per cent." per annum.

[1] The judge having charged the jury that if the notes had been altered so as to call for 8 per cent. subsequent to their execution by the maker and indorser they should be regarded as drawing interest at the rate of 7 per cent., and the jury having found a verdict finding the interest at the rate of 8 per cent. and finding the surety liable, they necessarily concluded that the notes had not been altered and that the surety's risk had not been increased, but that the notes when originally made and executed both by the maker and indorser called for interest at the rate of 8 per cent. If the jury had found that an alteration had been made, even though without intent to defraud, they could not have found, under the charge of the court, a verdict for interest at the rate of 8 per cent., but would have found a verdict for interest at 7 per cent. The jury having found that the notes were not altered and that the surety's risk was not increased, and that he was not exposed to greater liability, an instruction to the jury that in order to discharge the surety by an alteration which increased his risk it must have been made with intent to defraud was harmless.

[2-6] There being a miscalculation as to the interest and attorney's fees, the same being excessive, direction is given that the verdict be corrected and written off so as to read for the true amounts, viz. \$710.93 interest and \$333.75 attorney's fees.

Judgment affirmed, with direction.

JENKINS, P. J., and SMITH, J., concur.

Error from City Court of Floyd County; W. J. Nunnally, Judge.

Action by the Atlanta Journal Company against W. A. Knowles. Judgment of nonsuit, and plaintiff brings error. Affirmed.

W. B. Mebane and Maddox & Doyal, all of Rome, for plaintiff in error.

Dean & Dean and L. H. Covington, all of Rome, for defendant in error.

SMITH, J. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(24 Ga. App. 727)

HOLBERT v. ALLRED. (No. 10501.)

(Court of Appeals of Georgia, Division No. 2.  
Feb. 17, 1920.)

(Syllabus by the Court.)

1. APPEAL AND ERROR  $\S$  195—FRAUD  $\S$  58(1)—PLEADING  $\S$  238(3)—AMENDMENT TO PLEA SETTING UP NEW FACTS MAY NOT BE FILED WITHOUT AFFIDAVIT; OBJECTION TO FILING OF AMENDMENT TO PLEA SETTING UP NEW FACTS WAIVED BELOW CANNOT BE FIRST RAISED ON WRIT OF ERROR.

Mrs. M. E. Holbert instituted an action against W. O. Allred to recover a sum of money alleged to have been paid by her from her separate estate in settlement of a debt owing by her husband to the defendant. Before any trial of the case was had, the plaintiff and the defendant settled the suit, and this case is prosecuted by the plaintiff's attorneys for the purpose of recovering from the defendant the attorney's fees which the plaintiff had contracted to pay them. The question involved was whether the money paid by the plaintiff to the defendant in settlement of her husband's debt was her money or that of her husband, the plaintiff contending that the money belonged to her, and the defendant contending that it was the money of the plaintiff's husband, and that they (the plaintiff and her husband) had entered into a conspiracy or mutual scheme to defraud the defendant, by which the plaintiff was to take the money which in fact belonged to her husband, pay it over to the defendant as a part of the purchase price of certain land purchased from the defendant by her husband, thereby securing possession of the land, and, after cutting a large amount of timber from the land and committing other specified acts of waste, for her then to sue for and recover the money as having been her own, and not that of her husband. Upon the trial of the case the defendant offered an amendment to his plea, to which the plaintiff demurred, and, the trial court having overruled the demurrer, the plaintiff excepted. The jury returned a verdict in favor of the defendant, and the plaintiff made a motion for a new trial, and the overruling of which the plaintiff excepted. *Held*:

"All parties, whether plaintiffs or defendants,

in the superior or other courts, whether at law or in equity, *may at any stage of the cause* [italics ours], as matter of right, amend their pleadings in all respects, whether in matter of form or of substance, provided there is enough in the pleadings to amend by. The defendant after the first term cannot set up new matter by way of amendment, except as provided in section 5640." Civil Code 1910,  $\S$  5681. Thus, where the defendant is present at the trial, the court cannot permit a plea setting up new facts to be filed without requiring an affidavit that the original plea did not omit such facts for the purpose of delay, and that the amendment is not now offered for delay (*Bass Co. v. Granite City Co.*, 119 Ga. 124, 45 S. E. 980 [4]), unless it be that no such objection is made to its allowance at the time the amendment is offered, the plaintiff's failure at that time to enter his objection being taken as a waiver in the trial court, and such objection cannot be raised for the first time on writ of error. *Edwards v. Boyd Co.*, 136 Ga. 723, 72 S. E. 84. Nor was the amendment subject to the demurrer attacking it upon the ground that it failed to allege sufficient facts to show a scheme to defraud the defendant.

2. CONSPIRACY  $\S$  13, 19—FRAUD  $\S$  58(1)—CIRCUMSTANTIAL EVIDENCE MAY ESTABLISH FRAUD; ACT OR DECLARATION OF A PARTY TO A MUTUAL SCHEME TO DEFRAUD CONSIDERED THE ACT OF ALL.

Fraud may be established by circumstances, as well as by positive proof, and much latitude is allowed in introducing evidence for such purpose. *Causey v. Wiley*, 27 Ga. 444. Fraud being of a peculiarly subtle nature, slight circumstances may be sufficient to establish it. Civil Code 1910,  $\S$  4628; *Ridgeway v. Ridgeway*, 84 Ga. 25, 10 S. E. 495; *Higginbotham v. Campbell*, 85 Ga. 638, 11 S. E. 1027. This rule is particularly applicable where fraud is charged in family transactions. *Woodruff v. Wilkinson*, 73 Ga. 115. Thus, where two or more persons are charged with conspiring or entering into a mutual scheme to defraud, such fact may be proved by evincing a concurrent knowledge and approbation in the persons conspiring of each other's acts, and by proof of the separate acts of the several persons concentrating in the same purpose or particular object. *Dixon v. State*, 116 Ga. 186, 42 S. E. 357; *Woodruff v. Hughes*, 2 Ga. App. 361, 58 S. E. 551; 5 R. C. L. 1103,  $\S$  53. There were sufficient facts and circumstances disclosed by the evidence in this case to authorize the jury to find that the plaintiff and her husband had entered into the conspiracy or mutual scheme to defraud the defendant, as alleged, despite their positive testimony to the contrary. *Detwiler v. Cox*, 120 Ga. 638, 48 S. E. 142. The court therefore did not err in admitting the evidence complained of in the first, second, and third special grounds of the motion for a new trial, since, where once the conspiracy or mutual scheme to defraud has been established, the act or declaration of one of the parties in the prosecution of the enterprise is considered the act or declaration of all. *Slaughter v. State*, 113 Ga. 284, 38 S. E. 854, 84 Am. St. Rep. 242; *Cowart v. Fender*, 137 Ga. 586, 73 S. E. 822, Ann. Cas. 1913A, 932; 5 R. C. L. 1108,  $\S$  53.

8. TRIAL  $\Leftrightarrow$ 267(1)—FAILURE TO CHARGE IN PRECISE LANGUAGE REQUESTED WHICH HAS BEEN COVERED BY CHARGES GIVEN IS NOT ERROR.

The request to charge set out in the fourth special ground of the motion for a new trial was sufficiently covered by the general instructions given, and the failure to charge in the precise language requested is not, therefore, cause for a new trial. *Atlanta & W. P. R. Co. v. Miller*, 23 Ga. App. 847, 98 S. E. 248 (4). Nor is the excerpt from the charge of the court complained of in the fifth special ground of the motion for a new trial erroneous for any of the reasons assigned.

4. ATTORNEY AND CLIENT  $\Leftrightarrow$ 190(4)—PLAIN-TIFF'S ATTORNEY, ON DEFENDANT'S SETTLEMENT WITHOUT HIS CONSENT, MAY CONTINUE THE ACTION TO RECOVER HIS FEE; SETTLEMENT FOR LESS THAN AMOUNT CLAIMED DOES NOT PROVE LIABILITY.

While it is true that, where a defendant settles with the plaintiff without the consent of the plaintiff's attorney, the latter may nevertheless continue the action for the purpose of asserting his lien and recovering his fees, still, before the attorney can get a recovery in such cases, he must introduce proof as would be required if the action were proceeding for the benefit of his client. The mere fact that the defendant pays less than the full amount after suit is instituted is, at most, an admission in the nature of a compromise, and would not prove that any liability in fact existed. *Atlanta Ry. & Power Co. v. Owens*, 119 Ga. 833, 47 S. E. 218; *Collier v. Hecht-Brittingham Co.*, 7 Ga. App. 178, 179, 66 S. E. 400.

5. REFUSAL TO SET ASIDE VERDICT.

There was sufficient evidence to authorize the verdict, which has the approval of the trial judge, and no reason appears why it should be set aside.

Error from Superior Court, Pickens County; N. A. Morris, Judge.

Action by Mrs. M. E. Holbert against W. C. Allred, which, after a settlement without consent of plaintiff's attorney, was prosecuted by him to recover from defendant the attorney's fees which plaintiff had contracted to pay. Verdict for defendant; motion for new

trial denied, and plaintiff attorney brings error. Affirmed.

Roscoe Pickett, of Jasper, and Wm. T. Townsend of Cartersville, for plaintiff in error.

Geo. D. Anderson, of Marietta, John S. Wood, of Canton, and Wm. Butt, of Blue Ridge, for defendant in error.

JENKINS, P. J. Judgment affirmed.

STEPHENS and SMITH, JJ., concur.

(24 Ga. App. 766)

FLODING v. AMERICAN MACHINERY CO. (No. 11072.)

(Court of Appeals of Georgia, Division No. 2  
Feb. 10, 1920.)

(Syllabus by the Court.)

SUFFICIENCY OF EVIDENCE.

There was evidence to support the finding of the judge of the municipal court of Atlanta, who tried the case without a jury, and the judge of the superior court did not err in overruling the certiorari, based on the general grounds only.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action between W. E. Floding and the American Machinery Company. Judgment for the latter, and the former brings error. Affirmed.

Westmoreland & Smith, of Atlanta, for plaintiff in error.

W. S. Dillon and O. M. Lancaster, both of Atlanta, for defendant in error.

SMITH, J. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(179 N. C. 717)

## STATE v. SESSOMS. (No. 1.)

(Supreme Court of North Carolina. Feb. 18, 1920.)

## 1. CRIMINAL LAW §633(1)—MODE OF CONDUCTING TRIAL DISCRETIONARY WITH JUDGE.

The mode of conducting the trial is in the discretion of the trial judge.

## 2. CRIMINAL LAW §1152(1) — EXERCISE OF DISCRETION AS TO MODE OF CONDUCTING TRIAL NOT REVIEWABLE IN ABSENCE OF ABUSE.

The exercise of discretion by trial judge as to mode of conducting trial is not reviewable unless it appears that there has been an abuse of discretion in such a way as to prejudice the defendant.

## 3. WITNESSES §263 — REFUSAL TO PERMIT WITNESSES TO BE RECALLED TO TESTIFY TO FACT PREVIOUSLY TESTIFIED TO NOT AN ABUSE OF DISCRETION.

In prosecution for selling spirituous liquor, where witness who testified to having purchased liquor was corroborated by witness who was in defendant's house together with former witness at time liquor was purchased, court's refusal to permit defendant and other witnesses to be recalled for purpose of showing corroborating witness had not been with former witness at time of alleged sale was not an abuse of discretion, where court stated in presence of jury that defendant and each of his witnesses had been specifically asked to name those present at the time, and that they had denied that corroborating witness had been present, and that there was therefore no need to return to the stand to again deny it.

Appeal from Superior Court, Tyrrell County; Lyon, Judge.

H. R. Sessoms was convicted of selling spirituous liquor, and he appeals. No error.

Meekins & McMullan, of Elizabeth City, and J. E. Alexander, of Winston-Salem, for appellant.

Jas. S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

BROWN, J. The defendant was convicted under a bill charging the sale of spirituous liquor to one Anthony Spruill, with a count for having them in his possession for purposes of sale. Anthony Spruill testified that the defendant sold him a pint of intoxicating liquor, for which he paid him \$2.50. This was denied by the defendant, who was ex-

amined as a witness in his own behalf. In rebuttal one William Marriner testified for the state that he went with Anthony Spruill to the defendant's house, and also bought from the defendant at the time a pint of liquor and paid him \$2.50. The state closed.

The defendant then offered himself as a witness, and other witnesses, for the purpose of showing that William Marriner did not come to his house with Anthony Spruill, and that he sold Marriner no liquor that night. His honor stated, in the presence of the jury, that the defendant and each of his witnesses, in their examination, had been specifically asked to name each of those present at the house, and they had done so, and they had denied that William Marriner was there or that he had gotten any liquor, and that there was therefore no need for them to return to the stand to again deny it, and in the exercise of his discretion declined to permit them to again go on the stand. To this ruling by his honor defendant excepted.

This is the only exception in the record. It appears that counsel for the defendant in arguing the case to the jury referred to the fact that the testimony of William Marriner had been denied by the defendant and his wife, and each of his witnesses who had testified that he was not there that night, and of course if he was not there he could not have bought any liquor, and so argued to the jury.

[1, 2] The mode of conducting the trial is in the discretion of the trial judge, and the exercise of discretion is not reviewable unless it appears that there has been an abuse of the discretion in such way as to be prejudicial to the defendant. *State v. Cobb*, 164 N. C. 422, 79 S. E. 419; *State v. Moore*, 104 N. C. 743, 10 S. E. 183; *State v. Hodge*, 142 N. C. 876, 55 S. E. 791, 9 Ann. Cas. 361; 16 *Corpus Juris*, p. 806; *State v. Southerland*, 100 S. E. 187.

[3] We see no evidence of an abuse of discretion, as the court stated to the jury practically that the defendant and his witness had denied that William Marriner was at the house or that he had gotten any liquor from the defendant. In addition counsel for the defendant argued this to the jury. The matter of allowing the defendant and his witness to be recalled was in the sound discretion of the judge, and we see no abuse of such discretion.

No error.

For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(179 N. C. 208)

**FIRST NAT. BANK OF TARBORO v. TARBORO COTTON FACTORY. (No. 62.)**

(Supreme Court of North Carolina. Feb. 18, 1920.)

**1. ATTACHMENT ¶100—AFFIDAVIT DEFECTIVE WHERE GROUNDS OF BELIEF ARE NOT SET FORTH.**

Affidavit in attachment, alleging that defendant is about to assign, dispose of, and secrete sum of money with intent to defraud creditors, but not setting forth the grounds upon which the belief is based, *held* fatally defective.

**2. ATTACHMENT ¶125—DEFECTIVE AFFIDAVIT NOT AIDED BY ANSWER.**

Affidavit in attachment, which was defective in failing to state the grounds on which plaintiff's belief that defendant was about to dispose of money with intent to defraud creditors was based, was not aided by defendant's answer.

Appeal from Superior Court, Edgecombe County; Connor, Judge.

Action by the First National Bank of Tarboro against the Tarboro Cotton Factory. Motion to vacate attachment granted, and plaintiff appeals. Affirmed.

John L. Bridgers and Henry C. Bourne, both of Tarboro, for appellant.

Don Gilliam and Henry Staton, both of Tarboro, for appellee.

BROWN, J. On November 8, 1919, upon affidavit of the plaintiff, the clerk of superior court issued a warrant of attachment, attaching a certain sum of money then in the hands of the sheriff belonging to the defendant. At the same time, summons was issued, and complaint filed, stating a cause of action, and both summons and copy of complaint, together with warrant of attachment, were duly and properly served on the defendant. Motion was made by defendant to vacate the attachment, and petition and affidavit by defendant were filed, and answer to petition and affidavit were duly filed by plaintiff, and on hearing the motion to vacate before his honor, Judge Connor, it was adjudged that the plaintiff had not alleged sufficient facts to sustain the warrant of attachment, and the same was vacated, from which judgment plaintiff excepted and appealed.

[1, 2] The precedents seem to hold that the affidavit upon which the warrant of attachment was issued is insufficient. It alleges that the defendant is about to assign, dispose of, and secrete the sum of money in the sheriff's hands with intent to defraud its creditors, but it fails to set forth the grounds upon which this belief is based. This omission is fatal. *Hughes v. Person*, 63 N. C. 548; *Judd v. Mining Co.*, 120 N. C. 399, 27 S. E. 81; *Wood v. Harrell*, 74 N. C. 338; *Peebles v. Foote*, 83 N. C. 102. These cases

all hold that the mere assertion of a belief that the defendant is about to assign or dispose of its property with intent to defraud the plaintiff is insufficient, but that the grounds upon which such belief is founded must be set out, in order that the court may adjudge if they are sufficient. The same rule holds in applications for the appointment of receivers. *Hanna v. Hanna*, 89 N. C. 68. We do not think that the defective affidavit of the plaintiff is aided by the answer of the defendant.

It is possible the plaintiff may have mistaken its remedy. It appears that the Tarboro Cotton Factory is an insolvent corporation; that its property, with the exception of a small piece of land, was sold under a deed of trust; and that the plaintiff was one of the bondholders, and received its share of the proceeds of sale. The tract of land was sold under execution against the defendant, and after satisfying the debt a certain sum remained in the hands of the sheriff, which was attached in this cause by the plaintiff for the purpose of satisfying the balance due upon his bond. It is possible that the plaintiff's remedy, which may be done in this cause, is to apply for a receiver for the assets of the insolvent corporation, to the end that they may be applied equitably to the debts of the corporation. *Wood v. Staton*, 174 N. C. 246, 93 S. E. 794.

The order vacating the attachment is affirmed.

(179 N. C. 210)

**GAY v. WOODMEN OF THE WORLD. (No. 65.)**

(Supreme Court of North Carolina. Feb. 18, 1920.)

**INSURANCE ¶687, 723(2) — STATUTE AS TO STATEMENTS IN APPLICATION HELD APPLICABLE TO CERTIFICATE OF FRATERNAL BENEFIT ASSOCIATION; "FRATERNAL ORDER."**

Revisal 1905, § 4808, providing that statements in application for policy shall be deemed representations and not warranties, and shall not prevent recovery unless material or fraudulent, *held* applicable to certificate of fraternal benefit association incorporated under the laws of another state, providing for death benefits in excess of \$300; such association not being a "fraternal order," to which such statute does not apply under section 4794, as amended by Laws 1913, c. 46, but a fraternal benefit society as distinguished from a fraternal order under such statute and section 4795.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Fraternal Order.]

Appeal from Superior Court, Nash County; Lyon, Judge.

Action by S. S. Gay, administrator, against the Woodmen of the World. Verdict for plaintiff, and defendant appeals. No error.

The plaintiff, the beneficiary, seeks to recover upon a certificate issued upon the life of her late husband, by the defendant, a fraternal benefit association. The insured in his application stated he did not use and had never used, opiates, morphine, cocaine, or other narcotics, and there was evidence tending to show that both before and after that date he had used those articles. The jury found a verdict in favor of the plaintiff for \$600, with interest from the death of the insured. Appeal by defendant.

Cowper, Whitaker & Allen, of Kinston, and F. S. Sprull, of Rocky Mount, for appellant.

Finch & Vaughan, of Nashville, for appellee.

CLARK, C. J. Revisal, § 4808, provides:

"All statements or descriptions in any application for a policy of insurance, or in the policy itself, shall be deemed and held representations and not warranties; nor shall any representation, unless material or fraudulent, prevent a recovery on the policy."

In *Daughtridge v. Railroad*, 165 N. C. 193, 80 S. E. 1080, the court upheld this statute, citing numerous cases.

The defendant asked the court to charge that Revisal, § 4808, "has no application whatever to the defendant in this action, for that the defendant is a fraternal benefit society, and is not governed by the general regulations above cited, which apply only to the general life insurance companies." The court declined to so charge, and instructed the jury that said section did apply to this defendant, and the defendant excepted. This presents the only point in the case.

The defendant contends that Revisal, § 4794, provides that—

"Nothing in the general insurance laws, except such laws as are applied to fraternal orders, shall be construed to extend to benevolent associations, incorporated under the laws of this state that only levy an assessment on the members to create a fund to pay the family of the deceased member and make no profit therefrom, and do not solicit business through agents."

But that section does not apply to this defendant, which is not a fraternal order as defined in Revisal, § 4795, but is a "fraternal benefit society," for Revisal, § 4794 (above cited), was expressly amended by Laws 1913, c. 43, by adding:

"Such benevolent association providing death benefits in excess of three hundred dollars to any one person, or disability benefits not exceeding three hundred dollars in any one year to any one person, or both, shall be known as 'Fraternal Benefit Societies;' and those providing benefits of three hundred dollars or less, shall be known as 'Fraternal Orders.'"

The evident intent and effect of the act of 1913 was to group this defendant as a fraternal benefit society as distinguished from a fraternal society, which latter are restricted to those associations whose death benefits do not exceed \$300. The societies like this, providing benefits in excess of said amount, are designated as fraternal benefit societies, and come under the general provisions of Revisal, § 4808, as the court charged.

Besides, the protection of the said section, exempting fraternal associations from Revisal, § 4808, applies only to associations, in the language of the section, "incorporated under the laws of this state," whereas the defendant is incorporated under the laws of another state.

Under the plain provisions of the statute we find in the instruction of the court no error.

(179 N. C. 180)

WATERS v. BOYD et al. (No. 11.)

(Supreme Court of North Carolina. Feb. 18, 1920.)

1. SUBMISSION OF CONTROVERSY ⇔2—STATUTE AUTHORIZING IT STRICTLY CONSTRUED.

Revisal 1905, § 803, as to submission of action without controversy, must be strictly construed.

2. SUBMISSION OF CONTROVERSY ⇔8—AFFIDAVIT INSUFFICIENT.

In action submitted without controversy, affidavit that, "The controversy between them is genuine and is submitted to the court to determine the rights of the parties," is not in compliance with Revisal 1905, § 803, providing that affidavit must set out that the controversy is real and the proceedings in good faith to determine the rights of the parties.

3. SUBMISSION OF CONTROVERSY ⇔13 — AGREED STATEMENT OF FACTS INSUFFICIENT TO SHOW CAUSE OF ACTION AGAINST DEFENDANTS.

In submission of action without controversy by plaintiff claiming fee-simple title under a deed, and defendants, her children, claiming that they are tenants in common thereunder, agreed statement of facts, setting out, among other things, that plaintiff had made a sale of the land, but that the purchaser refused to accept deed because of defendants' claim, held not to show cause of action against defendants.

4. JUDGMENT ⇔707—NOT BINDING ON PURCHASER NOT MADE A PARTY TO CONTROVERSY BETWEEN OWNERS.

In submission of controversy by plaintiff claiming fee-simple title under a deed and defendants, her children claiming that they are tenants in common thereunder, agreed statement of facts setting out, among other things, that plaintiff had made a sale of the land, but that purchaser refused to accept deed because of defendants' claim, where name of purchaser



and terms of sale were not set out, and purchaser was not made a party, any judgment would not be binding upon him.

**5. JUDGMENT  $\S$  694—NOT BINDING ON CHILDREN CLAIMING INTEREST IN LAND IN CONTROVERSY NOT MADE PARTIES.**

In submission of controversy by plaintiff, claiming fee-simple title under a deed, and defendants, her children, claiming that they are tenants in common thereunder, judgment would not be binding on plaintiff's children, born since date of deed, but not made parties.

**6. SUBMISSION OF CONTROVERSY  $\S$  18 — RIGHTS UNDER DEED CANNOT BE DETERMINED IN ABSENCE OF DEED AND GRANTOR'S HEIRS.**

In submission of action without controversy by plaintiff, claiming fee-simple title under deed, and defendants, her children, claiming that they are tenants in common thereunder, whether the language in the warranty can be construed as a conveyance of the remainder to defendants cannot be adjudicated, unless the deed, as well as the heirs of the grantor in the deed, are before the court.

**7. SUBMISSION OF CONTROVERSY  $\S$  12, 18—ADDITIONAL PARTIES OR STATEMENT OF FACTS NOT PERMISSIBLE TO CURE DEFECTS.**

In submission of action without controversy by plaintiff, claiming fee-simple title under deed, and defendants, her children, claiming that they are tenants in common, the court could not have directed additional parties or statement of facts to be made in invitum to cure defect.

**8. APPEAL AND ERROR  $\S$  843(1)—MOOT QUESTION WILL NOT BE DECIDED.**

The Supreme Court will not render a decision on a moot question.

Appeal from Superior Court, Beaufort County; Bond, Judge.

Action without controversy between Nancy Elizabeth Waters and Henry C. Boyd and another. From the judgment rendered, plaintiff appeals. Action dismissed.

J. D. Paul, of Washington, N. C., for appellant.

**CLARK, C. J.** [1, 2] This is an action submitted without controversy under Rev. § 803. This statute must be strictly construed. *Arnold v. Porter*, 119 N. C. 123, 25 S. E. 785; *Grandy v. Gulley*, 120 N. C. 177, 26 S. E. 779. It requires that the affidavit must set out that—

"The controversy is real, and the proceedings in good faith to determine the rights of the parties."

The affidavit in this case merely sets out that—

"The controversy between them is genuine, and is submitted to the court to determine the rights of the parties."

This is not a compliance with the statute. In like manner the absence of the words "in

good faith," on an appeal in forma pauperis in a criminal case, is fatal (Rev. § 3278; *State v. Bramble*, 121 N. C. 603, 28 S. E. 269 [see Anno. Ed.]), and the failure to follow the statute in civil cases is also ground for dismissal (*Honeycutt v. Watkins*, 151 N. C. 653, 65 S. E. 762).

[3] Furthermore, the facts agreed show no cause of action stated against the defendants, and on that ground also it must be dismissed. The facts agreed set out the following:

"In the caption and granting clause in said deed, where any reference is made to the grantee, the name Nancy Elizabeth Waters is given and no other, except in the last clause of the deed these words are used: 'We warrant this title to Nancy Elizabeth Waters, to her and her children and executors and administrators and assigns forever.' The plaintiff paid the consideration recited in the deed, and contends that she owns the land in fee simple, and that the deed on its face shows that it was intended that she should take a fee-simple title. The defendants, who were her only children at the time the deed was given, contend that they are tenants in common with the plaintiffs, and rely upon the last clause in the deed above set out."

It is further agreed that—

"The plaintiff made a sale of the land described above, but because of the contention of the defendants the purchaser declines to accept her deed. If the court should be of the opinion that the plaintiff is owner in fee simple of said land, the plaintiff will be able to make the sale according to her agreement and contract; otherwise she will not."

[4, 5] The name of the purchaser and the terms of the sale are not set out, nor is the purchaser made a party to this action, and hence any judgment herein would not be binding upon him. Neither are the other children referred to as having been born since the date of the deed parties, and the judgment would not be binding on them.

It is agreed that the deed was dated November 5, 1866 (prior to Act of 1879, c. 148), but there is no agreement or allegation as to the date of its execution, nor whether the deed was made to the plaintiff and her heirs, or simply to the plaintiff.

[6] Whether the fee passed out of the grantor to Nancy E. Waters at all depends upon the exact wording of the deed and whether, if she took only a life estate (which is nowhere alleged), the language in the warranty can be construed as a conveyance of the remainder to the two children are matters which cannot be adjudicated unless the deed was before the court, nor in the absence as parties to this action of the heirs of the grantor in the deed to her.

[7] There is such a defect of parties and of allegations, and in the affidavit of submission, that the judgment in any aspect is erroneous, and must be set aside. Being a consent proceeding, the court could not have di-

rected additional parties or statement of facts to be made in invitum to cure the defect.

[8] On the record this is simply a moot question on which the opinion of the court is asked, but on such it will not render its decision. *Bates v. Lilly*, 65 N. C. 232; *Millikan v. Fox*, 84 N. C. 107.

Action dismissed.

(179 N. C. 190)

**CHAMBERS et al. v. NORTH RIVER LINE et al. (No. 17.)**

(Supreme Court of North Carolina. Feb. 18, 1920.)

**1. WHARVES §—9—LESSEE'S AGREEMENT TO "MAINTAIN" WHARF IN PRESENT CONDITION HELD COVENANT TO "REPAIR."**

Lease of wharf requiring lessee to "maintain the said wharf in its present condition during the continuance of this lease" held to obligate lessee to rebuild portion of wharf destroyed by breaking up of ice through no negligence of lessee, lessee's agreement being equivalent to a covenant to repair and leave in repair under the common law; the word "maintain" meaning practically the same thing as "repair," which means to restore to a sound or good state after decay, injury, delapidation, or partial destruction.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Maintain; Repair.]

**2. WHARVES §—9—DESTRUCTION OF A PORTION OF RENTED WHARF HELD NOT TO RELEASE LESSEE.**

The destruction of a portion of rented wharf making wharf useless without repairs, though not the fault of lessee, did not release lessee from lease obligating him "to maintain the said wharf in its present condition during the continuance of this lease."

**3. LANDLORD AND TENANT §—152(5)—LESSEE REQUIRED TO REBUILD UNDER COVENANT TO REPAIR.**

When the property is destroyed by fire, flood, tempest, or other act of God or the public enemy, it is the duty of the lessee who has covenanted to repair and leave in repair to rebuild, unless relieved therefrom by statute or exceptions specifically incorporated in the lease.

Appeal from Superior Court, Camden County; Lyon, Judge.

Action by B. H. Chambers and others against the North River Line and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

This is an action to recover damages for failure to rebuild a wharf known as "Shiloh" wharf and for rent under the lease thereof. The case was submitted upon facts agreed. It appeared therefrom that the defendant lessee covenanted "to maintain the said

wharf in its present condition during the continuance of this lease"; that the defendant company went into possession of the premises and paid the rents provided therein up to December 31, 1917; that on January 15, 1918, 270 yards of said wharf were totally destroyed leaving standing and remaining only 100 yards thereof next to the shore, built over shallow water, and about one-half of the pierhead. The freighthouse at end of said wharf was also completely destroyed.

It was also stated in the facts agreed that—

"The destruction of said 270 yards of wharf, including the freighthouse as aforesaid, was due solely to the freezing of Pasquotank river and the subsequent breaking up of the ice therein which swept the same away and the destruction was not due in any part to any fault or negligence on the part of the defendant company. The 100 yards of wharf remaining as aforesaid, including the one-half of the pierhead also remaining and all other property rights mentioned in said lease, are absolutely incapable of use for the purpose mentioned in the lease unless the 270 yards of wharf and the freighthouse swept away as aforesaid be rebuilt."

It was further agreed by the parties that—

"Said freeze began on December 31, 1917, and continued till January 24, 1918, and there had been only three such freezes in that locality in the last 40 years."

It is admitted that immediately after the destruction of the property aforesaid the plaintiffs called upon the defendant to replace the same, and the defendant declined to do so, denying any further liability under the lease, and has made no use of the premises since that time. It was agreed at the time of the refusal of the defendant to rebuild that the cost of rebuilding the wharf and freighthouse would be \$1,000.

Upon the above admissions the court rendered judgment that under the terms of the lease the plaintiff recover \$1,000, the cost of replacing said property, and \$420, the rent accrued since December 31, 1917, up to September 30, 1919, and the costs. Appeal by defendants.

Ehringhaus and Small, of Elizabeth City, for appellants.

Meekins & McMullan, of Elizabeth City, for appellees.

CLARK, C. J. [1, 2] The court properly held that by reason of the failure of the defendant to rebuild the 270 yards of wharf and repair the damages to the freighthouse there was a breach in its covenant "to maintain the said wharf in its present condition during the continuance of this lease," and that the defendant was liable for rent to the trial notwithstanding the destruction of the wharf and for the damages \$1,000 which it was

agreed by the parties would be the cost of replacing the destroyed wharf and repairing the freighthouse.

The defendants contended that said covenant did not obligate the defendant to replace the property which had been destroyed without fault or negligence on its part and that the destruction of the property also released the defendant from liability for rent. The court rendered judgment against the defendant on these points and it appealed. The plaintiff contended that the defendant was further liable not only for rent and \$1,000, agreed upon as the cost of replacing the wharf, but also for the difference in value of the property before and after the destruction of the wharf, plus the present cash value of the rent for the remainder of the unexpired term. The court held against this contention, and the plaintiff did not appeal.

[3] The covenant "to maintain the premises in their present condition during the continuance of this lease" is equivalent to a general covenant to repair and leave in repair under the common law. It is well settled by the authorities that under a covenant of this kind, "when the property is destroyed by fire, flood, tempest, or other act of God or the public enemy," it is the duty of the contracting party to rebuild unless relieved therefrom by statute or exceptions specially incorporated in the lease.

The law is thus summed up in 16 R. C. L. title "Landlord and Tenant," § 605:

"It is the well-settled common-law rule that a tenant's general covenant to repair the demised premises binds him under all circumstances, even though the injury proceeds from an act of God, from the elements, or from the act of a stranger, and if he desires to relieve himself from liability for injuries resulting from any of the causes above enumerated, or from any other cause whatever, he must take care to except them from the operation of his covenant. Under this rule, if the tenant enters into an express and unconditional covenant to repair and keep in repair or to surrender the premises in good repair, he is liable for the destruction of buildings not rebuilt by him, though the destruction may have occurred by fire or other accident or by the act of enemies, and without fault on his part."

In 18 A. & E. (2d Ed.) 249, the rule is thus stated:

"A general covenant by the tenant to repair or keep premises in repair includes a covenant to rebuild, and it was settled at an early date that such covenant imposes upon the tenant the obligation to rebuild in case the premises were destroyed."

It is further said that—

"The obligation to rebuild in case of the destruction of the premises imposed by the lessee's covenant to repair exists irrespective of whether the destruction was caused by storm, flood, fire, inevitable accident, or the act of a stranger."

The word "maintain" is practically the same thing as "repair," which means to restore to a sound or good state, after decay, injury, dilapidation, or partial destruction." Railroad v. Bryan (Tex. Civ. App.) 107 S. W. 576, citing Verdin v. St. Louis (Mo.) 27 S. W. 447.

In Railroad v. Iron Co., 118 Tenn. 194, 101 S. W. 414, it was held that, where a railroad company agreed to construct and lay a branch track to the mines of a mining company, and to "maintain and operate the same," the railroad company was obligated to reconstruct a bridge constructed by the mining company after the bridge was washed away by an extraordinary freshet, though the bridge, under the contract, would become the property of the mining company after completion.

In Pasteur v. Jones, 1 N. C. 393, the court held:

"Where a tenant covenanted to build and leave in repair, and did build, but the houses were destroyed by fire, the court of equity would compel him either to rebuild or pay the value of the buildings."

The defendant is not relieved by Revisal, § 1985, which provides:

"An agreement in a lease to repair a demised house shall not be construed to bind the contracting party to rebuild or repair in case the house shall be destroyed or damaged to more than one-half its value, by accidental fire not occurring from the want of ordinary diligence on his part."

This statute was enacted to change the rule formerly existing, but limits its application to the destruction of a house by accidental fire and only then where it is damaged to more than half its value. It does not apply to this case where the destruction is not by fire, but by ice and flood. In 18 A. & E. 307:

"The question as to the liability of the tenant, in case of the accidental destruction of the buildings has chiefly arisen where the buildings have been accidentally burned, but applies equally whatever the causes of their destruction. The tenant is not relieved from future rents though the demised building is destroyed by reason of inherent defects existing at the time of the letting."

The same rule is laid down in 24 Cyc. 1089:

"According to the common-law rule, which has been followed generally in this country a covenant on the part of the lessee to repair or keep in good repair imposes on him an obligation to rebuild the demised premises if they are destroyed during the term by fire or other casualty, even where he is without fault"—citing a large number of cases.

It is pointed out, however, that in some states this rule has been modified by statute.

In this state the only modification has been as above stated in the case of a house destroyed by fire or damaged to more than one half.

As to rent, this court has sustained the common-law rule as to the liability of the tenant therefor, notwithstanding the premises have been destroyed by fire. *Improvement Co. v. Coley-Bardin*, 156 N. C. 257, 72 S. E. 313, 36 L. R. A. (N. S.) 907, where the court said:

"The common law considers such a lease as the one in evidence as the grant of an estate for years, to which the lessee takes title. The lessee is bound to pay the stipulated rent, notwithstanding injury by flood, fire, or other external causes. It required a statute of the state to relieve the lessee where the property is destroyed by fire."

The liability of the defendant for rent is in no wise affected by *Revisal*, § 1992. An inspection of this statute will show that not only is it in terms confined to a demised house or other building, but that it expressly excepts from its provisions those leases in which there is an "agreement respecting repairs." An inspection of the statute will further disclose that by its express terms it requires, as a condition precedent to its application, that a lessee "surrender his estate in the demised premises by a writing to that effect, delivered or tendered to the landlord within ten days from the damage."

It thus appears that the liability for rent upon the part of the defendant is controlled by the rule of the common law unaffected by any statutory provisions.

**Affirmed.**

(179 N. C. 190)

**BELL et ux. v. HARRISON et al. (No. 16.)**

(Supreme Court of North Carolina. Feb. 18, 1920.)

**1. DEEDS ¶211(3) — EVIDENCE SHOWING FRAUD IN PROCURING DEED.**

In an action to set aside a deed, evidence held sufficient to sustain a finding that the defendants procured the deed by fraud.

**2. FRAUD ¶13(3)—UNTRUE STATEMENT MADE RECKLESSLY FRAUDULENT.**

If a party to a bargain avers the existence of a material fact recklessly or affirms its existence positively when he is consciously ignorant whether it be true or false, he may be held responsible for a falsehood, and this doctrine is especially applicable when the parties are not upon equal terms, the one, for instance, being under a duty to investigate and in a position to know the truth, and the other relying and having reasonable ground to rely upon the statements.

**3. CANCELLATION OF INSTRUMENTS ¶4—IF ACTION FOR DAMAGES WOULD LIE FOR DECEIT, SUIT TO CANCEL DEED MAINTAINABLE.**

Where an action for damages will lie for a deceit in the sale of land, a suit in equity, now a civil action, may be maintained to set aside the deed for the fraud.

**4. DEEDS ¶70(1)—ARTIFICES AND CONCEALMENT IN OBTAINING DEED FRAUDULENT.**

Misrepresentation avoiding a deed may be as well by acts as by words, by artifices to mislead as by positive assertions, or the misrepresentations may be by deliberate concealment calculated to deceive and mislead.

**5. DESCENT AND DISTRIBUTION ¶82—TRANSFER OF INTEREST OF HEIR PROCURED BY CO-HEIRS BY FRAUD SET ASIDE.**

Where defendant heirs at the funeral of intestate informed plaintiff heir that they had investigated the estate of the intestate and that the share of each would be about \$1,000, maybe more, maybe less, and induced plaintiff to part and sell them his interest for \$1,000, well knowing that each was entitled to more than \$4,000, and that their statements were relied on, and that plaintiff believed in their integrity, they were guilty of fraud, and court of equity will set aside the transaction.

**6. APPEAL AND ERROR ¶882(12)—PARTY CANNOT COMPLAIN OF INSTRUCTION GIVEN AT HIS REQUEST.**

A party cannot complain of an instruction given at his request.

**7. APPEAL AND ERROR ¶862(4) — JUDGE'S STATEMENT CONFLICTING WITH ASSIGNMENT OF ERROR TAKEN AS TRUE.**

An assignment of error will not be sustained which conflicts with the judge's statement of the case, as such statement must stand in the absence of any correction of the record by certiorari or otherwise.

**8. DESCENT AND DISTRIBUTION ¶82—INADEQUACY OF CONSIDERATION MAY BE CONSIDERED ON QUESTION OF FRAUD.**

In an action by heir against coheirs to set aside a deed upon the ground of fraud, court correctly instructed jury that they might consider inadequacy of consideration upon the question of fraud; alleged fraud being misrepresentation as to value of estate left by an intestate.

**9. APPEAL AND ERROR ¶1068(1)—ERRONEOUS INSTRUCTION HARMLESS.**

If it was error to instruct as to the effect "of a grossly inadequate consideration alone, being a fact from which fraud could be inferred," it was harmless, where it appears that jury based their findings, not alone on inadequacy of consideration, however "gross" it was, but on the allegations of the complaint and the entire evidence supporting them.

Appeal from Superior Court, Camden County; Lyon, Judge.

Action by A. B. Bell and wife against W. B. Harrison and another. Judgment for plaintiffs, and defendants appeal. No error.

This action was brought by plaintiffs to set aside a deed made by them to defendants upon the ground of fraud.

It appeared in evidence that one John G. Gray died intestate on the 12th of September, 1917, seized and possessed of a large estate of both real and personal property, and left surviving him four heirs; the plaintiff inheriting an undivided one-fourth interest in the estate. On the day of Mr. Gray's death, while plaintiff was at the home of Mrs. Harrison (mother of defendants), where Mr. Gray died, for the purpose of attending the funeral, he was approached by the defendant Gregory and told for the first time that his uncle had died intestate, and that he was an heir. Gregory showed him money which he was paying the undertaker, and then called him into another room and told plaintiff he wanted to buy plaintiff's interest. He further stated that they had taken charge of the estate and investigated it, and that he did not think the estate would net above debts and expenses \$4,000, making plaintiff's share not much more than \$1,000, and perhaps not so much, and further that they wished (on account of his mother's health and the effect it might have upon her to let the matter drag along) to close the matter up as quickly as possible. Harrison was called in, informed of what had taken place, and corroborated Gregory's statements as to the investigation and the value, and they offered plaintiff the \$1,000 for his share for quick acceptance.

There was further evidence that plaintiff, having great confidence in defendants, informed them that he did not know about the estate, and that, if they had investigated the matter and thought that was all that was due him, he would take it, of course. He believed and relied upon these statements. Plaintiff knew nothing of the notes, cash, or chattels of the estate, and plaintiff signed the deed in question next day, receiving in payment a note for \$800 and interest and the balance of \$168 in cash. Both note and cash were taken by defendant from the estate, so that plaintiff was paid out of the estate itself. Plaintiff is a man of advanced years, poor health, and limited education, with practically no business experience, and his capacity for trading is below the average.

Six days later defendants paid \$3,000 to plaintiff's sister for exactly the same interests; and four days later Harrison, qualifying as administrator, made affidavit and inventory showing \$2,400 worth of personalty belonging to the estate. Within 30 days the timber from a single tract of land was sold by defendants for \$5,300, and there were practically no debts due by the estate. Its total net value at the time was approximately \$18,000 to \$24,000, and plaintiff's share was therefore \$4,500 to \$6,000.

Gregory and Harrison are half-brothers, sons of Mrs. Susie Harrison, sister of John G. Gray, the intestate, and they are first cousins of A. B. Bell, the plaintiff, whose father was a brother of John G. Gray.

Plaintiff testified as follows:

"I do not recall who was at the house when I got there, but saw Mr. Harrison and Mr. Gregory there. I had not been there over an hour before mention was made to me of my uncle's affairs. At the time I went there I had no information that I would participate in the estate of my uncle. It was first brought up by Mr. Gregory. Q. Tell what was said by him, and how it came up? A. He said, 'Brother John is dead and left no will.' Q. I want to know if you were present when any money was paid to the undertaker? A. Yes; he came out there with three bills in his hands, 20's and a 10, and he came out there and said, 'Do you see that?' and then went on and gave it to the undertaker. Q. Was anything else said by him? A. No. Q. What was the next thing that he did? A. He touched me on the shoulder and said, 'Let me see you a minute;' and I went on down there and went in the house, and got in a room on the south end of the house and locked the door, and then he said he wanted to buy me off, and he said that Brother John had died without a will, and 'our attorney says that you and your sister are half owners in the estate,' and I said, 'Are we?' and he said 'Yes,' and I told him I did not know anything about it, and he said, 'We want to buy you off.' Q. Did Mr. Harrison come in? A. Yes; later; he said, 'We want to buy you off and we have investigated the matter, and I think that \$1,000 is as much as you will get, and we want to close up the matter as quickly as possible on account of Mother [Mrs. Susie Harrison].' He said that it might amount to more than \$1,000, or not quite as much. Q. Why on account of her? A. He said that she was frail, and that it would be the end of her. I had no information about the indebtedness of my uncle, and none at all about the expenses. I said I did not know anything about it. Harrison was not in there then. After he said he would give \$1,000, and I might not get as much, he said, 'I will go back and get Billie and we will talk the matter over.' He [Gregory] says, 'You know that you have had \$2,000, and I [Gregory] have not had a penny, and have been for 30 years a servant, and have had nothing, not even a penny.' I said, 'I will leave the matter to you, and if you have been and investigated it I reckon I will take it.' He then went and got Billie (who is Harrison), and he told Billie what I had agreed on. Mr. Harrison said, 'I think that is a fair proposition.' He mentioned to Harrison what he told me about having taken charge and investigated. He said to Mr. Harrison that he did not think it would exceed over \$1,000, and Mr. Harrison said that he did not think so either. No one else was present. Mr. Gregory said that he did not want to go in court. I said, 'I do not know about the estate, and if you have investigated the matter and think that is all that is due me, of course I will take it.' It is a fact that I had not investigated it, and relied upon them. I had confidence in them, and

we were brother and sister's children. We were always friends. I associated with them. We have always been warm friends, and I had all manner of confidence in them and thought that they would treat me right, because we were boys together and cousins. I believed what they said about it. They told me to keep it a secret and not even to tell my wife when I went home. This was said at the time, before we left the room. I do not know what personal property my uncle had. I knew nothing about the notes. He never said anything about any notes, said nothing about cash. All the cash that I saw was what he brought out there, and he just mentioned that much. I do not know anything about the gas boat that my uncle owned. I knew nothing about his indebtedness. This was on the 13th of September, between 12 and 1 o'clock. I remained until after 2 o'clock, until after the funeral was over. I think Mr. Harrison is a good, ordinary farm man. He had good experience; he had been a steward in the Methodist Church; and I thought he could be relied upon. I had confidence in him. Do not think either one of them had ever lived with their uncle, Mr. Gray. They used to go to the house where he and their mother lived right often, and they were there most every time I went. I went home about sundown. I went home from the burial. The body was still in the house when the conversation took place. Saw them next morning, near 8 o'clock. They were down the road in an automobile, coming to my house. They came there, and I went and got in the automobile and went to the register of deeds' office. The register of deeds had an office in a store in Shiloh, where we went. When we reached the office of Mr. Forbes, the register of deeds of Shiloh, they said we have come to have a deed fixed. I went with them to Mr. Forbes. I only knew the boundaries of the place on one side. It was the piece of land that I had inherited from my grandmother. Mr. Gregory told Mr. Forbes who came to my corner; then I gave the description down to my line. This piece was known as the Flora place. Q. Tell if you signed the deed there. A. Yes. Q. Was anything paid you then? A. No. Q. Was anything said about the note? A. No. Q. What did you do then? A. They went back to my house. Q. All three of you together? A. Yes. Q. Did you see your wife there? A. Yes. Q. Did you go in? A. No. Q. Had you told your wife anything about this trade? A. No; not until I started from the house to the steps in an automobile. She asked me where I was going, and I said I was going to make a deed to them, and I said that they had promised to give \$1,000, and asked her what she thought about it, and about that time I was on the steps and they were hurrying me up. Q. Did you tell her what the estate would net? A. No; I said they would give me \$1,000 for my interest in the estate. Q. Do you remember everything that you said to her? A. That was all that I said to her. Q. When you came back she signed the deed then? A. Yes; we all went in the porch, and Mr. Forbes went in the house, and none of the others. Forbes went in there and she signed the deed, and he came back on the porch, and then Gregory said, 'I guess you just as soon have a good note,' and I

said, 'I don't know that it would make much difference,' and he said, 'I have got two, one due this January and one next,' and I said, 'If I have to take either one, give me the one due this January.' Q. Did you look at the note? A. No. Q. Did you know the signers of the note? A. No. Q. Did you know anything about the signatures to the note? A. No; he just said that it was a good note. Q. How much cash did he pay you? A. \$168. Q. The note belonged to the estate of John Gray? A. Yes."

There was much evidence offered on both sides upon the issue of fraud. The jury returned the following verdict:

"(1) Was the deed dated September 14, 1917, obtained by the defendants, or either of them, by fraud, as alleged in the complaint? A. Yes."

Judgment for plaintiffs, and defendants appealed.

W. I. Halstead, of South Mills, Thompson & Wilson and Aydlott & Sawyer, all of Elizabeth City, for appellants.

D. H. Tillitt, of Camden, and Ehringhaus & Small, of Elizabeth City, for appellees.

WALKER, J. (after stating the facts as above). [1] There was ample evidence to support the finding of the jury that the deed executed by the plaintiffs to the defendants was obtained by fraud; that is, that defendants falsely represented to the plaintiff A. B. Bell the value of the estate with the intention of inducing him to part with his share of it at a greatly reduced price, and that he was persuaded to do so by reasonably acting upon the representations which he believed to be true. The defendants stated to him that they had investigated the affairs of the estate which they had in charge and knew its value. The jury could well infer that they intended to take advantage of his known ignorance of the true situation, and to mislead him as to the correct value of his interest in the estate, with a view to acquire it for their own benefit at an undervalue. There is evidence that he placed full confidence in what they said to him about the value of the estate, and this they well knew, and took advantage of it, and of his ignorance and lack of business judgment and capacity to make a large profit on the transaction. He seems to have been an easy prey to their allurements, and to have quickly succumbed to their insidious practices and deceptive inducements. It must be done at once, they said to him, so as not to worry their mother, Mrs. Harrison, and he was asked not to tell any one of it, not even his wife. This was done to prevent detection of their scheme to defraud him by his consulting others wiser than he, and whose advice might defeat their purpose. For this reason, too, they started early to lay their plans, even before the burial of the intestate.

If the jury believed the plaintiffs' witnesses, as it appears was the case, it was rather a bold case of fraud.

[2] The case in its main and essential features is not, in principle at least, unlike *Walsh v. Hall*, 66 N. C. 233; *Hodges v. Wilson*, 165 N. C. 323, 81 S. E. 340; *Dixon v. Green*, 178 N. C. 205, 100 S. E. 262; *Modlin v. Railroad Co.*, 145 N. C. 218, 58 S. E. 1075; *Whitehurst v. Insurance Co.*, 149 N. C. 273, 62 S. E. 1067; *Sprinkle v. Wellborn*, 140 N. C. 163, 52 S. E. 666, 3 L. R. A. (N. S.) 174, 111 Am. St. Rep. 827; *Griffin v. Lumber Co.*, 140 N. C. 514, 53 S. E. 307, 6 L. R. A. (N. S.) 463. It was said in the *Whitehurst* Case that it is not always required for the establishment of actionable fraud that a false representation should be knowingly made. It is well recognized with us that, under certain conditions and circumstances, if a party to a bargain avers the existence of a material fact recklessly, or affirms its existence positively, when he is consciously ignorant whether it be true or false, he may be held responsible for a falsehood; and this doctrine is especially applicable when the parties to a bargain are not upon equal terms with reference to the representation, the one, for instance, being under a duty to investigate, and in a position to know the truth, and the other relying and having reasonable ground to rely upon the statements as importing verity—citing *Modlin v. Railroad Co.*, supra; *Ramsey v. Wallace*, 100 N. C. 75, 6 S. E. 638; *Cooper v. Schlesinger*, 111 U. S. 148, 4 Sup. Ct. 360, 28 L. Ed. 382; *Pollock on Torts* (7th Ed.) 276; *Smith on Fraud*, 3; *Kerr on Fraud and Mistake*, 68. And it is further held there, on the authority of *Pollock on Torts*, supra, that in order to create a right of action for deceit, there must be a statement made by the defendant, or the person charged with the fraud, and with regard to that statement the following conditions or elements must be present and concur: It must be untrue in fact; the person making the statement, or the person responsible for it, must either know it to be untrue, or be culpably ignorant (that is recklessly and consciously ignorant), whether it be true or not; it must be made with the intent that the other party should act upon it, or in a manner apparently fitted for that purpose, or calculated to induce him to so act, and finally that he does act in reliance on the statement in the manner contemplated, or manifestly probable, and thereby suffers damage. And *Smith on Frauds*, supra, is quoted in support of the principle as follows:

"The false representation of a fact which materially affects the value of the contract, and which is peculiarly within the knowledge of the person making it, and in respect to which the other party, in the exercise of proper vigilance, had not an equal opportunity of ascertaining the truth, is fraudulent. Thus representations made

by a vendor to a purchaser of matters within his own peculiar knowledge, whereby the purchaser is injured, is a fraud which is actionable. Where facts are not equally known to both sides, a statement of opinion by one who knows the facts best involves very often a statement of a material fact; for he impliedly states that he knows facts which justify his opinion."

*Kerr on Fraud and Mistake*, supra, refers to the doctrine in this language:

"A misrepresentation, however, is a fraud at law, although made innocently, and with an honest belief in its truth, if it be made by a man who ought in the due discharge of his duty to have known the truth, or who formerly knew, and ought to have remembered, the fact which negatives the representation, and be made under such circumstances or in such a way as to induce a reasonable man to believe that it was true, and was meant to be acted on, and has been acted on by him, accordingly, to his prejudice. If a duty is cast upon a man to know the truth, and he makes a representation in such a way as to induce a reasonable man to believe that it is true, and is meant to be acted on, he cannot be heard to say, if the representation proves to be untrue, that he believed it to be true, and made the misstatement through mistake, or ignorance, or forgetfulness."

[3-5] The general rule seems to be established in recent years that, where an action for damages will lie for a deceit, in the sale of land, a suit in equity, now a civil action, may be maintained to set aside the deed for the fraud. It is so held in *Walsh v. Hall*, supra, which is approved in *Griffin v. Lumber Co.*, supra, where the court said:

"Whatever doubt may have existed in regard to the right to maintain an action for deceit relating to contracts for the sale of land respecting acreage, title, etc., is removed by the decision in *Walsh v. Hall*, 66 N. C. 233. *Dick, J.*, after noting the general rule of caveat emptor, says: 'But in cases of positive fraud a different rule applies. \* \* \* The law does not require a prudent man to deal with every one as a rascal, and demand covenants to guard against the falsehood of every representation which may be made as to facts which constitute material inducements to a contract. \* \* \* If representations are made by one party to a trade which may be reasonably relied upon by the other party, and they constitute a material inducement to the contract, and such representations are false within the knowledge of the party making them, and they cause loss and damage to the party relying on them, and he has acted with ordinary prudence in the matter, he is entitled to relief in any court of justice.'"

The rule as to actionable deceit was originally stated in *Pasley v. Freeman*, 3 Term Rep. 51, 2 *Smith's Leading Cases* (5th Am. Ed.) Marg. 55, as follows:

"A false affirmation, made by the defendant with intent to defraud the plaintiff, whereby the plaintiff receives damages, is the ground of an action upon the case in the nature of de-

ceit. In such an action it is not necessary that the defendant should be benefited by the deceit, or that he should collude with the person who is."

Chancellor Kent said of the rule, as thus stated, that the case went not upon any new ground, but upon the application of a principle of natural justice, long recognized in the law, that fraud or deceit, accompanied with damage, is a good cause of action, and that it is as just and permanent a principle as any in our whole jurisprudence. And the doctrine is equally well settled in equity that fraud will avoid a contract when a party is misled without his fault, and to his prejudice, by the dishonest practices of another to his prejudice, which were calculated and expected to deceive him, into acting imprudently. The rule is clearly stated by another court which held that fraud in the procurement of a contract avoids it; and where a party intentionally or by design misrepresents a material fact or produces a false impression in order to mislead another or to intrap or cheat him or to obtain an undue advantage over him, in every such case there is positive fraud in the truest sense of the term—there is an evil act with an evil intent—and the misrepresentation may be as well by deeds and acts as by words, by artifices to mislead as by positive assertions. *Tolley v. Poteet*, 62 W. Va. 231, 57 S. E. 811. See, also, *Butler v. Watkins*, 18 Wall. 456, 20 L. Ed. 629; *Laidlaw v. Organ*, 2 Wheat. 178, 4 L. Ed. 214. In a court of conscience a deliberate falsehood, or deliberate concealment, it being equivalent thereto, as to a material element in the contract of sale, which is calculated to deceive and mislead another into making the same, and so intended, will induce the court to intervene in behalf of the injured party to prevent a consummation of the fraud or to restore his rights to him. *Crosby v. Buchanan*, 23 Wall. 420, 23 L. Ed. 188. It will be observed that in some of the cases we have cited the courts were dealing with a fraudulent concealment of material facts where the offending party was under a duty or obligation to disclose them to the other contracting party, but this case is stronger than those, because here the representation of value was knowingly false and actually misled the plaintiff into conveying his interest in the estate to the defendants, whereby he lost, and they gained, a large sum. It is a clear case of fraudulent deception and circumvention, if we accept the evidence of the plaintiffs as true, which the jury did. The plaintiff had no substantial knowledge of the facts in regard to the value of the estate, and defendants knew that he was ignorant of it. They took advantage

of this ignorance by misleading him as to its true value, stating in order to inspire confidence in them that they had actually investigated the matter and knew what it was worth, and hurried him into acting, so that he could not acquire correct information of its value before signing the deed, or take the advice of his friends. They will not be heard to say, under the circumstances, that he should not have believed or trusted them, for they were stating positively a fact as within their knowledge, and he, having confidence in their integrity, as he stated, relied upon their statement and was thereby prevented from making any investigation in his own behalf. They were shrewd traders, and he was not, having had little or no experience in business affairs. As the jury evidently found the facts to be, a case of intentional fraud was completely made out, and the charge in respect to that feature was correct, and the court gave all the instructions to which defendants were entitled.

[6, 7] In regard to the instruction as to the effect "of a grossly inadequate consideration alone being a fact from which fraud could be inferred," if it be true, when the whole charge is considered, that the court so instructed the jury, and that it was erroneous to do so, the record shows that the court was responding to a request from the defendants as to what would constitute such a consideration and as to its effect upon the question of fraud, and its sufficiency, of itself, to show fraud. A party cannot complain of an instruction given at his own request; nor will an assignment of error be sustained which conflicts with the statement of the case upon the question whether the instruction was so given. The judge's statement as to what was done must stand, in the absence of any correction of the record by certiorari or otherwise.

[8, 9] The court correctly told the jury that they might consider the inadequacy of the consideration upon the question of fraud. *Hodges v. Wilson*, supra, and the jury, it would appear, based their finding, not alone upon the inadequacy of consideration, however "gross" it was, but upon the allegations of the complaint and the entire evidence supporting them, so that it is found that the false representations were made by defendants with intent to deceive the plaintiff, who was induced thereby to convey his land to them for an inadequate consideration, and in that view, if the instruction had been given by the judge without any request from defendants, and was erroneous, it did no harm.

We have carefully reviewed this case, and find no error therein of which the defendants can justly complain.

No error.



(179 N. C. 211, 637)

(102 S.E.)

**ENGLISH LUMBER CO. v. WACHOVIA BANK & TRUST CO. (No. 537.)****(Supreme Court of North Carolina. Feb. 18, 1920. On Petition to Rehear, June 2, 1920.)****1. APPEAL AND ERROR ¶268(2) — FINDINGS OF FACT CONCLUSIVE IN ABSENCE OF EXCEPTION TO SUFFICIENCY OF EVIDENCE.**

The findings of fact by the trial court are conclusive on appeal, where there is no exception that there is no evidence to support them.

**2. USURY ¶18, 55—COMMISSIONS AND RETENTION OF PART OF ADVANCE ON DEPOSIT OBTAINING MORE THAN SIX PER CENT. INTEREST USURIOUS.**

A commission charged for the purpose of securing more than 6 per cent. interest, or an agreement requiring a borrower to keep on deposit a part of the money advanced, or to pay interest on the deficiency not left on deposit, in addition to a charge of 6 per cent. interest, constitutes usury.

**3. LIMITATION OF ACTIONS ¶54(2, 3) — EXTENSION OF CREDIT AND LOANS CONSTITUTED A MUTUAL RUNNING ACCOUNT; STATUTE RUNS FROM LAST ITEM OF MUTUAL ACCOUNT.**

Where there were almost daily transactions in the nature of loans or credits allowed by a bank, taken up by substituted notes, substituted demand notes on customers' paper as collateral, and on discounted customers' paper, all covered by an agreement as to a line of credit agreed upon from time to time which was kept exhausted by the borrower, transactions being of practically daily frequency, each party keeping the whole of the accounts, the mutual items being so interlocked as to make them practically inseparable, there was an open, mutual running account to the close of the transactions, upon which limitations would not run until the final item.

**4. LIMITATION OF ACTIONS ¶49(8)—RULE AS TO OPEN, MUTUAL RUNNING ACCOUNTS APPLICABLE TO ACTIONS TO RECOVER PENALTY FOR USURY.**

The rule that a statute of limitations does not begin to run on open, mutual running accounts, except from the last item in the account, applies to an action to recover a penalty for usury, and Revisal 1905, § 396, subsec. 2, does not bar such an action until two years after the last item.

Brown, J., dissenting.

Appeal from Superior Court, Buncombe County; Ray, Judge.

Action by the English Lumber Company against the Wachovia Bank & Trust Company. Judgment for plaintiff, and defendant appeals. Affirmed.

This is an action to recover the penalty for usurious interest alleged to have been paid by the plaintiff to the defendant.

The defendant denied that usury was charged or paid, and pleaded the statute of limitations.

A reference was ordered, and upon the report being made, which was in favor of the defendant, exceptions were filed by the plaintiff, and upon the hearing the material findings of fact and conclusions of law of the referee were reversed, additional findings made by the court, and judgment rendered in favor of the plaintiff, and the defendant excepted and appealed.

It appears from the findings of fact made by the court:

That in 1909 the plaintiff was engaged in the lumber business with its principal office in Asheville, and that in that year it began business with the defendant bank. "That on March 20, 1909, it was agreed between the parties that a line of credit should be allowed to plaintiff by defendant bank on different classes of paper discussed, but each item in each class be subject to approval by defendant bank, of \$20,000, which line of credit on the various classes was, by agreement between the parties, extended to more than \$30,000, through the period of the transactions between the parties, and it was part of the agreement that the defendant bank would accept such of the plaintiff's paper as it approved of various classes, to the extent of the line of credit agreed upon from time to time, the plaintiff being required to pay 6 per cent. interest for such money as it borrowed and being required by the agreement to keep in the bank 20 per cent. of the amount of the loans obtained from the bank on its customers' notes discounted and on the personal loans. It is found that the plaintiff did not keep an average of 20 per cent. in the bank, as agreed to, up to the beginning of the month of June, 1909; but it is found that in consequence of said agreement the plaintiff did keep and maintain a balance of the money so borrowed, and attempted to keep 20 per cent., and, the exact amount not being ascertainable from this record, the defendant's estimate of not more than 6 per cent. is accepted by this court; and the court finds that as much as 6 per cent. monthly average was kept in said bank in consequence of said agreement up to the 1st of June, 1911, and by agreement between the parties, on the complaint of the bank that the average promised was not left, the defendant bank actually charged the interest upon the deficit, the amount of which for the different periods there shown is in the sum of \$216.65. That this agreement to maintain 20 per cent. balance on loans related to direct loans to the plaintiff on its own paper and on customers' notes discounted, but did not relate to demand loans on assigned accounts."

(3) That the plaintiff opened an account and began business with the defendant bank in March, 1909, and began to discount its customers' notes or paper, pursuant to an arrangement made at the time with the defendant bank, and continued same thenceforward, until it closed its business dealings with the defendant, in 1913.

(4) That said plaintiff, beginning about September 2, 1909, and continuing thenceforward until the close of its business dealings with the defendant bank, borrowed money from the defendant on its assigned invoices, or accounts re-

ceivable, as collateral security, from time to time, as its necessities required, and as shown in Exhibit A, as corrected by agreement of the parties, and agreed to pay, and did pay, and the defendant bank did receive, from the plaintiff, in addition to the 6 per cent. charged for the loan of the money, a charge of 1 per cent. upon 50 per cent. of the face value of said accounts receivable, or invoices, so assigned, handled or collected by said bank, and continued to make and collect this additional charge from the date hereinbefore in this section mentioned, until January, 1910, when the charge was reduced to two-thirds of 1 per cent. upon the face value of said assigned accounts receivable, or invoices, and said loans thenceforward were limited in amount to two-thirds of the face value of said accounts. That on a large portion of the transactions as shown by Exhibit A, to which this paragraph relates, the charge which was originally 1 per cent. on the face of the invoice and later two-thirds of 1 per cent., was often greater than the interest expected or received. That the accounts were, in at least 90 per cent. of the cases, promptly paid, were generally known and easily ascertained to be solvent, were guaranteed by plaintiff and required very little, if any, more attention than collateral loans upon other classes of paper; and said agreement was proposed by the plaintiff in order to get the accommodation of the loan, and the loan was granted because of the profit derived from the charge of the commission, which was an unreasonable charge and was an attempted device by which the bank would receive a greater than 6 per cent. income from its loans as the condition for making such loans. That there were almost daily transactions in the nature of loans or credits allowed by the bank, taken up by substituted notes, substituted demand notes on customers' paper, all collateral, and on discounted customers' paper, all covered by the agreement as to the line of credit, which line of credit agreed upon from time to time was kept exhausted by the plaintiff, transactions being of practically daily frequency, each party keeping the whole of the accounts, the mutual items being so interlocked as to make them practically inseparable. So that it was, and was assumed to be, an open mutual running account from March 1, 1909, to the close of the transactions; the final settlement and payments being on November 4, 1914.

There are other findings, but those set out are sufficient to a proper understanding of the legal questions presented.

The action was commenced more than two years after the date of most of the items in the account and within less than two years from the date of the final settlement.

His honor held that the account between plaintiff and defendant was a mutual running account, and that the statute did not begin to run until the last payment made by defendant.

Bourne & Parker and Theo. F. Davidson, all of Asheville, for appellant.

B. S. McCall, of Asheville, Pless & Winborne, of Marion, and Murray Allen, of Raleigh, for appellee.

ALLEN, J. [1] The findings of fact by the court are conclusive upon us, as there is no exception that there is no evidence to support them (*Eggers v. Stanbury*, 177 N. C. 85, 97 S. E. 619), and they make out a case of usury against the defendant.

[2] It is found as a fact that the charge of commissions of 1 per cent. at one time and  $\frac{2}{3}$  of 1 per cent. at another "was an attempted device by which the bank would receive a greater than 6 per cent. income from its loans as the conditions for making such loans," which comes directly within the authority of *Arrington v. Goodrich*, 95 N. C. 467, which holds that a commission charged for the purpose of securing more than 6 per cent. interest was usurious, and the agreement requiring the plaintiff to keep on deposit a part of the money advanced, or to pay interest on the deficiency, in addition to a charge of 6 per cent. interest, is expressly condemned in *Bank v. Wysong & Miles Co.*, 177 N. C. 388, 99 S. E. 199, where the principle is fully discussed with ample citation of authority in support of the opinion.

[3] The remaining question is as to the correctness of the ruling on the statute of limitations, and this also is practically foreclosed against the defendant by the finding that—

There were "almost daily transactions in the nature of loans or credits allowed by the bank, taken up by substituted notes, substituted demand notes on customers' paper as collateral, and on discounted customers' paper, all covered by the agreement as to the line of credit, which line of credit agreed upon from time to time was kept exhausted by the plaintiff, transactions being of practically daily frequency, each party keeping the whole of the accounts, the mutual items being so interlocked as to make them practically inseparable. So that it was, and was assumed to be, an open mutual running account from March 1, 1909, to the close of the transactions, the final settlement and payments being on November 4, 1914."

This brings the accounts between the plaintiff and defendant within the definition of a mutual running account as contained in *Hollingsworth v. Allen*, 176 N. C. 630, 97 S. E. 625, and other cases, and the statute of limitations does not begin to run on such accounts except from the last item in the account. *Green v. Caldcleugh*, 18 N. C. 323, 28 Am. Dec. 567; *Stokes v. Taylor*, 104 N. C. 399, 10 S. E. 566; *Stancell v. Burgwyn*, 124 N. C. 71, 32 S. E. 878.

[4] The principle is applicable to statutes of limitations generally, and, as there is no exception of an action to recover the penalty, and as the right to bring such action is controlled by our statute of limitations (Rev. § 396, subsec. 2), which provides that "an action to recover the penalty for usury" shall be brought within two years, it must be held that it applies to such actions, and it has been so held in other jurisdictions.

In *Webb on Usury*, § 209, the course of dealing between the plaintiff and defendant is described with much accuracy and the conclusion reached that the lapse of time is not a bar. The author says:

"In all cases regard must be had for the statute of limitation which, as will be seen, upon subsequent pages, may determine all the rights of the parties to the contract, including the debtor's right to apply his payments. But neither lapse of time nor the statute of limitation will affect a case where the transaction was a continued one. 'New dealings, new advances, new securities for money, mortgages upon the estate of the complainant, and some of the claims outstanding and unsettled, at the time of filing the bill, when taken together make out a case which neither time nor the statute of limitation can affect.'"

Again in *Slover v. Bank*, 115 Tenn. 347, 89 S. W. 399, 1 L. R. A. (N. S.) 528:

"The bill was filed to collect usury upon a series of transactions on the 20th of March, 1905. It charges that the last usurious interest was paid on the 1st of March, 1901, and that there was a final settlement between the parties on the 4th of March, 1902, of all the transactions between them involving the usury.

"There was a demurrer filed, relying upon the statute of two years and the statute of six years; and it was insisted in this court that the demurrer should have been sustained on the ground that the action was barred by the statute of two years.

"There being a series of usurious transactions, the statute of limitations would not begin to run until these transactions were closed; and a settlement was made between the parties on the 4th of March, 1902."

In *Pickett v. Bank*, 32 Ark. 346, at page 356, it appeared that the firm of Wormley, Joy & Co., of which Pickett was a member, had opened a bank account with the Merchants' National Bank of Memphis, with whom they had a running account for moneys loaned and checks paid, and credits for deposits and payments. The court held that this account, which commenced in 1866 and continued to 1868, constituted but one transaction. In the opinion in this case it is said:

"So held under like circumstances by the Supreme Court of Tennessee, in the cases of *Weatherhead v. Boyers*, 7 Yerger, 545, and *Boyers v. Boddie*, 3 Humph. 666. In the first-mentioned case Mr. Justice Peck said: 'The transaction was a continued one; new dealings, new advances, new securities for money, \* \* \* when taken, make a case where neither time nor the statute of limitation can have effect.' The defense was usury; the precise question, as to the time when the statute bar commenced, the transaction of advancements, payments, and settlements, extended for several years, and was held to be one transaction."

We therefore conclude that the cause of action is not barred.

Affirmed.

BROWN, J. (dissenting). I cannot agree with my Associates upon the judgment rendered as I am of the opinion that the penalties recovered in this case are barred by the statute of limitations.

#### Petition of Defendant to Rehear.

HOKE and ALLEN, JJ. We have re-examined this case with care, and see no sufficient reason for changing the former judgment of the court. It is not a case of disconnected transactions between a bank and its customer, but one of a mutual running account, based on one agreement for a line of credit, and where both parties kept one account showing debits and credits. The judge finds:

"That there were almost daily transactions in the nature of loans or credits allowed by the bank, taken up by substituted notes, substituted demand notes on customers' paper, all collateral, and on discounted customers' paper, all covered by the agreement as to the line of credit, which line of credit agreed upon from time to time was kept exhausted by the plaintiff, transactions being of practically daily frequency, each party keeping the whole of the accounts, the mutual items being so interlocked as to make them practically inseparable. So that it was, and was assumed to be, an open mutual running account from March 1, 1909, to the close of the transactions; the final settlement and payments being on November 4, 1914."

This order and the interpretation of the former opinion are approved by the court.

Petition denied.

(179 N. C. 204)  
RICKS v. BROOKS et al. (No. 64.)

(Supreme Court of North Carolina. Feb. 13, 1920.)

#### 1. QUIETING TITLE $\S$ 44(3)—INVALIDITY OF FORECLOSURE DEED NEED NOT BE SHOWN BY CONVINCING EVIDENCE.

In action to determine title to land and to remove a cloud from plaintiff's title, under Revisal 1905, § 1589, involving validity of a foreclosure deed under which defendants claimed title, plaintiff was not required to prove case by clear, strong, and convincing evidence.

#### 2. REFORMATION OF INSTRUMENTS $\S$ 45(1)—BURDEN OF PROOF MUST BE CLEAR AND CONVINCING.

In an action for reformation plaintiff must allege and show by clear, strong, and convincing evidence that instrument sought to be corrected failed to express the true agreement of the parties because of a mutual mistake, or because of mistake of one induced by fraud or inequitable conduct of the other, and that by reason of ignorance, mistake, fraud, or undue

advantage something material has been inserted or omitted contrary to such agreement and the intention of the parties.

**3. MORTGAGES** ¶351, 372(3) — FORECLOSURE DEED AFTER SALE ON DATE OTHER THAN THAT ADVERTISED VOID; VOID FORECLOSURE DEED PASSES MORTGAGOR'S RIGHTS TO GRANTEEES.

Where a mortgage foreclosure sale was held on the day preceding that for which it was advertised, and not on advertised day, the foreclosure deed was void, under Revisal 1905, § 641, as to mortgagor's heirs, except in so far as it passed mortgagee's rights to grantees.

**4. PLEADING** ¶406(5) — DEFECT IN STATEMENT OF CAUSE OF ACTION WAIVED BY FAILURE TO DEMUR OR MOVE FOR MORE CERTAIN STATEMENT.

There is a wide difference between the statement of a defective cause of action, that is, when no cause of action is stated, and the defective statement of a cause of action; and where statement is merely defective the defect is waived, if there is no request to have the pleading made more certain or definite, and no demurrer is interposed thereto.

**5. PLEADING** ¶408(2) — DEFECTIVE STATEMENT OF CAUSE OF ACTION MAY BE AIDED BY ANSWER.

A defect in the statement of cause of action may be aided by answer, if sufficient matter appears therein for such purpose.

**6. APPEAL AND ERROR** ¶888(2) — WHEN SUPREME COURT WILL NOT DISMISS CASE FOR DEFECTIVE STATEMENT OF CAUSE OF ACTION.

Where defendant did not ask to have complaint made more definite and certain, under Revisal 1905, § 496, and answer actually supplied the omission, the Supreme Court, on appeal from judgment for plaintiff on the merits, will not dismiss the case, under Pell's Revisal, § 509, but if necessary will allow plaintiff to amend so as to conform the pleadings to the facts proved, where amendment will not change substantially the cause of action, under Revisal 1905, § 507.

**7. PLEADING** ¶34(1) — TO BE LIBERALLY CONSTRUED.

Pleadings should be liberally construed for the purpose of determining their effect and with a view to substantial justice between the parties, under Revisal 1905, § 495.

**8. QUIETING TITLE** ¶43 — PLAINTIFF MAY ATTACK ANY DEED IN DEFENDANT'S CHAIN OF TITLE AS INVALID.

In action to determine title of land, or to remove cloud from title, under Revisal 1905, § 1589, it was competent for plaintiff to attack any deed in defendant's chain of title as invalid in law because of want of capacity or power to make it.

**9. PLEADING** ¶367(2) — REMEDY FOR COMPLAINT BEING TOO MEAGER IN ITS ALLEGATIONS IS MOTION TO HAVE IT MADE MORE DEFINITE AND CERTAIN.

If a defendant finds allegations of complaint too meager, his remedy is to ask that it be made more definite and certain by amendment, under Revisal 1905, § 496.

**Appeal from Superior Court, Nash County; Devin, Judge.**

Action by Donnie Ricks against Mrs. R. U. Brooks and others. Judgment for plaintiff, and defendants except and appeal. Affirmed.

This is an action under the statute (Revisal, § 1589) to try and determine the title to land, or to remove a cloud from the title of plaintiff to an undivided interest in a certain tract of land; the defendants claiming the same by virtue of a foreclosure sale and deed under a power contained in a mortgage deed and mesne conveyances.

In 1905 Louis Ricks died seized and possessed of a tract of land in Nash county containing 218 acres. In his will, duly probated, he devised this land to his wife, Lucinda Ricks, for life, with remainder to the plaintiff and his brothers and sisters, one-ninth each.

In 1906 the plaintiff and four of his brothers each executed a mortgage and crop lien to the Brooks Mercantile Company, covering their respective interests in said tract of land.

In July, 1911, R. U. Brooks, president of Brooks Mercantile Company, acting in the name of the corporation, which was then in process of dissolution, sold the land under the power contained in the mortgages, and executed deeds to B. A. Brooks, his son and the attorney of the corporation, for plaintiff's interest in the land. The total consideration recited in the five deeds exceeded \$1,500. At the same time B. A. Brooks reconveyed all five interests in one deed to R. U. Brooks for a recited consideration of \$1,000. No consideration was actually paid for the transfer, and the plaintiff was not credited with any of the proceeds of the sale.

The alleged foreclosure deed recited that sale of said premises was had on Monday, March 12, 1907. The notice of sale published in the Nashville Graphic the week prior to the alleged sale named March 12th as the sale date; the notice as to the sale of the interest of Jonas Ricks named Tuesday, March 12, 1907, as the sale date. March 12, 1907, was on Tuesday, and the sale was made on the preceding day, March 11, 1907. There was no advertisement or notice of a sale on March 11th, which was Monday. All the conveyances are duly recorded and are admitted to be regular in form and sufficient to convey the premises in question.

R. U. Brooks devised the interest in the land acquired by him under these deeds to the defendants, his children and heirs-at-law, and the defendants in their answer set up and allege title under the foreclosure deeds and the will.

The plaintiff, in 1918, brought this suit and filed his complaint claiming that he was still the owner of the one-ninth interest in the lands and that defendants were claiming some interest unknown to him in the same,

which constituted a cloud upon his title, and asked to have the same removed. The defendants answered, admitting that plaintiff once owned a one-ninth interest in the lands, but that they, through mesne conveyances from the plaintiff himself, were now the owners of the interest which had formerly belonged to the plaintiff.

The cause was tried by the court and a jury, and plaintiff offered in evidence the will of his father conveying to him the land and the admission in the answer that he did acquire said interest through his father's will, and rested. The defendants offered in evidence the mortgage from plaintiff to Brooks Mercantile Company the foreclosure deed to B. A. Brooks, and the deed from B. A. Brooks to R. U. Brooks, and it was admitted that defendants are the devisees of R. U. Brooks. The court then held that this shifted the burden of proof to plaintiff to "show by the evidence and the greater weight thereof that the foreclosure deed, which is regular and valid upon its face, is in fact inoperative as a deed, or is operative in law only as an equitable transfer of the mortgage, as he alleges same to be." The evidence offered by the plaintiff to show that said deed was inoperative was admitted, as shown by the exceptions, over defendants' objections.

The jury found that the deeds from the Brooks Mercantile Company to B. A. Brooks and from him to R. U. Brooks are void as to plaintiff, and the court held that they constituted only an equitable assignment of the mortgage given by plaintiff to the Brooks Mercantile Company. It was thereupon adjudged that the debt due by plaintiff be ascertained, and that if it is not paid the plaintiff's interest in the land be sold for its payment, etc. Defendants excepted and appealed.

E. B. Grantham, of Rocky Mount, and G. W. Taylor, of Whitakers, for appellants.

F. S. Spruill and M. V. Barnhill, both of Rocky Mount, for appellee.

WALKER, J. (after stating the facts as above). [1, 2] We may as well state in the beginning that this is not an action for the correction of a deed or for its reformation, and the doctrine as to the quantity of proof required in such a case does not apply, and the contention of the defendant in this respect cannot be sustained. In an action for reformation it must be alleged and shown by evidence clear, strong, and convincing, that the instrument sought to be corrected failed to express the true agreement of the parties because of a mistake common to both parties, or because of the mistake of one party induced by the fraud or inequitable conduct of the other party, and that by reason of ignorance, mistake, fraud, or undue ad-

vantage something material has been inserted, or omitted, contrary to such agreement and the intention of the parties. Ray v. Patterson, 170 N. C. 226, 87 S. E. 212; Newton v. Clark, 174 N. C. 393, 93 S. E. 951. But this rule does not apply where the purpose is not to reform but to set aside the instrument for fraud, undue influence, or upon other equitable ground. Poe v. Smith, 172 N. C. 67, 89 S. E. 1003, and Boone v. Lee, 175 N. C. 383, 95 S. E. 659, citing Harding v. Long, 103 N. C. 1, 9 S. E. 445, 14 Am. St. Rep. 775, and other cases.

[3] The plaintiff asserts that the whole transaction was but a fraudulent attempt to deprive him of his land, and not a genuine and bona fide effort to foreclose the mortgage by sale under the power in order to pay the debt secured thereby. The relief asked and given was that the deeds, as conveyances of his interest in the land, be set aside or annulled, agreeing, though, that they are valid for the purpose of transferring the interest of the Brooks Mercantile Company as mortgagee, or to subrogate the grantees in their deed to its rights as such. This is all that was done except that the court ordered an account to be taken of the debt and if it is not paid that further relief be granted for its payment. But these deeds are void as to plaintiff, except as passing the right of the Brooks Mercantile Company upon another ground, because it appears that the sale of the land was advertised to take place on Tuesday, the 12th day of March, when in fact it was made on Monday, the 11th of that month. The sale that was advertised never did take place, while the one that was actually made was not advertised at all; or, to put it in another way, the advertised sale was abandoned by failing to make it on the day named, while there was no notice given as to the one made on Monday, the 11th of March. Both the mortgage in this case and the statute (Revisal, § 641) contemplated necessarily that the sale be made on the day named in the advertisement; otherwise there might not be any competitive bidding.

The following was held to be the law in Eubanks v. Becton, 158 N. C. 231, 73 S. E. 1009, as stated in the syllabus:

(1) "When a power of sale is given in a mortgage, a strict compliance with the terms on which it is to be exercised is necessary; and when it is prescribed that the notice of sale be posted at the courthouse door and four other public places, a sale thereunder is invalid if the notice is posted at the courthouse door and three other public places. The effect of Revisal, § 641, was not before the court in this case, and it was not construed."

(2) "A purchaser at a sale of lands under a mortgage with power of sale is a purchaser with notice of the terms under which the power of sale, as therein expressed, must be exercised, and his deed is invalid when the terms of

sale of the mortgage antedating Revisal, § 641, are not in strictness pursued."

(3) "In order to waive an irregularity in the exercise of the power of sale contained in a mortgage, it is necessary that the acts alleged as a waiver be committed with the knowledge of the one who does them; and a mortgagor after an invalid sale for failure of the mortgagee to strictly observe the terms thereof, without knowledge of the irregularity, does not waive it by subsequently renting the lands from the purchaser."

(4) "A deed of mortgaged lands made to a purchaser at a foreclosure sale, which is inoperative, is valid only as an equitable assignment of the note and mortgage, and the mortgagor, nothing else appearing, is entitled to an accounting."

That case resembles this one in several of its features. See, also, *Mayers v. Carter*, 87 N. C. 146; 1 *Wiltse on Mortgage Foreclosure* (3d Ed.) § 318. The mortgagee's deed recites the fact that the sale was made on Monday, and this accords with the proof in the case.

[4-6] As to the position taken by the appellant that the complaint does not state a cause of action, upon which he bases a motion, in this court, to dismiss the case, we are of the opinion that a cause of action is stated, though defectively. There is a wide difference between the statement of a defective cause of action, that is, when no cause of action is stated, and the defective statement of a cause of action. *Johnson v. Finch*, 93 N. C. 205; *Wilson v. Sykes*, 84 N. C. 215. In the latter case, if there is no request to have the pleading made more certain or definite and no demurrer, the defective statement is waived, and if an answer is filed, the defect in stating the cause of action may be aided thereby if sufficient matter appear therein for the purpose. *Garrett v. Trotter*, 65 N. C. 430. We cannot grant the motion to dismiss, but, if necessary, would allow plaintiff to amend so as to conform the pleading to the facts proved, as such would not change substantially the cause of action. Revisal, § 507. In proper cases we may dismiss in this court, but this is not a case which calls for the exercise of the power.

"The court or judge thereof shall, in every stage of the action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." 1 *Pell's Revisal*, § 509, and note, in which the cases are cited.

[7] Pleadings should be liberally construed for the purpose of determining their effect and with a view to substantial justice between the parties. Revisal, § 495; *Blackmore v. Winders*, 144 N. C. 212, 56 S. E. 874; *Brewer v. Wynne*, 154 N. C. 467, 70 S. E.

947; *Muse v. Motor Co.*, 175 N. C. 466, 95 S. E. 900.

[8] It was competent for plaintiff to attack any deed in defendants' chain of title as invalid in law, because of want of capacity or power to make it. *Mobley v. Griffin*, 104 N. C. 112, 10 S. E. 142; *Jones v. Cohen*, 82 N. C. 75; *Fitzgerald v. Shelton*, 95 N. C. 519.

[9] This case has been tried upon its merits, and the plaintiff has won upon the facts. Defendant showed by his answer that he understood the cause of action, and has actually supplied the omission, if any, in the complaint. If he found it too meager in its allegations, he had a remedy by asking that it be made more definite and certain by amendment. Revisal, § 496; *Blackmore v. Winders*, supra; *Allen v. Railroad Co.*, 120 N. C. 550, 27 S. E. 76; *Conley v. Railroad Co.*, 109 N. C. 692, 14 S. E. 303; *Oyster v. Mining Co.*, 140 N. C. 138, 52 S. E. 198. Instead of availing himself of the several remedies above mentioned the plaintiff trusted his case to the jury upon the issue, and, having had a fair chance to present it, his motion does not commend itself to our favorable consideration. He still has the right to foreclose the mortgage, which has been allowed to him by the order of the court, and he must be content therewith.

We find no error in the case, and affirm the judgment.

No error.

(113 S. C. 117)

**BARTELL et al. v. EDWARDS et al.** (No. 10383.)

(Supreme Court of South Carolina. Feb. 23, 1920.)

**1. JUDGMENT ⇐713(2)—CONCLUSIVE AS TO MATTERS THAT MIGHT HAVE BEEN RAISED AND DECIDED.**

Plaintiff's ancestor having claimed a fee in an entire tract, and it having been adjudged in an action by her that she only had a life estate, neither she nor her privies or heirs could afterwards claim that she was entitled to a fee in one-third thereof, although the question as to a one-third interest was not raised, as it might have been litigated.

**2. WILLS ⇐506(3)—WIFE AS LIFE TENANT NOT "HEIR" UNDER WILL.**

Where wife owned a plantation and conveyed it in fee to her husband, who immediately executed a paper in form of a will bequeathing the plantation to the wife during her lifetime, and after her decease "the said plantation shall return to the heirs" of the husband, such wife was not included as a remainderman, and her heirs were not entitled to participate in the distribution on her death after the death of the husband.

[Ed. Note.—For other definitions, see *Words and Phrases*, First and Second Series, *Hair*.]

Appeal from Common Pleas Circuit Court of Florence County; James E. Peurifoy, Judge.

Action by Sarah A. Bartell and others against Barnabas Edwards and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

C. J. Gasque, of Florence, and Lee & Shuler, of Kingstree, for appellants.

Willcox & Willcox, of Florence, and G. F. Stalvey, of Lake City, for respondents.

FRASER, J. This case was brought as an action for partition. The defendants set up title in themselves. The case had been ably argued on both sides with a display of much learning, but, as this court sees it, the case is, in its last analysis, very simple.

William Edwards and Martha E. Edwards were husband and wife. Martha owned a plantation and conveyed it in fee simple to her husband. On the day of the conveyance Edwards executed a paper, in form a will, as follows:

"State of South Carolina, Marion County.

"In the name of God, Amen. I, Wm. Edwards, of the said state and county, being of sound mind and memory and considering the uncertainty of this frail and transitory life do therefore give and bequeath to my beloved wife during her lifetime one plantation or tract of land containing three hundred and four acres, conveyed by her to me on the 28th day of July, 1874, bounded N. E. by S. Parker's land, E. by Capt. McWhite's and H. Bartell's land, south by little and big swamp and S. W. by lands of the estate of B. I. Bostick, and it is the condition of this will that after her decease the said plantation shall return to the heirs of Wm. Edwards. In witness whereof, I have hereto set my name and seal this twenty-eighth day of July, one thousand eight hundred and seventy-four.  
William Edwards."

This so-called will had only two witnesses, and was filed for record and recorded on the same day as the deed. The papers were then taken back and delivered to and kept by Martha. William predeceased Martha. After the death of William, Martha brought action against the heirs at law of William (the children of a former marriage) to declare the deed void for fraud and the so-called will a nullity. The case was tried before Judge Shipp, who sustained the deed and refused to declare the so-called will a nullity, but

held that, while the so-called will was inoperative as a will, yet the two papers, taken together, set forth the true contract between the parties, and that the real contract as evidenced by these two writings conveyed the fee to William with a life estate for Martha, and a remainder to the heirs of William, after Martha's death. William died in 1894, and Martha died in 1914. After the death of Martha, this action was instituted by her heirs at law for partition, and plaintiffs claimed title, on the ground that Martha was the wife and one of the heirs at law of William, her husband.

[1] I. The first defense to be considered is that the plaintiffs are estopped by suit brought by Martha against the heirs of William. This position must be sustained. It is elemental law that a judgment not only estops the parties to the action and their privies from again raising the questions at issue in that case, but also such questions as might have been raised and decided by it. Martha having claimed a fee in the whole tract, and it having been adjudged that she had only a life estate, neither she nor her privies could afterwards claim that she was entitled to a fee in one-third thereof.

[2] II. While it is not necessary to consider the other defense, yet it may not be amiss to do so. The defense claims that Martha was not included as a remainderman, even though the word "heirs" was used, and Martha, as the wife, was one of the heirs of William. This defense is also sustained. Judge Peurifoy heard this case and sustained the defense.

The appellant cites *Rochell v. Tompkins*, 1 Strob. Eq. 114, as conclusive authority for appellants. The case does not bear out the appellant's contention. In *Rochell v. Tompkins* the wife was given a life estate, with a reversion to the estate of the testator. The testator was intestate as to the remainder, and of course the wife, as an heir, inherited her share of the remainder. Here there was a remainder over after the death of Martha, the life tenant, and that remainder did not take effect until Martha was dead and could not inherit.

There are some questions reserved for future determination, and they are left open.

The judgment appealed from is affirmed.

GARY, C. J., and HYDRICK, WATTS, and GAGE, JJ., concur.

(126 Va. 556)

**GRIGGS et al. v. BROWN et al.**

(Supreme Court of Appeals of Virginia. Jan. 22, 1920.)

**1. BOUNDARIES ¶33—IN ABSENCE OF POSSESSION, PLAINTIFFS IN ACTION TO FIX BOUNDARY MUST RELY ON PAPER TITLE.**

In a proceeding to have ascertained and designated the true boundary line or lines between coterminous land of the parties, plaintiffs must rely upon their paper title to sustain their claim of ownership to the disputed land, in the absence of any showing of actual possession.

**2. EVIDENCE ¶505 — CONCLUSION OF SURVEYOR BASED ON TESTIMONY NOT EVIDENCE OF TRUE BOUNDARY LINE.**

In a proceeding to ascertain a boundary line, testimony of a surveyor, to the effect that his conclusion from the evidence in the case was that metes and bounds described in deeds under which plaintiff claimed included the land in controversy, was a mere conclusion and not evidence.

**3. BOUNDARIES ¶87(1)—EVIDENCE INSUFFICIENT TO SHOW TITLE TO DISPUTED LAND IN PLAINTIFFS.**

In an action to ascertain and designate a boundary line, evidence held insufficient to sustain a finding that paper title was in plaintiffs.

**4. BOUNDARIES ¶27—IN ABSENCE OF POSSESSION, PLAINTIFF IN ACTION TO ASCERTAIN BOUNDARY MUST RELY ON OWN TITLE.**

In an action to ascertain and designate the true boundary line between certain coterminous land, a plaintiff, who cannot rely upon actual possession, must recover, if at all, upon the strength of his own title, as in an action of ejectment.

Error to Circuit Court, Westmoreland County.

Action by W. C. Brown and others against W. B. Griggs and others. Judgment for plaintiffs, and defendants bring error. Reversed and remanded.

This is a proceeding which was instituted by the appellees as plaintiffs in the court below by petition exhibited against the appellants to have ascertained and designated the true boundary line or lines between certain coterminous land of the parties under the statute in such case made and provided.

The parties will be hereinafter referred to in accordance with their positions as plaintiffs and defendants, respectively, in the court below.

There was a trial by jury which resulted in a verdict and judgment in favor of the plaintiffs for the land in controversy, and the defendants bring error.

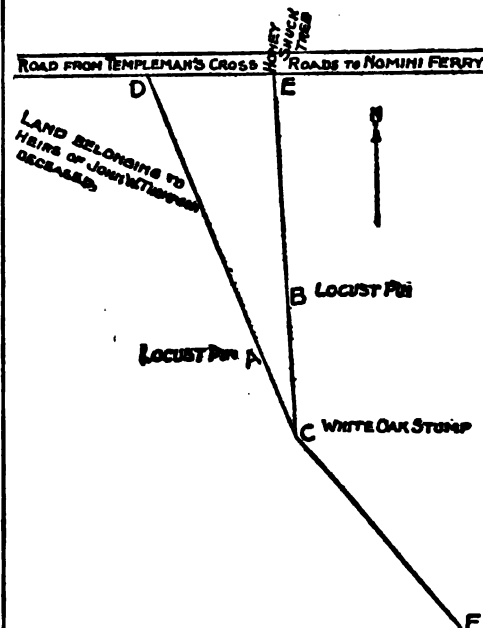
The sole assignment of error is that the verdict of the jury is contrary to the law and the evidence.

There are conflicting claims of title which

present the case of an interlock between the alleged boundaries of the plaintiffs' and defendants' lands. The land in controversy is contained within such interlock and consists of about one-half of an acre.

The whole tract of land claimed to be owned by the plaintiffs consists of 8¼ acres by recent survey, the lines of which include the land in controversy.

Such 8¼ acres, included within the lines E, B, C, A, D certain lines of the defendants' land as claimed by them, to wit, E, B, A, C, F; and the interlock or land in controversy, included within the lines A, B, C—are shown on the following diagram:

**EXHIBIT A.**

There is no evidence in the record that the plaintiffs, or any of their predecessors in title, ever had any actual possession of any part of said interlock or land in controversy; their possession being confined to that portion of the 8¼ acres outside of the interlock aforesaid.

On the question of whether the title deeds of the plaintiffs in evidence conveyed the land in controversy, the plaintiffs rely upon two certain deeds as evincing the conveyance of the land E, B, C, A, D, as shown on said diagram. One of these deeds is that from Nancy Crask to Thomas Clark, of date December 15, 1843, and the other of these deeds is from Julia E. Peake and Eliza I. Peake to Thomas Clark, of date March 22, 1849.

The last-named deed describes the parcel of land thereby conveyed, so far as material to be noted, and its boundaries, as follows:



" \* \* \* Piece or parcel of land containing four or five acres, more or less, \* \* \* bounded by the land purchased by said Clark of Mrs. Nancy Crask on the south, John Powers on the west, the main road on the north and Griffith's land on the east."

There is no evidence in the case concerning the boundary line of the "Griffith's land" thus drawn in question, which tends to locate such line at any earlier time than 1868; and such evidence as there is which goes back that far on that subject consists merely of a plat which purports to be "portion of plat and survey of the *Sallie* Griffith estate and notes of survey," made by R. L. Lawrence, surveyor of Westmoreland county, in "Sept. 1868." (Italics supplied.) This plat, if evidence on the subject, would tend to show that the line of the "Griffith's land" which is adjacent to the land now claimed by defendants was located in 1868 as claimed by defendants; but no deed of conveyance is in evidence conveying any land in accordance with such plat, nor any deed referring to or making such plat a part thereof, nor any record of any suit in which there is a decree of court establishing the said boundary line of the "Griffith's land" in accordance with said plat. See Sulphur Mines v. Thompson, 93 Va. 293, 25 S. E. 232; Christian v. Bulbeck, 120 Va. 74, 90 S. E. 661. And there is an entire absence of any evidence in the case tending to show that the line of "Griffith's land on the east" mentioned in the Peake deed of 1849 was on the same location as that of the said line of the *Sallie* Griffith's estate in 1868 as shown on the Lawrence plat aforesaid. There is also an entire absence of any evidence in the case of any probative value tending to show the location as of the date of the Peake deed in 1849 of the land purchased by said Clark of Mrs. Nancy Crask, as will appear from what is presently said in connection with the deed first above mentioned.

The deed first above mentioned, to wit, from Nancy Crask to Thomas Clark, of date December 15, 1843, describes the land thereby conveyed, so far as material to be noted, and its boundaries, as follows:

" \* \* \* A certain portion or parcel of land \* \* \* containing two roods, twenty-nine &  $\frac{1}{4}$  rods (be the same more or less) and bounded as follows: Beginning at a large white oak in John Powers line, thence N. 13° W. 86.68 rods to a cedar on the hill, corner to said Crask's lot. Thence N. 57 $\frac{1}{4}$ ° E. 9 rods to a locust corner to do. Thence N. 20° W. 9 rods to another locust corner to do. Thence N. 80° E. 1 rod to a locust in Griffith's line. Thence in *his* line (leaving a lane one rod wide between do, and said Crask's lot), S. 2° E. 52 rods to the beginning." (Italics supplied.)

There is, as aforesaid, no evidence in the case of any probative value to fix the location of the land conveyed by the Crask deed.

The use of the word "his" in this deed evidences that the "Griffith's line" therein referred to was not the line of the land of the "*Sallie* Griffith" whose estate is mentioned in the plat of the survey of September, 1868, above referred to, and there is no evidence in the case on the subject indicating that the "Griffith's line" referred to in the Crask deed was on the same location as the "Griffith's line" shown on the said plat of the September, 1868, survey, or what is later referred to by other deeds and the parol testimony in the case as the "Griffith line." No deeds or other evidence of the title to or from any "Griffith" appear in evidence.

There are no deeds or other evidence of title to or from John Powers which appear in evidence. The only testimony in the case as to the location of the "John Powers line" is parol and has no specific reference to the title even as far back as 1868 and does not undertake to locate where the "John Powers line" was in 1843 or 1849 when the two deeds above mentioned were executed.

The following is all of the testimony we have been able to find in the record with respect to the location on the ground of the calls for metes and bounds in the Crask deed:

One of the plaintiffs testified that he "undertook to begin and run around the disputed triangle to see if it contained the two roods and 29 $\frac{1}{4}$  rods called for in the Nancy Crask deed referred to, and it was decided by the surveyor that it about did it, and the survey stopped there." A surveyor, who was a witness for plaintiffs, testifies that he began at the point "C," as shown on said diagram, "and ran according to the calls in the deed from Nancy Crask to Clark to see if the triangular piece of land between the points marked A, B, and C on the diagram were not identical with the ground called for in the Crask deed. He is convinced they are, and that the triangle in dispute is the identical land called for in the Crask deed. \* \* \* But on cross-examination he admitted that he found nothing to identify or locate on the ground any of the corners or lines called for in the Crask deed or to determine whether the land conveyed by such deed came to the line C, A as shown on said diagram. That he did not discover 'the cedar on the hill, corner to Crask's lot, or the locust corner to Crask's lot, or the other locust corner to same, or the locust in Griffith's line called for in said Crask's deed, or anything to identify these points. \* \* \* That the land had been partially cleared up.' That he did not allow anything for the lane one rod wide between the lot conveyed by Crask and the "Griffith line." When asked "if he could not have selected any point anywhere out in the open field and starting from that point have run a triangular line or lines

between which would have been an area of 2 roods, 29½ rods, said he could. But stated he believed this to be the correct line because it seemed to coincide."

T. J. Downing, of Lancaster, and C. Conway Baker, of Montross, for plaintiffs in error.  
Frank Stuart, of Montross, and W. T. Mayo, of Hague, for defendants in error.

SIMS, J. (after stating the facts as above).  
[1] There being no evidence in the case even tending to show any actual possession of any part of the land in controversy by the plaintiffs or any of their predecessors in title, as appears from the statement preceding this opinion, the plaintiffs must rely upon their paper title to sustain their claim of ownership of such land.

Further: As also appears from said statement, there is a break in the chain of the plaintiffs' claim of paper title due to the fact that there is no evidence in the case of any probative value which even tends to show that the boundaries, by which the land is claimed to be conveyed by two deeds on which plaintiffs rely and must rely, include the land in controversy.

The deeds alluded to are mentioned in detail in the statement aforesaid and will be hereinafter designated by the names of the grantors therein, as the Crask deed and the Peake deed. We will first consider the general description contained in such deeds.

As does appear from such deeds, the parcels of land conveyed thereby adjoin, and the two parcels lying adjacent to each other extended toward the south from the road mentioned and which is shown on the diagram above set out. But there is no evidence of any probative value even tending to show that such land as conveyed by such deeds extended beyond, i. e. to the south of, the line A, B shown on such diagram. The John Powers and Griffith land mentioned in the Crask and Peake deeds may have then cornered at a different point from the point C shown on said diagram. The land in controversy may have belonged to a "Griffith" at the time these deeds were made, and the beginning station of the survey, the calls of which are contained in the Crask deed, may have been at A as shown on said diagram, and a line of the Griffith land may have then run from the points A to E as designated on such diagram; or at that time such beginning point may have been somewhere on the line A, B as shown on such diagram, and the John Powers line may then have been on a different location than from D to A, and the Griffith line on a different location than from E to B as shown on such diagram. Such locations would depend on the location of the powers and Griffith lands in question at that time as evidenced by their titles, respectively, appearing from deeds or other evidence of their acquisition of lands in that

locality and the evidence of what alienation they may have made of such previously acquired lands prior to the time in question; and there is an entire absence in this case of any evidence whatsoever of that character.

The quantity of land conveyed by the two deeds in question as called for therein falls short of the 8¼ acres claimed by plaintiffs by some 2¼ to 3¼ acres; so that even that element of description contained in such deeds, which is of the least probative value on the subject of location, furnishes no evidence tending to show that the lands conveyed by such deeds extended from the road, shown on said diagram, so far south as the line A, B, even if we could assume that the side lines of the plaintiffs' lands were located by their paper title approximately as claimed by them.

As appears from the statement preceding this opinion, both of said deeds conveyed by general description; the Peake deed by general description only, the Crask deed also, however, by calls for courses and distances. We will now consider the extrinsic evidence before the jury to locate the land by such courses and distances. On this subject we are met, as appears from the aforesaid statement, with the fact that there was an entire absence of any evidence before the jury to locate on the ground the beginning point, or any other point of beginning or ending of any of the lines of the land as per such metes and bounds.

[2] There is left only the testimony of a surveyor, who was one of the witnesses for plaintiffs, which is mentioned in the aforesaid statement, to the effect that his conclusion from the evidence in the case was that such metes and bounds included the land in controversy. Such conclusion was not evidence. *Va. Coal & Iron Co. v. Ison*, 114 Va. 144, 75 S. E. 782; *Richmond v. Jones*, 111 Va. 214, 68 S. E. 181; *Holleran v. Meisel*, 91 Va. 144, 21 S. E. 658; *Sutherland v. Gent*, 116 Va. 783, 82 S. E. 713.

And although such testimony was admitted before the jury without objection, that circumstance cannot give to it any probative value. Being itself unsupported by the evidence on which it was based, all of which was before the jury, it could add nothing to the quantum or effect of such evidence.

[3] On the whole, therefore, it is plain that there was no evidence before the jury to sustain a finding that the boundary lines of the land as called for in the said deeds in the chain of title of the plaintiffs included the land in controversy, and hence the verdict of the jury must be set aside and a new trial awarded to the defendants.

[4] There are other questions raised in the case; but, in view of the above conclusion, it is unnecessary for us to deal with them. It is uncontroverted before us that in a pro-

ceeding such as this, equally as in an action of ejectment, a plaintiff, who cannot rely upon actual possession, must recover, if at all, upon the strength of his own title.

Reversed and remanded.

(85 W. Va. 520)

**LENHART v. KEYSTONE COAL & COKE CO. (No. 3823.)**

(Supreme Court of Appeals of West Virginia.  
Feb. 10, 1920.)

*(Syllabus by the Court.)*

**1. MALICIOUS PROSECUTION  $\S$  4—PARTY INSTITUTING PROSECUTION LIABLE FOR INJURY BY OFFICER ACTING UNDER WARRANT.**

As a general rule one who sets a prosecution in motion by suing out a warrant and placing it in the hands of an officer is legally liable in damages for any injury done to another by the officer under authority of the writ.

**2. MALICIOUS PROSECUTION  $\S$  16—WANT OF PROBABLE CAUSE AND MALICE NECESSARY; INFERENCE OF MALICE FROM WANT OF PROBABLE CAUSE IS REBUTTABLE.**

In an action for malicious prosecution, to recover the plaintiff should show want of probable cause and malice; and while malice may be inferred from want of probable cause, the inference is not a necessary one; it may be rebutted from the facts and circumstances of the case.

**3. MALICIOUS PROSECUTION  $\S$  82, 71(2, 3)—WANT OF PROBABLE CAUSE AND MALICE FOR JURY.**

Where on the trial of such an action the evidence of want of probable cause and of malice is substantial, the question of fact should be submitted to the jury.

Error to Circuit Court, McDowell County.

Action by John Lenhart against the Keystone Coal & Coke Company. From a judgment directing a verdict for defendant, plaintiff brings error. Reversed, and remanded for new trial.

Strother, Taylor & Taylor, and Froe & Capehart, all of Welch, for plaintiff in error.

Anderson, Strother, Hughes & Curd, of Welch, for defendant in error.

**MILLER, J.** In a case of alleged malicious prosecution the question presented for review is whether the court below erred in its final judgment striking out plaintiff's evidence and directing a verdict for defendant.

The evidence applicable to the pleadings as amended during the trial was that, in August, 1915, the defendant company through its superintendent sued out of the office of the recorder of the town of Keystone, in McDowell County, under the provisions of chap-

ter 155 of the Code (secs. 5513-5516), a search warrant, to search certain premises of the plaintiff with a view to locating certain copper wire said to have been stolen from the defendant company. The writ was lost, but its contents were proven to have been substantially in the form and directed as required by the statute, commanding the officer to search the place designated, seize the property alleged to have been stolen or other things if found, and to bring the same and the person in whose possession they should be found before the officer having cognizance of the case. Plaintiff also proved that a police officer in company with the superintendent of the defendant visited plaintiff's place of business and there found certain copper wire, which plaintiff explained he had purchased from a small boy, whose name he gave the officer, in company with another boy, who represented they had gotten the wire, not from the defendant's property, but at another place where they had been working. On this representation the officer in charge of the warrant was instructed by defendant's superintendent not to take the property or make the arrest until further investigation, and no arrest was then made nor the property so found taken away until some time thereafter, and after the officer had seen the boys and was told by them that they had not sold the copper wire to plaintiff. Relying on this information and without seeing or consulting defendant or its superintendent, the officer arrested the plaintiff on a Saturday and confined him in the city jail, where he remained until the following Monday. On learning of the arrest and that the boys, after the arrest, had confessed to the taking of the copper wire from the defendant company and selling it to the plaintiff, the superintendent directed the proceedings to be dismissed and the plaintiff discharged, and he was discharged, although the recorder's docket showed no record of the proceedings, either of the issuance of the warrant or of return thereof, or of the discharge of the prisoner. The evidence showed that plaintiff was a small junk dealer, or at least that he had two small places where he stored junk, though he had no license, and that on a former occasion the defendant company had located a piece of machinery called a valve in the possession of the plaintiff; and this fact seems to have been relied upon to justify the search of plaintiff's premises to locate the stolen copper wire. This was substantially all the evidence relied on to prove the want of probable cause and malice necessary to plaintiff's recovery.

Counsel for defendant urge that the judgment below ought to be affirmed, on the ground that there was no evidence of unlawfully suing out or irregularity in the search warrant, and that the warrant did not show

that plaintiff was directly accused of larceny of the goods stolen. The declaration is in three counts; each may be subject to the same criticism as to its averments; but we think it is sufficiently certain in each count to make out a case of the wrongful suing out of the warrant without probable cause and of malice. The fact that the warrant did not directly accuse the plaintiff of theft of the goods, is unimportant. The gravamen of the complaint is that under this warrant plaintiff might be, and in fact was, deprived of his liberty, and if done without probable cause and maliciously, his right of recovery would be clear.

[1] Another preliminary question urged by counsel to support the judgment is that the officer being instructed by the superintendent of defendant company not to make the arrest until further investigation acted without authority in taking plaintiff into custody without further direction; but we think the warrant having been sued out by authority of defendant, and placed in the hands of the officer, the defendant was legally responsible for anything done by the officer under authority of the warrant. This at least is the holding of the court in *Lyons v. Davy-Pocahontas Coal Co.*, 75 W. Va. 739, 84 S. E. 744.

[2, 3] The law in cases of this kind is well settled in this state as in other jurisdictions, that it is prerequisite to recovery that want of probable cause and malice concur, and that the jury may infer malice from want of probable cause, but it is not a necessary inference, it may be rebutted or overcome by the facts and circumstances in the case. Want of malice shown will defeat recovery, though there be want of probable cause. *Lyons v. Davy-Pocahontas Coal Co.*, supra; *Catzen v. Belcher*, 64 W. Va. 314, 61 S. E. 930, 131 Am. St. Rep. 903, 16 Ann. Cas. 715; *Porter v. Mack*, 50 W. Va. 581, 40 S. E. 459; *Bailey v. Gollehon*, 76 W. Va. 322, 85 S. E. 556, 723. Plaintiff relies largely on his discharge without prosecution by the defendant as proof of want of probable cause; but as these authorities hold, this is not conclusive on either the question of probable cause or of malice. Whether the defendant or its superintendent had any reasonable ground for accusing the plaintiff as the search warrant implied, is a question of fact not so very well developed. There was a little evidence, as already noted, of the finding by defendant of a piece of machinery in plaintiff's place of business, but there is no evidence of what other grounds, if any, defendant may have had. Defendant seems to have acted with some precaution, and at the time of suing out the warrant neither allowed plaintiff to be arrested nor the property found to be taken out of his possession

until about the time the arrest was subsequently made.

On the question of malice the evidence was indeed very slight. There is some evidence that when the proceedings were ordered dismissed, the reason for so doing was that they involved the small boys of good parentage in the community, and that it was not out of consideration for the plaintiff. Of course this is a slight circumstance, which might or might not, in the minds of the jury, indicate some ill feeling toward or lack of consideration for the plaintiff. As was said in the *Mack Case*, the parties acting in good faith and without malice have the right to pursue the remedies given them by law for the protection of their person and property without being liable in damages to another who may be affected thereby. It is only when in doing so they act maliciously that the law imposes liability upon them.

Our conclusion is that on both questions, want of probable cause and malice, the case should have gone to the jury. We therefore reverse the judgment and remand the case for another trial.

(85 W. Va. 516)

**CUSTARD v. McNARY et al.** (No. 3897.)

(Supreme Court of Appeals of West Virginia.  
Feb. 10, 1920.)

(Syllabus by the Court.)

**1. BANKRUPTCY — 151 — RIGHTS OF TRUSTEE ARE SUBJECT TO EQUITY AGAINST BANKRUPT.**

The rights of a trustee in bankruptcy generally are not greater than those of the person whose estate he represents. He takes the property of the bankrupt, in cases unaffected by fraud, not as a bona fide purchaser, but in the same capacity and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt, except in cases where there has been a conveyance or incumbrance of the property which is void as against the trustee by some positive provision of the Bankruptcy Act (U. S. Comp. St. §§ 9585-9656).

**2. BANKRUPTCY — 154 — AMOUNT PAID BY OWNER UNDER CONTRACT WITH BANKRUPT CONSTRUCTION COMPANY TO SUBCONTRACTOR COULD NOT BE RECOVERED BY TRUSTEE.**

Where a construction company, before bankruptcy, enters into a building contract whereby it engages to erect and complete a building on or before a specified date, with a provision authorizing the owner, upon failure or inability of the contractor to secure sufficient supplies, material, or labor to prosecute the work continuously and diligently to completion, to secure the same and deduct the cost thereof from any amount then due the contractor or which may thereafter be due him, and a subcontractor, fearing the insolvency of his principal, refuses to proceed with his part of the work, but later completes it after receiving verbal assur-

ance from the owner, in accordance with the provision of the contract, that the latter will pay him out of the balance due the contractor, and he does so pay him, the sum so paid constitutes no part of the assets of the bankrupt, and recovery thereof may not be had at the suit of the trustee.

**3. FRAUDS, STATUTE OF §33(1)—ORAL PROMISE TO PAY ANOTHER'S DEBT INVOLVING BENEFIT OF PROMISOR IS VALID.**

If a person makes an oral promise to pay the debt of another in order to derive some benefit to himself thereby, which he would not otherwise have had, such promise is an original undertaking and not within the statute of frauds.

**Error to Circuit Court, McDowell County.**

Action of assumpsit by John H. Custard, as trustee in bankruptcy of the Bluestone Construction Company, against C. S. McNary and others. Judgment for plaintiff, and defendants bring error. Reversed, and on agreed stipulation of facts judgment entered for defendants.

Lits & Harman, of Welch, for plaintiffs in error.

W. E. Ross, of Bluefield, for defendant in error.

**LYNOX, J.** From a judgment for plaintiff pronounced by the lower court sitting in lieu of a jury in an action of assumpsit to recover money paid defendants, alleged to belong to plaintiff as trustee in bankruptcy, defendants prosecute this writ. On July 5, 1916, the Bluestone Construction Company, now bankrupt, contracted with the State Board of Control for the construction of a certain addition to Welch Hospital No. 1, at Welch; the work to be completed on or before December 1, 1916. The contract contained this provision:

"If, at any time, the contractors should for any cause fail or be unable to secure sufficient supplies, material or labor to continuously and diligently prosecute the work in such a manner as to complete it within the time specified, then the State Board of Control or its superintendent is hereby authorized to secure the same or such part or parts thereof as in their opinion are necessary, and deduct the cost thereof from any amount then due the contractors or which may thereafter be due them."

Shortly after the date of the contract, the Bluestone Construction Company employed defendants to install the plumbing specified for the building. The former was unable to complete the building within the time specified, and defendants, becoming aware of its probable insolvency shortly after they began to perform their agreement, notified the construction company orally and the Board of Control by letter, January 20, 1917, of their intention not to do the work they had con-

tracted to do. In order to expedite the completion of the building, the superintendent of construction for the Board of Control, acting for and on its behalf in accordance with the provisions of paragraph six, verbally notified defendants to proceed with the plumbing and assured them that if they did the board would pay them out of the balance due the construction company. Defendants, acting upon that assurance, installed the plumbing and completed the installation about February 10th, the date on which the construction company petitioned for and was adjudged a bankrupt. Two days later they presented to the Board of Control their bill for the services rendered, amounting to \$827, of which the board paid \$189.25, deducting that sum from the unpaid balance due under the building contract. To recover the amount so paid, plaintiff, as trustee, instituted this action, charging such sum to be part of the assets of the bankrupt's estate; and it seems that was the view taken by the trial court.

[1, 2] With this opinion we do not agree. Though deducted from the balance that would then have been due and payable to the bankrupt, had it fully performed the contract without the intervention of the Board of Control, as authorized by paragraph six, nevertheless under the circumstances the money formed no part of the assets of his estate. Similar provisions for like contingencies, occasioned by default or failure of a contractor to complete his work within a reasonable time by giving the owner the right to take charge and to complete it at the builder's expense, are not uncommon in building contracts. 9 O. J. 812, 813; Wilds v. Board of Education, 227 N. Y. 211, 125 N. E. 89, affirming 186 App. Div. 472, 174 N. Y. Supp. 875. Paragraph 6 expressly authorized the State Board of Control "or its superintendent" to secure the work to be done if the contractor did not or could not complete it within the time specified, "and deduct the cost thereof from any amount then due the contractors or which may thereafter be due them." If the contractors could not legally or equitably demand payment to them of any part of the consideration for their contract paid by the board to defendants to do what the contractors promised but failed to do, by what authority or upon what hypothesis may plaintiff require restoration to him of the money received by them as compensation for services not rendered by the contractors? His rights certainly are not superior to those of the person whose estate he represents. His position is not more highly favored than that of the bankrupt either in law or conscience. Hardy, Trustee, v. Weyer, 42 Ind. App. 343, 85 N. E. 731. He does not acquire title to property to be administered by him in the capacity of a bona fide purchaser for value and has no equities therein that

the bankrupt did not have. He acquires his title subject to the same conditions, claims, liens, and equities then attaching to it, except in so far as it is affected with fraud or where there has been a conveyance or incumbrance of the property which is declared void by some positive provision of the Bankruptcy Act (U. S. Comp. St. §§ 9585-9656). *York Mfg. Co. v. Cassell*, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782; *Hurley v. Atchison, Topeka & S. F. Ry. Co.*, 213 U. S. 126, 132, 133, 29 Sup. Ct. 466, 53 L. Ed. 729; *Zartman v. First National Bank*, 216 U. S. 134, 30 Sup. Ct. 368, 54 L. Ed. 418; *Chicago Title & Trust Co. v. National Storage Co.*, 260 Ill. 485, 103 N. E. 227; *Mankins v. Forward Movement Syndicate*, 28 Cal. App. 285, 152 Pac. 313; 3 R. O. L. p. 231. See, also, *Wilds v. Board of Education*, 227 N. Y. 211, 125 N. E. 89. The *Bluestone Construction Company* clearly could have offered no valid objection against the course provided for in the contract, to which it voluntarily consented, and followed in the disposition of the fund; and the right of its trustee is no greater, considered in the light of the circumstances presented by this case.

[3] Though the promise given orally by the superintendent to pay defendants for their work was in substance one to pay the debt of another, the board derived some benefit to itself thereby, which it otherwise would not have had, and for that reason it is an original promise and not within the statute of frauds. *Howell v. Harvey, Ex'r*, 65 W. Va. 310, 64 S. E. 249, 22 L. R. A. (N. S.) 1077.

For these reasons, we reverse the judgment of the court below, and on the agreed stipulation of facts enter judgment for defendants, and award them costs.

(85 W. Va. 524)

**OLINE v. McADOO**, Director General of Railroads. (No. 3899.)

(Supreme Court of Appeals of West Virginia. Feb. 10, 1920.)

*(Syllabus by the Court.)*

**1. RAILROADS** ⇨327(1) — TRAVELER APPROACHING CROSSING MUST STOP, LOOK, AND LISTEN.

As many times decided, it is the duty of a traveler on a public highway, on approaching a railroad crossing, to stop, look and listen, without which, if injured, he will be guilty of contributory negligence.

**2. RAILROADS** ⇨327(5), 350(19)—TRAVELER, ON CROSSING DOUBLE TRACKS, MUST LOOK IN BOTH DIRECTIONS.

Where the railroad consists of a double track, on which the trains run in opposite directions are operated, this rule of obligation is not discharged by a traveler by looking only

in one direction; it is his duty to look in both directions; and where there is nothing to obstruct his view or hearing, the question of his negligence is generally one of law for the court and not of fact for the jury.

**3. RAILROADS** ⇨327(5)—TRAVELER BOUND TO NOTICE OPERATION OF CARS ON DOUBLE-TRACK ROAD.

The fact that the engine or train doing the injury complained of may have been moving backwards on the track not regularly used by trains going in that direction does not excuse the traveler, as a general rule, from discharge of his duties, for he is bound to take notice that the railroad may operate trains on either track in either direction.

**4. RAILROADS** ⇨335(5)—CONTRIBUTORY NEGLIGENCE OF TRAVELER AT CROSSING PROXIMATE CAUSE OF INJURY.

Where one so negligent is injured by carelessly driving on a railroad crossing in front of a moving engine or train, the proximate cause of his injury must be regarded as his contributory negligence and not the negligence of the railroad company in omitting to ring the bell or blow the whistle.

**Error to Circuit Court, McDowell County.**

Action by D. E. Cline against W. G. McAdoo, Director General of Railroads. Demurrer to plaintiff's evidence was joined in by plaintiff, and there was conditional verdict for plaintiff and judgment thereon by the court, motions to set aside the verdict as excessive and for a new trial overruled, and defendant brings error. Reversed, demurrer to evidence sustained, and judgment entered for defendant.

Sale & Tucker, of Welch, and F. M. Rivinus, of Philadelphia, Pa., for plaintiff in error.

G. W. Howard, of Welch, for defendant in error.

**MILLER, J.** The plaintiff sued defendant for damages for personal injuries and also damages to his automobile, the result of being struck at a street crossing in the town of Davy, by one of defendant's engines being operated westward on the east bound track. At the conclusion of plaintiff's evidence the defendant interposed a demurrer thereto, which was joined in by plaintiff, and the jury returned a conditional verdict assessing plaintiff's damages at \$1,000.00, conditioned on the law of the case as it might thereafter be determined by the court, and in answer to special interrogatories, in connection with their verdict, the jury responded that they had included therein \$850.00 for personal injuries sustained by the plaintiff and \$150.00 for damages to his automobile.

On the demurrer thus submitted to the court, the court found the law for the plaintiff and entered judgment in his favor against the defendant for the full sum

found by the jury. The usual motions to set aside the verdict as excessive in amount, and for a new trial, were overruled.

The acts of negligence alleged and relied on by plaintiff were, the operation of the engine doing the injury westward on an east bound track, failure of the trainmen to keep a proper lookout, and their failure to ring the bell or blow the whistle as provided by section 61, chapter 54 of the Code (sec. 2971).

There was evidence introduced tending to show negligence of the trainmen in the particulars alleged, and it is conceded that the engine which struck plaintiff's automobile was at the time being operated backward and westward over the east bound track.

To reverse the judgment defendant relies solely upon the contributory negligence of the plaintiff, which it is claimed is fully established by his own evidence, as a matter of law for the court and not of fact to be submitted to the jury. As opposed to this theory of defendant plaintiff contends that conceding his contributory negligence there was supervening negligence of the defendant which constituted the proximate cause of his injuries, but there is no evidence of such intervening negligence, unless shown by the failure of the trainmen to ring the bell or blow the whistle at the road or street crossing where the collision occurred.

The facts pertinent to the real questions involved, namely, the one of contributory negligence of the plaintiff and the supposed intervening negligence of the defendant, are few. As alleged and proven they are these: The defendant at the town of Davy operates his trains over east and west bound tracks, the one paralleling the other in close proximity; that usually the east bound trains are operated on the east bound track and those west bound on the west bound track. Shortly before he sustained his injuries plaintiff was at the railroad station, about one thousand feet east of the road or street crossing where the said collision took place. After transacting his business there, he started westward along the county road, paralleling and running within a few feet of the east bound track of the railroad. On his way he stopped at a store on the south side of the county road and opposite the railroad. When he had transacted his business there, he reentered his automobile and proceeded westward to the road or street crossing the railroad tracks. At the point of intersection one branch of the road went almost directly north and the other almost directly south, the former in the direction of plaintiff's home and the other in the direction of the town of Iaeger. The evidence of plaintiff shows that this point of intersection is about one hundred feet from the east bound track. The plaintiff admits that on reaching the point of intersection he turned to the

right without stopping, looking or listening for any train approaching the crossing on either track from the east. He admits that he was hard of hearing in his right ear; that he was looking westward only for trains that might be approaching from that direction; and that he was wholly negligent in performing his duty in other respects. What transpired at the moment and just before the plaintiff was injured, may be best stated in his own language:

"Well, I was at the depot, and got through my business up there and started back down west along the side of the east bound track and I could see the track all along and didn't see no train on it, that is, from in front of me, and I stopped in a store down there about half way between the crossing and the depot and traded a little, and after I got through, I got in my car and went on down towards the crossing. I could see down the east bound track that there was nothing coming up it. Well, about that time, I made the curve to cross and as soon as my front wheels got on the track I turned my eye and there was that backing engine in about twenty feet of me, I thought, maybe a little less. Well, then, I went to thinking. I didn't know what speed that engine was traveling and I thought if I undertook to go on across and it would strike me while I was midways on the track there would be no chance to save my life. Then I undertook to back, and before I could back off, it struck me—struck the car; it never touched me."

[1] We think this evidence established gross contributory negligence; and unless some other facts and circumstances have been shown to excuse plaintiff, or sufficient to carry the case to the jury on the question whether or not he did what a reasonable and prudent person under like circumstances would have done, the fact of his contributory negligence constitutes a complete defense to his action. We find nothing in the record which would excuse him for his neglect to stop, look and listen, and for his deliberate attempt to drive over the railroad tracks without doing so. It is not only proven but admitted that there was nothing to obstruct plaintiff's view east and west after he left a switch or side track some 250 or 300 feet from the crossing.

[2, 3] The duty of a traveler on a highway, on coming to a railroad crossing, is not discharged by looking only in one direction. Our decisions and the decisions everywhere are to the same effect that he must if necessary stop, and look and listen in both directions. *Beyel v. Newport News, etc., R. R. Co.*, 34 W. Va. 538, 12 S. E. 532; *Berkeley v. C. & C. Ry. Co.*, 43 W. Va. 11, 26 S. E. 349; *Bassford v. P., C. & St. L. Ry. Co.*, 70 W. Va. 280, 73 S. E. 926; *City of Elkins v. Western Maryland Ry. Co.*, 76 W. Va. 733, 88 S. E. 762, 1 A. L. R. 198.

But it is contended in support of the judgment that the demurrer to the evidence was

properly overruled notwithstanding the rule of law just stated, because, as it is conceived, this case falls within an exception to the general rule illustrated in its application in our cases of *City of Elkins v. Western Maryland Ry. Co.*, supra, *Riedel v. Traction Co.*, 69 W. Va. 18, 71 S. E. 174, and cases of their character. And to bring this case within the exception, counsel insist that if plaintiff knew it was a custom of defendant to operate the west bound trains on the west bound track and the east bound trains on the east bound track, he was excused thereby for not looking, or observing the engine that struck him, moving westward on the east bound track. In the *City of Elkins Case*, reversing the judgment below sustaining the demurrer to the evidence, we concluded that the contributory negligence there relied on was a question of fact for the jury and did not, as the facts here do, establish contributory negligence per se. In the *Elkins Case* the evidence was that the drivers of the team injured both looked and listened, though they did not stop, but their view of the crossing was obstructed by cars placed on a sidetrack by the railway company, and the evidence is that they listened but heard no bell ring, and if one had been rung they would have heard it. They could not get a view of the track on which the train was moving without getting down from their wagon and going forward; and whether under all the facts and circumstances there shown they should have taken this precaution, presented a question of fact for the jury. In the *Riedel Case*, involving the operation of an electric car on city streets at a street crossing, we reversed the judgment below for defendant, which struck out plaintiff's evidence, being of opinion that whether plaintiff's contributory negligence or the intervening negligence of the motorman in not sounding the gong or stopping the car after seeing plaintiff on the track and in peril constituted the last acts of negligence responsible for plaintiff's injury, were questions of fact for the jury and not of law for the court. The rule applicable to the operation of steam railroads is different in some respects from that applicable to cars operated by electricity on city streets. Steam railroads are regarded as having the right of way, while travelers on streets, particularly at street crossings, are regarded as having rights practically equal to those of street railways.

Had the plaintiff, under these authorities, the right to rely on the supposed custom of the railroad company, of operating its east bound and west bound trains on their respective tracks, so as to excuse him from performing his duty when approaching the rail-

road crossing? We think not. Plaintiff was bound to know that in operating trains the railway company may run its trains backward or forward on any track. The engine that struck plaintiff was not an engine attached to a regular train, but the evidence tends to show it was engaged in work at a wreck that had occurred east of the station. We are cited by plaintiff's counsel to some cases where persons crossing railroad tracks were excused from contributory negligence when struck by regular trains that had passed and had been run suddenly backward without warning, but they are all distinguishable from cases like the present one, which we think is similar to *Berkeley v. C. & O. Ry. Co.*, supra. That case involved the operation of a switch engine.

Outside of these circumstances what is there to excuse plaintiff's negligence? We find absolutely nothing. Hearing in his right ear was somewhat difficult, according to his testimony, but this should have made him all the more careful in turning upon the track without performing his full duty.

[4] But was there any intervening negligence of defendant which constituted the proximate cause of the injury? We think none is shown. True, we must assume the trainmen were negligent in not ringing the bell or blowing the whistle, as shown. But this was the original act of negligence alleged and proven. If the plaintiff had been seen by the trainmen when on the way and immediately before he turned onto the track, they had no notice that he would deliberately drive on the track before the approaching engine, as plaintiff admits he did, and so suddenly as not to observe the approach of the coming engine. The trainmen would have had right to assume that he would stop or was going in the opposite direction. As observed by Judge Brannon in *Beyel v. Newport News, etc., R. R. Co.*, supra, the reciprocal duties of railways and travelers upon public roads and streets to each other and the traveling public are equal, and it is of the highest importance that both observe with the greatest care their respective duties in the premises. The lives and property of the people depend as much on the one as on the other, and it is in the interest of the public as well as of the parties individually, and neither is relieved from the proper observance of the rules governing them.

For these reasons we are of opinion that the judgment below must be reversed, and the demurrer to the plaintiff's evidence sustained; and the judgment which we think the circuit court should have entered will be entered here, that the plaintiff take nothing by his action and that the defendant recover his costs in the circuit court and in this court in this behalf expended.



(85 W. Va. 501)

**THURMOND et al. v. GUYAN VALLEY COAL CO. (No. 98.)**(Supreme Court of Appeals of West Virginia.  
Feb. 10, 1920.)*(Syllabus by the Court.)***1. EXECUTORS AND ADMINISTRATORS ¶8(1) — REPRESENTATIVE MAY NOT AS GENERAL RULE CONTINUE DECEDENT'S BUSINESS.**

Executors or administrators of a decedent's estate generally have no right, and it is no part of their duty in administering an estate committed to their care and management, to continue in their names the business in which decedent was engaged at the time of his death, unless he has by will conferred upon them that power, or his legatees or distributees and creditors, if any, consent thereto.

**2. EXECUTORS AND ADMINISTRATORS ¶96—ESTATE NOT LIABLE ON CONTRACTS OF PERSONAL REPRESENTATIVE.**

The general rule is that a personal representative cannot charge the estate by contracts originating with himself, although for the benefit and in the interest and on behalf of the estate; such contracts binding him only in his private capacity.

**3. EXECUTORS AND ADMINISTRATORS ¶427—RULE AS TO RIGHT TO SUE IN INDIVIDUAL OR REPRESENTATIVE CHARACTER STATED.**

Where the contract or transaction which is the basis of the suit is one to which the representative is a party, as, for instance, where the subject-matter of the litigation is a promise made by the defendant, not to the decedent, but to the representative, the latter may bring the suit in his individual or in his representative character, as he may elect.

**4. EXECUTORS AND ADMINISTRATORS ¶444(3) —REPRESENTATIVE OR INDIVIDUAL CAPACITY OF SUIT IS DETERMINED FROM PLEADINGS.**

Whether the plaintiff has instituted an action in a representative or individual capacity, and whether words following his name are to be deemed descriptive of his person or of the character in which he sues, is to be determined from all the allegations of the pleading.

**5. EXECUTORS AND ADMINISTRATORS ¶444(3) —DECLARATION NOT SHOWING WHETHER ACTION IS IN FIDUCIARY OR INDIVIDUAL CAPACITY MAY BE DEMURRABLE.**

Where a personal representative elects to sue in his fiduciary instead of his individual capacity on a cause of action having an apparently remote and doubtful connection or relation, if any, to the estate represented by him, his pleading should disclose such relevancy where it does not otherwise appear; and a declaration that fails to reveal such connection or relation between the recovery sought and the estate represented may for that reason be demurrable.

**6. ASSUMPSIT, ACTION OF ¶19—CONSIDERATION MUST BE ALLEGED IN ACTION ON SPECIAL CONTRACT.**

In an action of assumpsit on a special contract to recover damages, the consideration

must substantially be averred in the declaration.

**7. CONTRACTS ¶79—WRITTEN CONTRACT EMBODYING PRIOR ORAL AGREEMENT PARTLY EXECUTED DOES NOT REST ON PAST CONSIDERATION.**

A contract which embodies in writing a prior oral agreement, fully executed on plaintiff's part, is one not based upon a past consideration, but the mere embodiment of a pre-existent agreement into a formal contract.

Certified Question from Circuit Court, Cabell County.

Action of assumpsit by J. S. Thurmond and others, as executors of W. D. Thurmond, deceased, against the Guyan Valley Coal Company. Demurrer to second and third special counts sustained, and question certified. Affirmed.

Fitzpatrick, Campbell, Brown & Davis, of Huntington, for plaintiffs.

Deegan & Boman and Holt, Duncan & Holt, all of Huntington, for defendant.

LYNCH, J. The action of the circuit court in holding the second and third and only special counts of the declaration insufficient on demurrer to permit recovery by plaintiffs, suing in assumpsit as executors, is here upon a certificate for the sole and only purpose of determining the propriety and correctness of that ruling.

On the 4th day of April, 1917, according to the averments of the second count, plaintiffs, "in their said capacity of executors of the last will and testament of W. D. Thurmond, deceased," and defendant, entered into a contract, on which the suit is based, whereby defendant for a valuable consideration promised and agreed with the plaintiffs, "in their said capacity," to pay them 5 cents for each ton of coal furnished by defendant to the Chesapeake & Ohio Railway Company or the Chesapeake & Ohio Railway Company of Indiana, under the terms of an agreement entered into by defendant and the two railway companies October 20, 1915, and that pursuant thereto defendant did after April 4, 1917, furnish the two railway companies 200,000 tons of coal, for which it has failed and refused to compensate plaintiffs according to the terms of the contract. The only obvious difference between the two counts is that, while the second does not show plaintiffs to have been the active agents in the procurement of the contract of October 20, 1915, relating to the coal to be furnished, and furnished, by defendant, and out of which the contract of April 4th arose, or that the latter is or is not in writing, the third count does show plaintiffs to have been the agents who conducted the negotiations resulting in the consummation of the contract of October 20th between the railway

companies and defendant, and that its procurement was effected only by and through the efforts of plaintiffs under an oral agreement providing as compensation for that service 5 cents for each ton of coal so to be furnished by defendant to the companies, and which agreement was reduced to writing, signed and sealed by defendant, April 4, 1917, the terms of which the third count sets forth in extenso.

One of the objections urged alike against each count goes to the failure of both to disclose, otherwise than by the descriptive phrases, "in their said capacity of executors of the last will and testament of W. D. Thurmond, deceased," and "in their said capacity," any pecuniary advantage or profit that likely will or may inure to the estate represented by plaintiffs in the event of a successful termination of this action in their favor, or any connection or relation such estate has or may have with the cause of action averred in both counts; and, not having done so, defendant questions the right of plaintiffs to maintain the action in the capacity in which they sue, and that having alleged a contract made by them in their representative character, they must show such connection or sue in their individual characters for a breach thereof.

When the testator died, whether before or after October 20, 1915, the date on which it is averred defendant contracted to furnish the coal, or whether the testator was in any wise instrumental in originating negotiations finally resulting in the October 20th contract, or participated in its procurement, or had anything to do with its execution, neither count furnishes any information. As we have said, the second count does not show who was instrumental in negotiating that contract, but the third count discloses who were, namely, the plaintiffs. In other words, neither count by any averment shows any relation or connection between the testator's estate and the cause of action averred, otherwise than by the use of descriptive phrases, and these may and often do serve no purpose other than by way of identification.

Of course, the rational inference from these averments excludes the idea of the testator's having had any knowledge of an intention on the part of the persons appointed by him to execute his will to act as brokers to effect contracts for the sale of coal or other like or similar contracts affecting his estate; and this want of knowledge on his part the third count makes obvious, for it shows that it was procured through the efforts of the plaintiffs. Treating it as such, can they in their executorial capacity maintain an action on the April, 1917, contract, which is but the earlier contract between them and defendant reduced to writing, without in some manner showing on the face

of the pleading, otherwise than as they have done, how or in what way the value of the estate represented by them is to be enhanced in the event the litigation terminates in a judgment in their favor? This is the primary and obviously the most important question to be dealt with in determining the sufficiency of each count.

[1, 2] Executors or administrators of a decedent's estate have no right, and it is no part of their duty in administering an estate committed to their care and management, to continue in their names the business in which decedent was engaged at the time of his death, unless he has by his will conferred upon them that power, or his legatees or distributees and creditors, if any, consent thereto. Without such authority or consent they become personally responsible for any loss that may follow, and out of the estate cannot reimburse themselves therefor. In other words, they take the estate as he left it, charged with the duty of administering it for the benefit of his creditors and distributees, and, as part of such duty, to reduce it to liquid assets and apply them to the payment of his indebtedness and distribute the residue among the persons designated by his will, or, in the absence of such designation, among those legally entitled to share in it, and that also at the earliest opportunity consistent with due and orderly administration. *Hooper v. Hooper*, 29 W. Va. 276, 1 S. E. 290; note, 40 L. R. A. (N. S.) 201, 204. And the general rule is that a personal representative cannot charge the estate by contracts originating with himself, although for the benefit and in the interest and on behalf of the estate, such contracts binding him only in his private capacity. *Wick v. Dawson*, 48 W. Va. 469, 472, 37 S. E. 639; *Thompson v. Mann*, 65 W. Va. 648, 64 S. E. 920, 22 L. R. A. (N. S.) 1094, 131 Am. St. Rep. 987; 18 Cyc. 247.

[3] These propositions counsel do not gainsay, but those who speak for plaintiffs rely on a rule to the effect that sometimes and in some circumstances a personal representative may sue in his individual or representative character, as he may elect. The rule relied on is stated in 11 R. O. L. 287:

"Where the contract or transaction which is the basis of the suit is one to which the representative himself is a party, as, for instance, where the subject-matter of the litigation is a promise made by the defendant, not to the decedent, but to the representative, the latter may bring the suit in his individual or in his representative character, as he may elect."

To this statement of the law there can be no objection, for a similar holding exists in this state. *Elliott v. Blue*, 74 W. Va. 209, 81 S. E. 982. And the same rule is enunciated in 2 *Schouler on Wills, Executors and Administrators* (5th Ed.) § 1292. But, whatever may have been the right of the plain-

tiffs to sue in their individual capacity, they did not elect to pursue that course, but instead brought their action in a representative character. The capacity in which parties plaintiff have instituted a suit is to be determined from an examination of all the allegations of the declaration. *Hanson v. Blake*, Adm'r, 63 W. Va. 560, 60 S. E. 589. The whole tenor of the declaration in this case shows that plaintiffs are suing in a representative character. The phrases they have used so describe them, and the conclusion becomes irresistible, because of the addition to the declaration of an averment setting forth plaintiffs' due appointment and qualification as executors, pursuant to the rule prescribed by this court in *Austin v. Calloway*, 73 W. Va. 231, 80 S. E. 361, Ann. Cas. 1916E, 112, and *Perry v. Coal Co.*, 74 W. Va. 122, 81 S. E. 844, where suit is instituted by an administrator or executor in his representative capacity.

[4, 5] But plaintiffs contend that, since this action is one which they could have brought in their individual character, all allegations referring to them as representatives of the estate of the deceased should be regarded as surplusage and as descriptive of the persons referred to, citing 11 R. C. L. 288. However that may be, where the words used, as in *Hanson v. Blake*, Adm'r, 63 W. Va. 560, 60 S. E. 589, are merely descriptive of the person and not of the character or capacity in which he sues, yet the test there laid down is that whether words following the name of the party are to be deemed descriptive of his person or of the character in which he sues or is sued is to be determined from all the allegations of the declaration. The same doctrine is enunciated in 1 *Woerner*, *American Law of Administration* (2d Ed.)\* 643:

"It is now generally held that the title and pleadings may be considered together to ascertain the true nature of the action, and it will be treated as an individual or representative one as disclosed upon an inspection of the whole record."

See, also, 18 Cyc. 978-981.

From an examination of the allegations of the declaration it is clear that the plaintiffs intended to sue in their representative character. Since they have elected to sue in that capacity, should they not also show in their pleading some connection or relation between the recovery sought and the estate represented by them? We have discovered no case directly in point upon this question, nor have counsel cited us to any. But the requirement of an allegation in the pleading setting forth such connection or relation seems so easy to make, if the plaintiff is justified in suing in a representative capacity, and so conducive to accurate and scientific pleading and to a proper hearing of the cause,

that we are disposed to regard it as essential. Of course, under our decisions, plaintiffs are bound personally by the contract, though in this case that imposes no burden upon them, for they have already rendered the services which the contract sued on seeks to requite, and probably could have maintained a suit in their individual capacity. But since they have chosen openly and frankly to acknowledge that they are suing in a representative capacity, it imposes only a small additional burden to require them to show some connection between the recovery sought and the estate which they represent. Such an averment will tend to greater certainty and accuracy in the proceeding, and may prevent confusion during the course of the trial. Both counts are defective in this particular, and the demurrer thereto properly was sustained, subject, of course, to plaintiffs' right to amend.

[6, 7] The further objection, predicated also upon the insufficiency of each count, relates to their alleged failure to state specifically the full consideration for the contract sued on, and seems to us to have some merit, at least as regards the second count, for in *Davisson v. Ford*, 23 W. Va. 617, point 8 of the syllabus, it is said:

"In an action of assumpsit on a special contract to recover damages, the entire consideration and the entire act to be done must be stated in the declaration."

There the subject-matter of the controversy was Ford's agreement to render to Davisson compensation for certain of the cattle belonging to him then in the possession of Ford under a contract of bailment, and this court reversed the judgment for plaintiff because he did not prove the contract declared upon; the difficulty being the failure to state fully the conditions upon which the promise was based. This requirement the third count of the declaration does, but the second does not, fully comply with. The compliance and the failure to comply are obvious, for the averment in the second count does not show or recite any consideration for defendant's promise, while the third count fully sets forth the entire contract, which, being a sealed instrument, imports a consideration as well as states one. The contract merely embodied in writing a prior oral agreement fully executed on plaintiffs' part, and hence is not one based upon a past consideration. 1 *Page on Contracts* (2d Ed.) § 629. In this aspect of the case, as it is presented and seems to us, the third count is sufficient and the second count insufficient.

Whether these defects may be cured by amending the counts, so as to show the purpose of the contemplated recovery to be to benefit the decedent's estate, or so as to permit plaintiffs to prosecute the action for

their own benefit, we are without jurisdiction to decide upon this certificate, and the circuit court has not ruled thereon. Its other rulings we approve, and direct our approval to be certified thereto, for such further proceedings in the action as it may deem advisable.

(85 W. Va. 538)

**HARRISON v. HARMAN et al. POCAHONTAS COAL & COKE CO. v. GILLESPIE et al. SAME v. HARMAN et al.** (Nos. 3870, 3871.)

(Supreme Court of Appeals of West Virginia. Feb. 10, 1920.)

*(Syllabus by the Court.)*

**1. CHAMPERTY AND MAINTENANCE ¶4(5) — STRANGERS CANNOT TAKE ADVANTAGE OF CONTRACT.**

Strangers to a champertous contract cannot take advantage of it; only a party to it can do so.

**2. APPEAL AND ERROR ¶1158—FINAL DECREE WILL BE REVERSED WHEN PREMATURELY ENTERED AND CAUSE REMANDED FOR FURTHER PROCEEDINGS.**

Where several causes materially affecting the same subject-matter have been consolidated and heard together, and it appears that several issues are therein raised, some between the plaintiff and a number of the defendants and others between codefendants, all affecting plaintiff's rights, which have not been fully developed, and it is apparent that evidence exists to establish such issues, and the court enters a final decree for plaintiff without passing on many of such issues, except inferentially, this court will not review the decree upon its merits, but will reverse it solely because prematurely entered, and remand the causes for further proceedings.

**Appeal from Circuit Court, Mercer County.**

Suit by Hattie Harrison against George W. Harman, W. F. Harman, the Virginia-Pocahontas Coal Company, the Carter Coal Company, and R. E. Wood Lumber Company, consolidated with suit by the Pocahontas Coal & Coke Company against J. S. Gillespie and others, and suit by the Pocahontas Coal & Coke Company against W. F. Harman and others. Causes heard together, and from the decree George W. Harman, W. F. Harman, the Virginia-Pocahontas Coal Company, the Carter Coal Company, and the R. E. Wood Lumber Company appeal. Reversed and remanded.

Strother, Taylor & Taylor and Anderson, Strother, Hughes & Curd, all of Welch, for appellant R. E. Wood Lumber Co.

J. W. Chapman, of Tazewell, Va., W. B. Kegley, of Wytheville, Va., and S. M. B. Coul-

ling, of Tazewell, Va., for appellants George W. Harman and others.

A. G. Fox, of Bluefield, J. Powell Royall, of Tazewell, Va., M. O. Litz, of Welch, and Sanders & Crockett, of Bluefield, for appellee.

**WILLIAMS, P.** The three above-styled causes, having been previously consolidated by order of the court, were heard together on June 15, 1918, and the decree therein rendered, from which this appeal was taken by George W. Harman, W. F. Harman, Virginia-Pocahontas Coal Company, the Carter Coal Company, and the R. E. Wood Lumber Co. The first of said suits was reviewed by this court twice before, reported first in 76 W. Va. 412, 85 S. E. 646, and the second time in 80 W. Va. 68, 92 S. E. 460. It was brought by Hattie Harrison, one of the 12 children of Henry Harrison, deceased, to have reviewed the proceedings in a suit brought by George W. Harman and D. G. Sayers against the administrator and heirs at law of said Henry Harrison, deceased, and to have set aside, reversed, and annulled, in so far as they affected the title of plaintiff, as one of the heirs of Henry Harrison, to certain lands which had been therein sold and purchased by George W. Harman and later confirmed and conveyed to him by W. H. Stokes special commissioner of court, pursuant to its order. The prayer of plaintiff's bill was granted, and the decrees complained of and the conveyance to said W. F. Harman were set aside so far as they affected her one-twelfth undivided interest in the lands which had been so sold. This decree was rendered on the 13th of March, 1918. On appeal taken by George W. and W. F. Harman the decree was affirmed, and the cause remanded. Plaintiff then filed an amended and supplemental bill, making the Virginia-Pocahontas Coal Company, the Carter Coal Company and R. E. Wood Lumber Company parties defendant, and prayed for a partition of the land described in her original bill and also in the bill and proceedings in the second of the above-mentioned causes. That was likewise a partition suit, which was brought in the meantime by the Pocahontas Coal & Coke Company, a corporation, as plaintiff, against W. F. and George W. Harman and apparently all other persons including Hattie Harrison, claiming title to the lands and to undivided interests therein. The Virginia-Pocahontas Coal Company filed its answer to that bill, exhibiting a copy of a coal mining lease, executed to it by George W. and W. F. Harman and their respective wives, covering all the interest of the aforesaid Harmans in the land, including the undivided interest claimed by Hattie Harrison. George W. Harman also answered that bill, and admitted making the aforesaid coal lease, and said George W. Harman and

W. F. Harman, in their joint and separate answers filed to the amended and supplemental bill of Hattie Harrison, likewise admit it, and aver that it included all the coal and mining rights and privileges in all of the six undivided twelfths of the heirs of Henry Harrison, deceased, which had been conveyed to said George W. Harman by Special Commissioner W. H. Stokes, which includes the interest claimed by Hattie Harrison. George W. Harman further avers that at the time he purchased the aforesaid interests the title thereto was forfeited to the state; that said lands were proceeded against as forfeited, and in said proceedings he was adjudged to be the former owner of the six undivided twelfths, was permitted to redeem, and did redeem, the same. He also avers that, in acquiring the aforesaid coal lease, the Virginia-Pocahontas Coal Company dealt with him and W. F. Harman in good faith; that said company, some time after February 11, 1913, transferred its rights under said lease to the Carter Coal Company.

Respondents, the said Harmans, also admit a sale of the timber of certain dimensions on the aforesaid undivided six-twelfths interest in the Henry Harrison land, but they insist that the time for the removal thereof has expired, and that, under the terms of the contract of sale, there is a reversion of title to the timber to them. But the R. E. Wood Lumber Company also filed its answer, denying the alleged forfeiture, and setting up, as an excuse for not cutting and removing the timber within the time stipulated, the failure and refusal of the Harmans to have the land partitioned among the joint owners thereof, the timber purchased by it being upon certain undivided interests in the land. This issue, raised by the pleadings between the codefendants, has not been decided between them, nor has it been directly decided as between the R. E. Wood Lumber Company and the plaintiff.

[1] In their answer the Harmans also set up a contract between Hattie Stone (née Harrison) and her husband of the one part and J. Powell Royall, M. O. Litz, and A. Z. Litz of the other part, from which it appears that said A. Z. Litz, who is not an attorney at law agreed to pay the costs of appealing and prosecuting plaintiff's suit in consideration for an interest in plaintiff's claim, in the event she should succeed in the suit, and that plaintiff bound herself not to settle or adjust her claim except by and with the consent of said A. Z. Litz and her counsel. They insist that this contract is champertous, and is cause for dismissal of her suit. But, admitting that the contract is champertous, the Harmans are not parties to it, and the laws seems to be settled in this state at least that only the parties to such a contract can take advantage of it. *Davis v. Settle*,

43 W. Va. 19, and page 41, 26 S. E. 557; 1 Wharton on Contracts, p. 594, § 429; 11 Corpus Juris, p. 278, § 123; 5 R. C. L. p. 284. They aver that, after the conveyance by W. H. Stokes, special commissioner, to George W. Harman, they had to make large expenditures of money in payment of taxes and redeeming the land from forfeiture, and for costs of the proceedings in the two causes of State of West Virginia v. D. G. Sayers and Grace I. Van Winkle et al. v. D. G. Sayers et al., and in acquiring the outstanding title of the said Grace I. Van Winkle et al., and that, in the event plaintiff should be held to be entitled to her claim for one-twelfth undivided interest free from the claims of the Carter Coal Company and the R. E. Wood Lumber Company, respondents are entitled to be repaid the aforesaid outlays of money spent in redeeming the land and perfecting the title thereto. This matter has not been determined by the lower court.

The coal mining lease bears date January 14, 1913, and was acknowledged by the Harmans and their respective wives on the same day, and by the Virginia-Pocahontas Coal Company, by its president, George L. Carter, on the 25th day of January, 1913, but does not appear to have been recorded. The Virginia-Pocahontas Coal Company admits, as alleged in the answer of the Harmans, that it assigned said lease to the Carter Coal Company subject to the approval of the Harmans.

The Virginia-Pocahontas Coal Company and the Carter Coal Company also filed joint and separate answers to Hattie Harrison's amended and supplemental bill, in which they allege that all of her interest in the aforementioned coal lease was assigned to the Carter Coal Company on the 4th day of October, 1913, and the assignment exhibited with their answer bears that date. It will be remembered that plaintiff's bill of review was dismissed on demurrer on the 11th of February, 1913, and that she did not take an appeal from that decree until the 4th day of November, 1913; hence the question whether or not the Carter Coal Company was a pendente lite purchaser is presented, a question not directly passed on by the lower court.

After these answers were filed, plaintiff filed her second amended and supplemental bill, in which she averred that she had no knowledge of the fact or time when the aforesaid coal lease was assigned, that neither the lease nor the transfer of it had been placed upon the public records of McDowell county, nor did she admit that it was assigned at the time stated in the alleged assignment, and called for strict proof thereof, and averred that the former company was a lessee, pendente lite, and claimed that its assignee could acquire no greater rights against her than its assignor had, and alleged, as a fur-

ther reason why it could acquire no greater rights, that the Carter Coal Company is only the successor of its assignor, that the stockholders and officers in the two companies were and are the same, and that the only purpose in creating the latter company was to change the name of the former. She further averred that she had no knowledge of the claim of the R. E. Wood Lumber Company until it filed its answer; that it was a pendente lite purchaser, having purchased the standing timber on the land in controversy, with full knowledge of plaintiff's interest therein; that at the time of said alleged purchase there was pending in McDowell county a suit by Joseph Harrison et al. against said George W. Harman et al., raising the same issues that are involved in plaintiff's present suit, which she avers was consolidated and heard together with her suit. The Harmans, R. E. Wood Lumber Company, the Virginia-Pocahontas Coal Company, and Carter Coal Company filed their several demurrers and answers to plaintiff's second amended and supplemental bill, the court, on the 29th of October 1917, overruled their demurrers, and plaintiff replied generally to each of said answers, and the causes were continued.

The consolidated causes were then brought on to be heard together on the 15th of June, 1918, upon the pleadings and exhibits therewith filed, and, upon the report of the commissioners filed in the last two of the causes above styled, the decree reciting that the report had been confirmed on the 24th of April, 1916, and the decree now appealed from was entered on said 15th of June, 1918. The court found that plaintiff, Hattie Harrison, is entitled to 18448/101237 part of 191287/100 acres, designated by the commissioners on their report and map filed therewith as parcel B, and appointed commissioners to allot and assign to her the aforesaid proportion of the land aforesaid, by metes and bounds, according to quantity and quality, and authorized them to employ a surveyor and such assistants as he might need, and required them to report their proceedings to the next term of the court, and "further adjudged, ordered, and decreed that the said interest of the said Hattie Harrison in the said land so directed to be laid off and assigned to her be taken and held by her in fee simple, and free from any and all claims of any party to either of the above-entitled causes."

[2] The land of which Henry Harrison died seised was an undivided moiety in a tract owned by him and D. G. Sayers jointly, supposed to contain 1,600 acres. It had been partitioned between said Sayers and the heirs of Henry Harrison, and found to contain over 3,200 acres, the western half thereof being assigned to the Harrison children, of whom there were 12. Six of the adult ones had conveyed their respective interests before the suit was brought by Harman and Sayers

against them and Henry Harrison's administrator, and hence only the interests of the remaining 6 were sold at the judicial sale. These were purchased by George W. Harman, and of those 6 children, plaintiff, Hattie Harrison, is the only one contesting the claim of the purchaser. After his purchase, George W. Harman sold an undivided interest to W. F. Harman, and perhaps other interests to others, until now he claims to own but two of the six-twelfths which he originally acquired by the commissioner's deed. On the last appeal (80 W. Va. 68, 92 S. E. 460), it was held that Hattie Harrison had a right to her one-twelfth of the Henry Harrison land as against G. W. Harman, the purchaser of the six-twelfths, and as to him this adjudication is final. But since the cause was remanded numerous answers have been filed, setting up the claims of others to certain rights or interests in all of the undivided interests so purchased by him, to wit, by the Carter Coal Company to a coal mining lease, and by the R. E. Wood Lumber Company to the timber thereon; and, although the issues are presented by the pleadings in the manner herein designated, in the various suits which were consolidated and heard together, the court has not directly passed upon any of those adverse claims, and it is not clear from the terms of the decree whether the court intended thereby to pass upon them or not. While the language of the decree, fairly interpreted, would seem to imply that the court meant to decide that the coal lease claimed by the Carter Coal Company and the R. E. Wood Lumber Company's claim to the timber were void, so far as they affect plaintiff's interest, yet the decree does not say so in express terms. The Carter Coal Company denied that it was the mere successor of its assignor, the Virginia-Pocahontas Coal Company, and denied that the officers and stockholders of the two companies were the same. The issue thereby raised is important in determining plaintiff's rights, for if the Carter Coal Company is not merely the successor of the Virginia-Pocahontas Coal Company, and took an assignment of the lease in good faith, after the dismissal of plaintiff's suit and before she appealed, it may be that its rights in the lease would be protected even as against her. However, we are not deciding this question. We think the court should have expressly decided the issue between the Carter Coal Company and plaintiff, and also the issue between her and the R. E. Wood Lumber Company, and the issue between it and the Harmans, raised by the cross-pleadings between them, before directing plaintiff's interest to be partitioned off to her. The decree for plaintiff, before deciding those issues, and likewise before deciding the question whether or not George W. Harman was entitled to recover from Hattie Harrison any part of the money expended by him in redeeming the

Henry Harrison land from forfeiture and in perfecting the title thereto, and, if entitled to recover anything, ascertaining and fixing the amount thereof, was prematurely entered. Therefore, in the interest of complete justice to all the litigants concerned in the suit, and without passing upon the merits of the case further than was done upon the last appeal, but following numerous precedents, where it is apparent that evidence determinative of the issues exists, we will reverse the decree and remand the cause for the development and decision of the aforementioned issues, and for such further proceedings as may appear to be necessary. *Wildell Lbr. Co. v. Turk*, 75 W. Va. 26, 83 S. E. 83; *La Belle Iron Works v. Savings Bank*, 74 W. Va. 569, 82 S. E. 614; *Cook v. Lumber Co.*, 74 W. Va. 508, 82 S. E. 327; *Peabody Ins. Co. v. Wilson et al.*, 29 W. Va. 528, 2 S. E. 888.

Reversed and remanded.

RITZ, J., absent.

(85 W. Va. 568)

### NESTOR v. BURNS. (No. 3814.)

(Supreme Court of Appeals of West Virginia.  
Feb. 17, 1920.)

(*Syllabus by the Court.*)

#### 1. PARTNERSHIP §199—PARTNER AFTER ACCOUNTING CAN SUE AT LAW TO RECOVER PART OF DEBT ASSIGNED TO HIM.

Where, in the division of the assets of a partnership, there is transferred to each member an aliquot part of a debt due such partnership, and the debtor upon being advised thereof agrees to pay each partner the amount so assigned to him, each of the partners may thereafter maintain a suit at law to recover such part so assigned to him.

(*Additional Syllabus by Editorial Staff.*)

#### 2. ABATEMENT AND REVIVAL §8(6) — PENDENCY OF SUIT NO BAR WHERE SUBSEQUENT PROMISE IS MADE BY DEFENDANT.

The long pendency of suit in equity by partnership to collect firm account, which had never been determined, was no bar to action at law by one partner to recover amount due him, where partners by agreement transferred to each member his aliquot part of debt and debtor thereafter agreed to pay each partner such amount.

Error to Circuit Court, Tucker County.

Action by Charles D. Nestor against J. P. Burns. Judgment for plaintiff, and defendant brings error. Affirmed.

J. W. Harman, of Parsons, for plaintiff in error.

A. Jay Valentine and Ohas. D. Smith, both of Parsons, for defendant in error.

RITZ, J. The basis of this suit is a claim asserted by the plaintiff against the defendant for certain labor performed for him, and also a claim for one-third of the amount of a debt which it is claimed the defendant owed to a partnership composed of the plaintiff and two other persons. Upon the trial of the case the plaintiff had judgment for both of the items above referred to, to review which this writ of error is prosecuted.

[1] There is no controversy as to the item for services rendered the defendant by the plaintiff, but it is contended that the other item for an aliquot part of the amount due by the defendant to the partnership composed of three persons, of which the plaintiff was one, cannot be recovered in this action, upon the ground that it is a joint liability of the defendant to the partnership, and that to subject him to the liability of suits by each member of the partnership for an aliquot part of it would embarrass him unduly, and compel him to make defense to three actions, when he never contemplated such a condition at the time he incurred the liability. This would be entirely true. Ordinarily, the individual members of a partnership cannot sue to recover a debt due the firm. Suit must be brought by the partnership, or by the surviving partners in case some of them are dead. It appears in this case, however, that after the liability was incurred by the defendant to the partnership the partners had a settlement of their affairs, in which it was agreed that each partner should have as a part of his share of the social assets one-third of the amount due the partnership by the defendant. This was in effect an assignment to each partner by the partnership of a part of the debt due it, and conferred upon each individual the equitable ownership of such aliquot part. This would not, however, entitle any one of the individuals composing the firm to maintain a suit at law for the recovery of the part so assigned to him. Equity alone would have jurisdiction, unless the debtor assented to the division of the debt, and agreed to pay each of the partners. *Wamsley v. Ward*, 61 W. Va. 65, 55 S. E. 998; *Dudley v. Barrett*, 66 W. Va. 363, 66 S. E. 507. This is just what the plaintiff contends the defendant did. He swears that, a short time before the institution of this suit, he and the other two members of the firm divided the partnership assets, and in this division one-third of this debt was transferred to each of the partners, that immediately thereafter they called upon the defendant and informed him of this division of the indebtedness due by him to the firm, and that he promised to pay each of the parties the amount due; and it is upon this new contract that this suit is based. It is true the defendant denies that he ever made such a promise, but the plaintiff swears that he did,

and in fact it is proved by one of the other partners that he actually did pay him his one-third. The court below, to whom the case was submitted for determination in lieu of a jury, found for the plaintiff, and this finding carries with it the decision of that question in favor of the plaintiff's contention. We think the evidence justified the conclusion to which the court came on this point. By the act of the parties in dividing this debt among them, and the agreement of the defendant to pay each of them the amount so apportioned, he became liable to each of the partners for that amount in lieu of the joint liability which had theretofore existed.

[2] It is further insisted that this suit cannot be maintained for the reason that some time ago, and long before the settlement of the partnership and the division of its assets, the partnership brought a suit in equity against the defendant and others to enjoin the transfer by him of certain lumber and other materials which were the subject-matter out of which the indebtedness grew, and to collect the partnership indebtedness. This suit, it appears, was allowed to drag along and no final decree was ever taken in it. Long after it was brought, however, and while it was still pending, the partnership settlement above referred to was made, and the agreement of the defendant to pay each of the partners the amounts so assigned to them as aforesaid. This new agreement took the place of the former contracts of the parties, and there is no reason why this suit cannot be prosecuted upon the new agreement. The defendant urges that he has equitable set-offs to the claim made against him. If this is true, he could have refused to submit to the division of this claim into three parts. It is shown by one of the partners that he paid him off in full, and at that time expressed an opinion to the effect that he did not care whether the other two partners ever got their share or not. We do not think, under these circumstances, that the pendency of the chancery suit above referred to is any bar to this suit upon the new promise of the defendant to the plaintiff.

Finding no error in the judgment complained of, we affirm the same.

(85 W. Va. 570)

**HEATER v. LLOYD et al. (No. 109.)**

(Supreme Court of Appeals of West Virginia.  
Feb. 17, 1920.)

*(Syllabus by the Court.)*

**1. APPEAL AND ERROR**  $\S$  308—SUSTAINING DEMURRER WITHOUT DISMISSING BILL MAY BE REVIEWED ON CERTIFICATE BUT DISMISSAL OF PARTIES FROM SUIT ONLY ON APPEAL.

The correctness of the ruling of a trial court sustaining a demurrer to a bill, but not dismiss-

ing it, may properly be considered by this court upon certificate, as authorized by section 1, c. 135 (sec. 4981), Code; but the court will not consider that part of the order dismissing from the suit one or more, but not all, of the parties defendant; such action being final as to them, and, if erroneous, correctable only upon appeal.

**2. EQUITY**  $\S$  44—RIGHT TO RESCIND PURCHASE OF STOCK FOR FRAUD NOTWITHSTANDING CONCURRENT REMEDY AT LAW.

Where a person has by fraud been induced to buy from another stock in a bank which shortly thereafter is adjudged insolvent, he may institute and maintain a suit in equity for rescission of the transaction and repayment of the consideration paid therefor, notwithstanding the existence of a concurrent remedy at law.

**3. EQUITY**  $\S$  427(1)—IN SUIT FOR TOTAL RESCISSION OF PURCHASE OF STOCK INDUCED BY FRAUD THE COURT WITH ACQUIESCENCE OF THE PARTIES MAY DECREE A PARTIAL RESCISSION.

Where the worthless bank stock thus acquired by plaintiff was only part of the consideration involved in the transaction, and the bill, read and considered as a whole, shows that a total rescission of the transaction is sought, but alleges plaintiff's willingness in lieu thereof to rescind only in so far as the stock is concerned, the court, with the acquiescence of the defendant, may enter a decree for such partial rescission instead of one restoring the status quo.

**4. EQUITY**  $\S$  148(5)—BILL SEEKING RESCISSION OF PURCHASE OF BANK STOCK AND TO ENJOIN BANK'S RECEIVER FROM ASSESSING STATUTORY LIABILITY IS NOT MULTIFARIOUS.

Nor will such bill be held multifarious because it seeks, not only a rescission of the transaction involving the bank stock, but also an injunction restraining the receiver of the insolvent bank from assessing the statutory personal liability against plaintiff as owner of the stock, and from collecting the amount so assessed.

**5. INJUNCTION**  $\S$  180—SCOPE OF INJUNCTION AGAINST RECEIVER'S ASSESSMENT OF STATUTORY PERSONAL LIABILITY AGAINST OWNER OF BANK STOCK.

But in such a case the court should limit the scope of its injunction, leaving the receiver free to institute a general creditors' suit, and to assess against the stock its relative proportion of the liabilities, if any, incurred by the bank during the period of plaintiff's ownership of the stock, and restraining the receiver only from collecting such assessment from plaintiff until the court shall have determined whether any liabilities accrued against the bank during such period, and, if so, whether plaintiff or his fraudulent transferor is liable therefor.

**6. BANKS AND BANKING**  $\S$  48(1) — STOCKHOLDER'S STATUTORY DOUBLE LIABILITY APPLIES ONLY TO LIABILITIES INCURRED BY BANK DURING STOCKHOLDER'S OWNERSHIP.

A stockholder in a bank is subject to the statutory double liability only with respect to



liabilities incurred by the bank during the period of his ownership of the stock.

Certified from Circuit Court, Braxton County.

Bill by Bruce A. Heater against Homer J. Lloyd, the People's Bank of Burnsville, and J. I. Bender, its receiver. Demurrer to bill sustained on each ground assigned, and bill dismissed as to defendant Bank and its receiver, with leave to plaintiff to amend, and the correctness of such ruling certified. Rulings so far as sustaining the demurrer disapproved; ruling on demurrer of defendant Lloyd reversed; case recertified.

Hall Bros., of Sutton, for plaintiff.

James E. Cutlip, Haymond & Fox, and Alex Dulin, all of Sutton, for defendants.

LYNCH, J. The bill in this suit has for one of its two chief purposes the rescission of an executed agreement of sale, consummated June 18, 1919, whereby plaintiff transferred to defendant a certificate for the shares of stock owned by him in the Delta Coal Company, a corporation, and representing a one-third interest therein, in consideration of the transfer to him by defendant, at par value, or an aggregate valuation of \$500, of a certificate calling for five shares of the capital stock of the People's Bank of Burnsville, a state banking institution of which defendant is stockholder and director, the payment of a sum in cash, and the assumption by Lloyd of certain liabilities incurred by and chargeable to plaintiff as part of the unpaid purchase price of the coal company stock. The other object is to obtain an injunction to prohibit the assessment of the statutory personal liability against the bank stock, the certificate of which plaintiff has held as owner since the transfer, and the collection of the amount so assessed; the defendant bank in the meantime having become utterly insolvent, and defendant Bender the receiver of its assets for the purposes of liquidation. The bill joins as defendants Lloyd, the insolvent bank, and J. I. Bender, receiver.

The right to maintain the suit for either purpose against any of the defendants for the attainment of these ends is based upon the alleged fraudulent representations of Lloyd regarding the actual market value of the five shares of bank stock at the time of the assignment of the certificate; the date thereof preceding by one month only the official ascertainment of the insolvency of that institution and the appointment of Bender receiver of its assets. To the bill each of the defendants demurred and assigned as grounds of the challenge want of equitable jurisdiction to pronounce the decree prayed for, the availability of an adequate remedy at law for the deception, if any, practiced by Lloyd, and multifariousness of the bill. The

demurrer thus interposed the court sustained on each ground assigned, dismissed the bill as to the bank and the receiver, gave leave to plaintiff to amend, and certified here for our opinion the correctness of that ruling.

[1] Viewed in the light of the purposes of the final clause of section 1, c. 135 (sec. 4981), Code, and the decisions of this court relative to the right to certify questions finally determined and adjudicated in the trial court, as was done by the order dismissing and discharging the defendants bank and Bender from the suit, manifestly this court cannot consider, discuss, or decide anything affecting them otherwise than by writ of error or appeal. The effect of the provisions of that statute is to circumscribe, restrict, and limit the right of this court to entertain and decide only questions immediately arising in the preliminary stages of a controversy, that is, mere interlocutory orders, not those fully and completely terminating the action or suit by final judgment or decree. To obtain relief from an erroneous judgment or decree the party aggrieved must resort to the usual writs provided by law for that purpose, and not to those provided for a special purpose. It is true this court has held in *Gulland v. Gulland*, 81 W. Va. 487, 94 S. E. 943, that a decree sustaining a demurrer to part of a bill and dismissing it as to such part may be certified to this court for review, and, if found to be erroneous, the bill will be reinstated in so far as it was dismissed. But the court in this case dismissed two of the parties, and not part only of the bill, as in *Gulland v. Gulland*. The sufficiency of a pleading dismissed in part and the propriety of the dismissal of one or more, but not all, of the parties are two totally different things. The bill was found to be deficient upon demurrer, but no part of it was dismissed, and the questions raised respecting it properly are before this court for consideration upon the certificate.

Since the defendant Lloyd raised the same questions upon his demurrer as did the parties dismissed, it is necessary for us to discuss and indirectly pass upon questions affecting the bank and receiver; but we cannot reinstate them as parties, if they were dismissed improperly, otherwise than on appeal. As to them the decree is final and appealable, and to correct any error in that order plaintiff must resort to the usual procedure provided for that purpose.

[2] With respect to the jurisdiction of equity to entertain a suit for rescission we entertain no doubt. A reading together of the allegations of the bill and its prayer discloses plaintiff's willingness and offer to accept either a total or partial rescission of the contract whereby he acquired, through the fraudulent representations of defendant, the ownership of the five shares of bank stock. Although one part of the prayer is

that he recover from defendant the sum of \$500, the value at which he accepted the stock in the exchange consummated by the contract, the preceding clause is "that the transaction aforesaid by which he purchased the said five shares of stock \* \* \* may be rescinded, canceled, and annulled," apparently referring to the entire transaction. That this was the intention is clear from the recitals of the bill. It states the offer made, and now repeated, to rescind the whole transaction by repaying to Lloyd the cash payment heretofore referred to, by relieving him from the obligations assumed as aforesaid, and by surrendering to him the said shares of bank stock, upon return of the coal stock delivered to Lloyd and the repayment by him of \$500, the valuation at which the bank stock entered into the consideration. Upon Lloyd's refusal to rescind in toto, because he theretofore had sold to another the shares of coal stock so purchased, plaintiff offered, and in his bill consents, to accept in lieu thereof an equal amount of other stock of the same coal company, since acquired by Lloyd from another source, or to rescind in so far as Lloyd is now able to do so by returning the five shares of bank stock upon the repayment of the \$500 paid by plaintiff for it. These offers defendant declined and still refuses to accept by way of adjusting the matters in dispute.

[3] Treating the bill as one for rescission in toto, or to such an extent as defendant is able to make restitution, including the return of the \$500 for the bank stock, there can be no doubt of the jurisdiction of equity to grant the relief asked, even though plaintiff may have an action at law to recover the money actually paid for the stock. Plaintiff seeks for something more than a mere money judgment. He desires to be relieved of the burden incident to the possession and consequential liability due to ownership of the shares of stock which defendant fraudulently induced him to accept. The remedy which the law may afford is necessarily incomplete and inadequate because of the lack of power to effect a rescission by a direct adjudication thereof and thereby unburden him of these liabilities. *Bruner & McCoach v. Miller*, 59 W. Va. 36, 52 S. E. 995. As said in that case at page 45 of 59 W. Va., at page 999 of 52 S. E.:

"From the peculiar nature of the jurisdiction for the purpose of rescission, this court has always recognized the right of a party who is the victim of a fraud or mistake to come into equity for relief, notwithstanding the existence of concurrent jurisdiction in the law courts."

And in *Morrissey v. Williams*, 74 W. Va. 636, 82 S. E. 509, L. R. A. 1915D, 792, relief very similar to that sought here was granted. See, also, 2 Black on Rescission and Cancellation, § 646; *Bosley v. National Machine Co.*, 123 N. Y. 550, 25 N. E. 990. The varied

forms of relief by rescission which the court under plaintiff's bill might render, and the protection sought against the bank and its representative, require for full effectuation the broader and more elastic machinery of a court of equity rather than the more rigid proceedings at law. *Warren v. Boggs*, 83 W. Va. 89, 97 S. E. 589, pt. 7, Syl.

It is unnecessary to discuss the extent of the jurisdiction of a court of equity to grant partial rescission of such a transaction, where that alone is sought, or to consider the related question whether that part of the transaction whereby plaintiff was induced to accept at a valuation of \$500 bank stock that was practically worthless was divisible and separable from the other portions of the transfer so as to warrant partial rescission. As has already been said, reading together all the allegations of the bill, the tenders therein made in order to restore the status quo, and the prayer for general relief, we treat the bill as one for entire rescission of the transaction. But since plaintiff in his pleading has expressed willingness to accept less than total rescission, that is, payment by defendant of the \$500 agreed valuation at which plaintiff accepted the stock, defendant likewise may be willing to pursue that course rather than be restored to the status quo, in which case it may be proper for the court to enter a decree for such sum, upon return of the bank stock to defendant, and permit the remainder of the transaction to stand. *Silliman v. Gillespie*, 48 W. Va. 374, 37 S. E. 669.

[4] Finally the bill was assailed successfully on the ground of multifariousness, in that it included in the same pleading two distinct causes of action, namely, a suit to rescind the transaction between plaintiff and defendant and one to restrain the receiver of the insolvent bank from levying any assessment upon or collecting any amount from him as a stockholder of said bank or as owner of the five shares of its stock. It is certainly true, as we have held recently (*Bean v. County Court*, 101 S. E. 254), that—

"A bill setting up two separate and distinct causes of action in no wise related to each other, calling for relief different in its nature, character, and extent, both of equitable cognizance, the proof in support of which would be separate and distinct and in no wise related, and the defense of which calls for setting up matters in no wise related, resulting in a confusion of the issues involved and the proof offered in support thereof, if attacked in limine, will be held multifarious."

But the rule against multifariousness is generally regarded as one of convenience, and where the matters contained in the bill are not wholly separate and distinct, but are intimately correlated and relevant to the relief sought, and it is possible to litigate and dispose of them in one suit without injustice to any one or confusion of the issues involv-

ed, the objection should be disregarded. *Coal & Coke Co. v. O'Neal*, 82 W. Va. 186, 95 S. E. 822. As incidental to a rescission of the transfer to him of the stock of the insolvent bank, plaintiff seeks to restrain the imposition upon him of any burdens which subsequent proceedings in the case may show that he should be free from. The issues are closely connected in subject-matter and in the substance of the relief sought. The bill expressly alleges "that there was very little, if any, business transacted by said bank after the purchase by him (plaintiff) of the shares of stock aforesaid," and that "no losses were sustained after he purchased said stock."

[6] These allegations the demurrer admits to be true, and if so, plaintiff is wholly exempt from the imposition of any burden chargeable to the owner of bank stock, for such a stockholder is subject to the statutory double liability only with respect to liabilities incurred by the bank during the period of his ownership of the stock. Section 78a (3), c. 54, Code (sec. 3034); *Dunn v. Bank of Union*, 74 W. Va. 594, 82 S. E. 758, L. R. A. 1915B, 168; *Morrissey v. Williams*, 74 W. Va. 636, 82 S. E. 509, L. R. A. 1915D, 792. Such is the express language of the statute, and such is the construction that has been placed upon it. The allegations of the bill, therefore, disclose a situation exonerating plaintiff from such liability, if the proof sustains the allegations.

Whether, if the facts developed upon the hearing should disclose liabilities incurred by the bank during the period of his ownership of the stock, he or his fraudulent transferor would be liable therefor to the receiver, is a question not arising under the pleading, and as to it we express no opinion, except to say that the only two authorities which we have discovered involving the point, and they are recent cases, agree that the bank has a direct action against the holder of record, although he became such holder by reason of a fraudulent transfer. *Brooks v. Austin* (Tex. Civ. App.) 206 S. W. 723; *Bundy v. Wilson* (Colo.) 180 Pac. 740. As to whether we would be disposed to follow these decisions we express no opinion.

[5] The injunction sought by the bill to restrain the receiver from the imposition or collection of any assessment against plaintiff as stockholder of said bank would perhaps have been proper under the allegations of the bill that no liability had accrued against the bank during the period of plaintiff's ownership of the stock. But since the proof may show the facts to be otherwise, it will be more in accordance with due regard for the rights and duties of the receiver to restrain the latter only from collecting any assessment from plaintiff until the question is settled whether plaintiff or defendant

Lloyd is responsible for the liability, if any, incurred by the bank during that period, leaving the receiver free to institute a general creditors' suit and to assess against the five shares of stock their relative proportion of that indebtedness. Such a qualified injunction will accord to the receiver the freedom of action which his position of trust requires in protecting the rights of the creditors whom he represents, and at the same time will safeguard plaintiff by relieving him from collection of any assessment that may be levied against the shares which he holds, until the question whether plaintiff or his fraudulent transferor is liable therefor can be determined in this suit. However, since the receiver is no longer a party to the suit, no injunction of any kind properly may issue against him at this time.

For these reasons we disapprove the rulings of the trial court in so far as they sustain the demurrer to the bill, but take no action respecting the reinstatement of the parties dismissed from the suit.

(85 W. Va. 609)

FAIRVIEW FRUIT CO. v. H. P. BRYDON & BRO. (No. 3868.)

(Supreme Court of Appeals of West Virginia.  
Feb. 17, 1920.)

*(Syllabus by the Court.)*

1. EVIDENCE §553(3)—FACTS MAY BE ASSUMED AS BASIS OF HYPOTHETICAL QUESTION WHERE EVIDENCE TENDS TO PROVE THEM.

Facts may properly be assumed as the basis of a hypothetical question propounded to an expert witness, when there is evidence tending to prove them; for such purpose it is not necessary that they should be undisputed.

2. DAMAGES §112—MEASURE OF DAMAGES FOR DESTRUCTION OF YOUNG GROWING FRUIT TREES.

A proper measure of damages for the destruction of young, growing fruit trees is their value in place at the time they were destroyed, and such value may be ascertained without regard to the diminished value of the land.

3. EVIDENCE §441(8) — PROOF OF ORAL AGREEMENT BY MANAGER AS TO DAMAGES TO ITS PROPERTY ADMISSIBLE NOTWITHSTANDING PROVISIONS OF DEED.

Evidence is admissible to prove an oral agreement between the general manager of an incorporated fruit company, owning the surface of land, subject to the mineral and mining rights in another, which it has planted in fruit trees, and the owner of the coal that all the apple trees, destroyed by stripping the surface in the process of mining, are to be paid for at a certain price per tree, the deed under which the company holds providing that the mining is to be done in a manner least injurious to the surface, and, when so done, that no

right of action shall accrue because of such injury.

**4. CORPORATIONS ¶406(4)—POWER OF GENERAL MANAGER TO MAKE ORAL AGREEMENT AS TO DAMAGES TO ITS PROPERTY.**

The general manager of such a company is its general agent, and has implied power to bind it by such agreement, which need not be in writing in order to be enforceable.

**5. APPEAL AND ERROR ¶1056(1)—EXCLUSION OF MATERIAL EVIDENCE IS PREJUDICIAL.**

Rejection of material evidence is prejudicial error.

**6. APPEAL AND ERROR ¶989—TRIAL ¶28 (2)—REFUSAL TO PERMIT A VIEW IS NOT REVERSIBLE ERROR UNLESS AN ABUSE OF TRIAL COURT'S DISCRETION.**

Refusal of the court to permit a view of the premises by the jury is within its sound discretion, and not reversible error, unless he has abused such discretion.

**7. RAILROADS ¶480(2) — NEGLIGENCE PRE-SUMED FROM FIRE WITHIN REACH OF SPARKS FROM LOCOMOTIVE.**

It is sufficient to make a case of prima facie negligence against the owner and operator of a steam locomotive engine for negligently setting fire to the dry grass in plaintiff's fields near by, to prove that the engine emitted sparks in dangerous quantity, that fires were observed to be burning in the grass shortly after it had passed, and that the fires could not reasonably have originated from any other source. When such facts are proven, the burden is cast upon defendant to rebut the presumption by showing the exercise of reasonable diligence.

**Error to Circuit Court, Mineral County.**

Action by the Fairview Fruit Company against H. P. Brydon and Richard Brydon, partners, doing business as H. P. Brydon & Bro. Judgment for plaintiff, and defendant brings error. Reversed and remanded for a new trial.

J. Leonard Baer and Taylor Morrison, both of Keyser, for plaintiff in error.

Chas. N. Fennell, of Keyser, for defendant in error.

**WILLIAMS, P.** [1] This action is brought by the Fairview Fruit Company, a corporation, against H. P. Brydon and Richard Brydon, partners, doing business as H. P. Brydon & Bro., to recover damages for the destruction of its young growing apple trees by the alleged negligence of defendants in permitting sparks to escape from their "dinky" engine, which was used in hauling coal from their coal mine on plaintiff's land across the surface thereof to the tippie, thereby setting fire to the dry grass and other combustible materials in its orchard and killing the apple trees, and for damages caused by wrongfully removing the surface of the land from off the top of the coal and digging up and otherwise destroying other of plaintiff's growing apple

trees. Plaintiff recovered judgment for \$1,796.88, and defendants have brought the case here, assigning numerous errors. The first is in permitting certain hypothetical questions, concerning the value of the growing apple trees destroyed, to be propounded to witnesses Kephart, Arnold, and Pack. The question asked of witness Arnold was as follows:

"Assuming that that section of country is well adapted to the growing of apples, that the apple trees which were destroyed by fire and which were dug up and carried away by the excavating which was done there had been cultivated, pruned, sprayed, and otherwise given reasonable care, what would you say was the average valuation per tree of the trees that were so destroyed, assuming also that they were set out in the spring of the years 1912 and 1913, and that the injuries by fire took place in July and August, 1917, and in April, 1918?"

To which witness answered as follows:

"We usually, and I think it figures about right, estimate the apple trees in good variety and good soil at \$1.00 per year."

The facts assumed in the question to exist are all supported by testimony of witnesses, and this is a compliance with the rule respecting the laying of a foundation for a hypothetical question asked of an expert witness. There is testimony that the section of country where plaintiff's commercial orchard was planted is well adapted to apple growing, that 631 apple trees, which had been set out in the spring of the years 1912 and 1913, were destroyed by fire, and by digging up and removing the soil; that although the trees had not reached the bearing stage they had been cultivated, sprayed, and otherwise given reasonable care, and were at the time of their destruction in good condition. The witness was shown to be qualified to testify as an expert as to their value, because he had had experience for at least 24 years in apple growing, and was at that time manager of the Knobley Orchard Company, and had been its manager for about 14 years. The assumed facts, as the basis of a hypothetical question, need not be established by undisputed testimony; it is enough if there is evidence tending to prove them. *Bowen v. Huntington*, 35 W. Va. 682, 14 S. E. 217; *State v. Musgrave*, 43 W. Va. 672, 28 S. E. 813; *State v. Cook*, 69 W. Va. 717, 72 S. E. 1025; *State v. Angelina*, 73 W. Va. 146, 80 S. E. 141, 51 L. R. A. (N. S.) 877. Witnesses Kephart and Parks are also practical, commercial fruit growers, each having had an experience of from 15 to 16 years, and were therefore qualified as expert witnesses, and the questions propounded to them were practically the same as that propounded to witness Arnold. This testimony was entirely proper.

[2] As the measure of its damages plaintiff proved the actual number of trees destroyed by fire, and the number destroyed by digging

up the soil, and the value of each apple tree so destroyed, also the value per acre and the acreage of soil removed from off the coal, and defendants insist that this is not the correct measure of damages; that the correct measure is the difference between the value of the real estate immediately before and its value immediately after the injury. While such is generally a correct rule, nevertheless the method employed by plaintiff is also permissible, and, in view of the circumstances of this case, if any difference, is the more accurate measure. While it is true that shrubbery, shade trees, and fruit trees, growing on the land, generally have no commercial value apart from the land; it is nevertheless true that their value in situ is capable of ascertainment with reasonable accuracy. Fruit trees have to be planted and cultivated and allowed to grow for a number of years before they begin to bear any fruit, and it is proper to consider, not only the cost of replacing them, but also the length and loss of time in doing so. It would require 5 or 6 years to produce other trees growing in the same condition and as near the bearing stage as those that were destroyed. They had an actual value in place, apart from any value they may have added to the land, and in that case plaintiff had the right to recover their value, without regard to the diminished value of the land. 3 Sedgwick on Damages (9th Ed.) § 833, and numerous cases cited in note; 4 Sutherland on Damages (4th Ed.) § 1066; Atchison, Topeka & Santa Fé Ry. Co. v. Geisler, 68 Kan. 281, 75 Pac. 68, 1 Ann. Cas. 812. This case holds that in the case of damage for destruction of fruit trees the measurement of damages may be ascertained by either one of two methods: First, their value as a distinct part of the land, if susceptible of such measurement; and, second, the value of the land immediately before and after their destruction, and that where both methods are employed in the same case the jury must ascertain the damage from all the evidence. The following cases are also in point: Mitchell v. Billingsley, 17 Ala. 391; Montgomery v. Locke, 72 Cal. 75, 13 Pac. 401; Hart v. C. & N. W. Ry., 83 Neb. 652, 120 N. W. 176; Louisville & N. R. R. v. Beeler, 126 Ky. 328, 103 S. W. 300, 11 L. R. A. (N. S.) 930, 128 Am. St. Rep. 291, 15 Ann. Cas. 913; Burdick v. C., M. & St. P. Ry., 87 Iowa, 384, 54 N. W. 439; Missouri, K. & T. Ry. Co. v. Lycan, 57 Kan. 635, 47 Pac. 526.

[3-5] The next assignment is the rejection of the testimony of Richard Brydon, one of the defendants, to the effect that Burke Randalls, president and the general manager of plaintiff company, had agreed with him as to the amount of recovery plaintiff should be entitled to recover, in the event defendants injured plaintiff's soil and fruit trees by stripping the surface from off the vein of coal. It appears from the testimony of this witness, taken out of the presence of the jury and incorporated in the record, that Mr.

Randalls agreed with him on the price of 40 cents per tree for all apple trees destroyed in that manner, and on \$30 per acre for the soil. He says he had several conversations with Mr. Randalls in regard to the matter, and that he assured him he had a controlling interest in the plaintiff company, and that what he did in that respect would be agreeable to the other stockholders; that this contract was oral, but the understanding was that Mr. F. C. Reynolds, now deceased, but who was then attorney for both parties, would prepare the papers to be signed, but this was not done, the reason therefor not appearing. It is admitted that Mr. Randalls is the president and general manager of plaintiff. Counsel insists that this testimony was properly rejected: First because it tended to prove an incomplete agreement; second, because it showed that the agreement, if made, related to the corpus of the realty, and plaintiff's general manager had no power to make such an agreement, unless authorized by the board of directors to do so, and no such authority was shown; and, third, because witness admitted some of the conversations were had in the presence of one Thomas Devine and H. P. Brydon, neither of whom was offered as a witness in reference thereto. Mr. Randalls had acquired title to the surface of the land, and made a conveyance thereof to the plaintiff company. A copy of the deed to plaintiff was exhibited in evidence, from which the following clause is here copied:

"Reserving and excepting from this conveyance all coal, lead, iron and other minerals that may be underlying the said land, together with the right at any time to mine and remove from beneath said land in any manner as will be considered least injurious to the surface thereof, all such minerals and the right of ingress and egress for tracks and tramways and other rights of way necessary and requisite to properly mine and remove all the minerals hereby reserved, but such mining operations to be carried on so as not to unnecessarily interfere with the use of said land for farming purposes, but a right of action for damages shall not accrue because of injury to the surface of said land caused by the removal of any or all of said minerals."

The rejected evidence should have been allowed to go to the jury. Although Mr. Randalls denied making any such agreement, the credibility of the witnesses was a jury question. The rejected testimony, if believed by the jury, would have materially reduced the amount of damages which plaintiff was entitled to recover.

As general manager, Mr. Randalls had implied authority to bind his company by such an agreement, for he was its general agent. Its deed for the surface showed that the title to the minerals, together with the necessary mining rights, belonged to another, and that the probability of injury to the surface in the removal of the coal by whatever means or

method employed was a matter in contemplation, and the deed provided that the mining was to be carried on in a manner least injurious to the surface; hence the general manager, by virtue of his implied authority, could agree with defendant as to the manner of mining which he thought would be least injurious to the surface. Such authority is within the scope of his duties as plaintiff's general manager, and therefore its general agent. 1 Clark and Skyles on Agency, pp. 470, 471; Fruit Dispatch Co. v. Ellis, 75 W. Va. 52, 83 S. E. 187; Producers' Coal Co. v. Miffin Coal Mining Co., 82 W. Va. 311, 95 S. E. 948; Brace v. Northern Pac. Ry. Co., 63 Wash. 417, 115 Pac. 841, 38 L. R. A. (N. S.) 1135, and cases cited in note.

It was not necessary that the agreement should have been in writing and signed in order to be binding. Notwithstanding the witness says it was to be reduced to writing, nevertheless he says they had agreed on all the matters to be put in the writing, and he acted on that agreement in good faith. This is enough to show an agreement. It was not such an agreement as the law requires to be in writing in order to make it enforceable.

That defendant did not offer to prove the agreement by other witnesses who heard some of the conversations is no excuse for rejecting the testimony of Brydon in respect to it. Counsel insists that defendant was not prejudiced by the exclusion of the testimony. It must be presumed that he was prejudiced, for the jury are the only judges of the weight and value of conflicting testimony. Because, in a trial by jury, the court can decide only on the admissibility of testimony, leaving the jury to determine its value, it necessarily follows that the party, whose evidence has been improperly rejected, as well as a party against whom irrelevant testimony has been admitted, is presumed to have been thereby prejudiced. It is proven and not disputed that 125 apple trees were destroyed by being covered up and broken down by removing the surface from off the coal, and that about two acres of the surface were thereby rendered unfit for agricultural purposes, and plaintiff's evidence tends to prove the value of the trees destroyed, whether negligently by fire, or wrongfully by removing the surface, was at least \$4 apiece, whereas the rejected testimony tends to prove that 40 cents each was the price agreed on for the trees destroyed by removal of the soil, so that the excluded evidence may have greatly reduced plaintiff's damages, if it had been allowed to go to the jury. While plaintiff's deed provides that no right of action shall accrue to it for damages on account of injury to the surface of the land, caused by the removal of any or all of the minerals, still the rejected testimony shows that \$30 per acre for the surface was the price agreed on as the damage thereto, and there appears to be no controversy as to that; that is all plaintiff

charged for damage to the surface in its bill of particulars. That provision of the deed, read in connection with the other, providing that the mining was to be carried on in a manner "least injurious to the surface," shows that the method of mining the coal, either in the ordinary way of taking it out from underneath the surface, or by stripping the surface, was a question which the parties interested in the surface and in the minerals, respectively, could thereafter determine by agreement.

[8] Refusal to permit the jury to view the premises shows no abuse of judicial discretion, and hence no cause for reversal. Davis v. Telephone Co., 53 W. Va. 616, 45 S. E. 926, and State v. Lemon, 99 S. E. 263.

[7] It is insisted that plaintiff has failed to prove the origin of the fire. Defendants employed Brady Bros., by contract, at a fixed price per ton, to mine the coal, and they operated a steam shovel for the purpose of removing the surface. Counsel insist that it does not appear from the evidence whether the sparks causing the fire were generated by the stationary engine, so used, or by the "dinkey" engine used by defendants' employees and agents in hauling the coal, that the fires were as likely to have originated from the one as the other, and in case they were caused by the former defendants were not liable, and that the evidence left the matter of origin of the fire merely to the speculation of the jury. It is unquestionably true that where the evidence respecting the negligent act causing an injury is uncertain as to whether it originated from one or the other of two sources, for one of which only the defendants are responsible, plaintiff cannot recover. The evidence must prove the negligent act with reasonable certainty before a verdict will be allowed to stand. But the evidence does make it reasonably certain in this case. The fires are shown to have occurred in July and August, 1917, and in April, 1918, and it is also shown that the "dinkey" engine, at least part of the time, was not provided with a spark arrester, that sometimes, especially when pulling up grade, it threw out sparks in great volume; that on one or two occasions fire in the orchard was observed to start within 10 or 15 minutes after the engine had passed by the place, and on another occasion, when it was very dry and the wind was blowing from the "dinkey" engine toward the orchard, the fire was discovered just after it passed. Moreover, it is shown defendants maintained a signal whereby warning was given to the men working in the mine, in order for them to assist in extinguishing fires. On the other hand, there is no evidence tending to prove that the stationary engine emitted sparks in dangerous quantity, or that any one of the numerous fires, which burned over parts of plaintiff's orchard, actually originated from the stationary engine, although on the occasion of one fire at least it

does appear the two engines were equally distant from the point where the fire started, but in opposite directions therefrom. The question was one for the jury, and we think the evidence was such as to enable them to determine, with a reasonable degree of certainty, that the fires all originated from the "dinkey" engine. It is sufficient to make out a case of prima facie negligence, shifting the burden to defendant to overcome it by proof of reasonable diligence, but this defendant did not do.

The court refused to permit Richard Brydon to testify as to what instructions he gave to the men in his employ about the operation of the "dinkey" engine. The record shows that, if he had been permitted to answer, he would have stated:

"That the employes were instructed to operate the engine in a careful manner, having due regard to accidents by fire, and that he personally saw that said instructions were faithfully executed, and that the engine was operated in a careful and proper manner so as to avoid fire to the property of others."

The question and answer were properly rejected. The instructions to his employes were not proper evidence, unless the employes were shown to have been careful in carrying out the instructions. The mere giving of instructions to their servants did not relieve defendants from liability. They had a right, of course, to show that their servants, operating the engine, were competent and were careful at the time, and that a reasonably safe spark arrester was used on it, but this they did not attempt to do, only in the manner indicated by the question. It does not appear that if witness Brydon had been permitted to answer he would have said he personally saw that the engine was operated in "a careful and proper manner, so as to avoid fire to the property of others," but that part of his answer was not responsive to the question, and was a mere conclusion of law and evidence of a fact. What was a careful and proper manner to operate the engine was the question in issue, and was to be determined from the facts by the jury. The operator of the engine at any of the times the fires occurred was not examined as a witness, nor is his absence accounted for. It further appears that the only ground for witness Brydon's statement that the engine was provided with a spark arrester is that he ordered one and paid the bill for it when rendered; he does not say that he saw that it was placed in the engine.

The evidence of Bushrod Grimes, who examined the ground in the orchard, over which the fire had burned, about two weeks before the trial and long after the fires had occurred, was properly rejected. The fact that it may then have been full of brush, logs, and rocks,

and in a very dirty condition, is not evidence of its condition at the time of the fire.

Three instructions were given by plaintiff of which defendants complain. No. 1, although inartificially drawn, in effect, as we interpret it, tells the jury that the origin of the fires "may be established by circumstantial evidence which justifies a reasonable and well-grounded inference that the same were started by sparks from the locomotive of the defendants, and rebuts the probability of said fires having originated from any other source." This is the usual manner of proving the origin of such fires, for it is hardly ever the case that an eyewitness can be produced who saw the sparks pass from the smoke-stack of a locomotive engine and set fire to inflammable material. It makes a prima facie case of negligence, to show that the engine emitted dangerous sparks, that a fire was observed to be burning within reach of the flying sparks a short time after the engine passed, and that there was no other probable source of the origin of the fire. *Aglionby v. Norfolk & Western Ry. Co.*, 80 W. Va. 687, 93 S. E. 812; *McLaughlin v. Baltimore & Ohio R. R. Co.*, 75 W. Va. 287, 83 S. E. 999.

The next two instructions are so plainly correct statements of the law applicable to the case that we deem it unnecessary to incumber the record with a discussion of them.

Defendants' instruction No. 1 was properly refused, not because it does not correctly state the law as to how the prima facie negligence may be rebutted, but because there is no evidence to show that defendants' engine, at the time the fire escaped from it, was being operated in a careful and prudent manner. In fact there is no evidence to show what character of servants were then in charge of it.

Plaintiff's second count being based upon the injury done, not on account of negligence, but on account of a trespass upon its land and the destruction of its trees in the process of mining, about which there seems to be no controversy, except as to the value of the trees, it had a right to a verdict in any event. The court, therefore, properly modified defendants' instructions 4, 5, and 7, so as to limit their application to the first count of the declaration, which related alone to the alleged negligence.

Their No. 2 was properly rejected, because the principle therein stated was fully covered by their No. 7, which was given as modified. Their No. 3 was mandatory in respect to the damages claimed by plaintiff for the destruction of its trees by fire, and, in view of the evidence, was properly rejected.

On account of the error committed in refusing to admit the testimony of witness Richard Brydon, we reverse the judgment, and remand the case for a new trial.

Reversed and remanded.

(85 W. Va. 533)

YOHO v. THOMAS. (No. 3713.)

(Supreme Court of Appeals of West Virginia.  
Feb. 17, 1920.)*(Syllabus by the Court.)*APPEAL AND ERROR ¶23—WHERE AMOUNT IN  
CONTROVERSY DOES NOT GIVE APPELLATE JU-  
RISDICTION COURT WILL DISMISS ON OWN  
MOTION.

Where it fully appears from the record that the sum or value in controversy is not sufficient in amount to give this court jurisdiction, the court will of its own motion dismiss the writ of error or appeal as having been improvidently awarded.

Error to Circuit Court, Wetzel County.

Action by V. C. Yoho against Mose Thomas. Judgment for plaintiff before a justice, and from a directed verdict for defendant on a trial de novo plaintiff brings error. Writ of error dismissed.

Thayer M. McIntire, of New Martinsville, for plaintiff in error.

M. R. Morris and Larrick & Lemon, all of New Martinsville, for defendant in error.

MILLER, J. The subject of this suit, begun before a justice, and tried de novo on appeal in the circuit court, was an alleged breach of a contract between plaintiff and defendant for the alleged sale and purchase of two hundred bushels of potatoes. Plaintiff obtained judgment before the justice for fifty dollars. In the circuit court, after plaintiff had introduced all his evidence, the court, on motion of the defendant, struck that evidence out and directed a verdict for defendant, upon which the verdict of nil capiat was pronounced.

The only contract proven, if one was in fact proven, was that the defendant agreed to sell and deliver to the plaintiff two hundred bushels of potatoes, at "reasonable digging time" in the year 1917, at the price of eighty cents per bushel. On the trial plaintiff proved that at the time and place of delivery the prevailing price of potatoes was \$1.20 per bushel, and the only evidence which the jury could have considered as showing market price did not exceed \$1.25. At either price the damages did not exceed forty-five cents per bushel, and the total amount of damages would have been less than one hundred dollars.

The first duty of this court, on writ of error or appeal, is to test its jurisdiction, by the sum or value in controversy. In the record we find want of jurisdiction in this court, because the sum or value in controversy does not exceed one hundred dollars; and being without jurisdiction, we must decline to take jurisdiction. The writ of error having been

improvidently awarded, must be dismissed. Dickinson v. Mankin, 61 W. Va. 429, 56 S. E. 824; Oppenheimer v. Triple-State Natural Gas & Oil Company, 62 W. Va. 112, 57 S. E. 271.

(85 W. Va. 604)

COX v. DAVIS et al. (No. 3889.)

(Supreme Court of Appeals of West Virginia.  
Feb. 17, 1920.)*(Syllabus by the Court.)*1. CONTRACTS ¶79 — GRATUITOUS SERVICES  
NOT SUFFICIENT CONSIDERATION FOR SUBSE-  
QUENT PROMISE TO PAY THEREFOR.

Services rendered and benefits conferred gratuitously do not constitute a sufficient consideration for a subsequent promise to pay therefor, whether such promise be merely verbal or written.

2. CONTRACTS ¶78 — NO OBLIGATION FOR  
GRATUITOUS SERVICES WITHOUT AN ANTECED-  
ENT OR CONTEMPORANEOUS PROMISE UNDER  
WHICH THE SERVICES WERE RENDERED.

Services rendered and benefits conferred, under circumstances rendering lack of expectation to be compensated therefor highly probable, impose no obligation to make such compensation, in the absence of proof of an antecedent or contemporaneous promise thereof, under which the services were rendered or the benefits conferred.

3. CONTRACTS ¶76—WORK AND LABOR ¶  
6—PROMISE TO PAY FOR BOARD AND A STORE  
ACCOUNT IS NOT IMPLIED BETWEEN CLOSELY  
RELATED FAMILIES; WRITTEN PROMISE BY  
OWNER OF REALTY TO PAY ONE BENEFITTED  
BY ITS USE FOR STORE ACCOUNT MADE AT END  
OF THEIR RELATION IS WITHOUT CONSIDERA-  
TION.

The law raises no implied promise to pay for board and a small amount of merchandise, or either of them, in the case of residence of two closely related families, in a dwelling house owned by the head of one of them, while the head of the other conducts a mercantile business in another building also owned by the former, no rent being paid in either case, and there is a general mingling of services and benefits between the two families, in both the home and the business, in the absence of proof of any antecedent or contemporaneous agreement, intent, or purpose to have an accounting between the parties; and a written promise by the owner of the real estate to pay to the other party compensation for board and a store account, made at the termination of the relation between them, is void for lack of consideration.

Appeal from Circuit Court, Gilmer County.

Bill to enforce vendor's lien by D. E. Cox against D. L. Davis and others. From a decree dismissing the bill, plaintiff appeals; D. L. Davis being sole appellee. Reversed, and decree entered for plaintiff, and the cause remanded.



J. Ramsey, of West Union, and O. M. Bennett, of Glenville, for appellant.

R. F. Kidd and L. H. Barnett, both of Glenville, for appellee.

POFFENBARGER, J. The decree now under review dismissed a bill filed for enforcement of a vendor's lien; the debtor having denied liability for the debt and right in the creditor to sell the property for satisfaction thereof.

The defense is founded upon a claim or contention in the nature of a defeasance; it being insisted that the note secured by the lien was never to be paid, but was to be satisfied or defeated by a paper executed by the payee thereof, shortly before its date, by which she agreed that a board bill and store account, aggregating a sum equal to the note, should be set off against it. Regarding the two transactions, execution of this paper and of the note and deed, as constituent elements of a single larger one, the trial court sustained the contention of the defendants.

This suit was brought by the assignee of the note, and he took it about ten months after the date of its maturity. He brought his suit against the assignor as well as the maker of the note and grantee in the deed. The latter disclaims any interest in the property as well as ultimate liability for the debt. In the entire transaction he claims to have represented his brother, who is the son-in-law of the payee, although he took the conveyance of the property and executed the note in his own name.

The property is a piece of land containing 11 acres and situated at Cox's Mills, in Gilmer county. At and before the date of the note and deed a dwelling house and a store building stood on it. In October, 1905, Mary A. Nicholson, the payee of the note, purchased it from Homer Mason, who seems then to have been conducting a store in the store building. At or about the same time her son-in-law, Zack Davis, or he and his brother, D. L. Davis, purchased Mason's stock of goods and mercantile business and thereafter carried on a mercantile business in that building. Just prior to these transactions Mary A. Nicholson, while living at a place called Buck Horn, had lost her house and furniture by fire. After the fire she and her family seem to have lived for a short time with Zack Davis on Leading creek. When the Mason property was purchased by her, she and Zack both moved into the house situated on it, with their families, and lived there together for about eight months, at the expiration of which period Mrs. Nicholson conveyed the property to D. L. Davis in consideration of \$1,000, of which \$50 was paid and the balance represented by four notes, one for \$150, two for \$250 each, and another for \$300, secured by a vendor's lien on the property. The theory of the defense is that Zack

Davis was the real purchaser, but that the transaction was put in the name of D. L. Davis, because Mrs. Nicholson's husband would not join her in a deed to Zack, and also that, in point of fact, the purchase money actually to be paid was only \$700, but it was necessary to make it appear to be \$1,000 in order to secure execution of the deed by the husband. Hence the deed recites such consideration, and the cash payment and notes represent it. Zack Davis claims to have obtained from Mrs. Nicholson, through A. S. Jones, an intermediary, her agreement to allow him to set off against the last note \$200 for the board of herself, her husband, and two daughters while they lived with him and his wife in her house and while he or he and his brother conducted the store in her building, paying no rent, and a store bill for goods obtained by her from the store during the same period of time. That agreement and the store account, if they ever existed, were both destroyed in a fire which consumed the store. Mrs. Nicholson and some of her daughters deny execution of the paper and the existence of any liability for board and the alleged store account or either of them.

Zack Davis paid the cash payment and the first three notes. About ten months after maturity of the last note it was assigned to D. E. Cox for value and without notice of any claim of an equity against it. Some time afterwards there was correspondence between Cox and D. L. Davis, according to the testimony of the former, in which no objection was made to the note, other than a claim of credits. None of that correspondence could be produced, however.

[1-3] Our conclusion renders inquiry as to the application of many of the legal propositions found in the briefs and urged at the bar unnecessary. Improbability of any purpose on the part of Zack Davis to charge his mother-in-law for the board of herself and her family or for goods furnished her while they lived together under the circumstances stated puts upon him the burden of proof of an express antecedent or contemporaneous promise on her part to pay therefor. They lived together as one family in her house, and he conducted his store in her building. She and a daughter did most of the housework, while he and his wife worked in the store. One of the daughters also worked in the store. He paid no house rent nor store rent. Mrs. Nicholson and her daughters say she owned two cows yielding the family milk and butter, and brought with her two hogs which were killed for meat, some potatoes, and a lot of turkeys which Zack sold. He denies that she furnished any of the food, but he makes no denial in detail of these specific charges. Under the broad generality of his denial he could admit that she did furnish this property, and then

attempt to deny receipt of any benefit from it. The fatal defect in his case is his failure to prove by his own testimony or otherwise that the benefits received by his mother-in-law under this family arrangement were bestowed upon her under any promise by her to pay for them. It is difficult to conceive a relation much closer or circumstances better calculated to raise an implication of gratuitous service and bestowal of benefits. There was a complete and indiscriminate mingling of services and contributions to family support and a business undertaking, admittedly without any charge or intent to charge, on the one side, and without evidence of such intent, on the other, until at or near the termination of the relation. And then the demand, if any, was set up as a means of effecting a purchase of property on more favorable terms than Mrs. Nicholson's husband would assent to, not as a claim or demand based upon any antecedent purpose, intention, or agreement. The time, manner, and purpose of the assertion of these claims are almost conclusive evidence in themselves of lack of original intention to assert them. They first appear in the effort to buy the property. There is not a particle of evidence that they were ever mentioned or thought of at an earlier date. Mrs. Nicholson's ownership of the residence and store building is admitted. It is also admitted that no rent was paid. Zack endeavors to avoid the effect of this circumstance by the claim that he was to have the store building and the two acres of ground on which it stood, but he nowhere says he was to pay for them, and, however that may be, he neither owned it nor paid any rent for it. Nor does he disclose the character of the store account. It may have represented groceries consumed by the family of six, including himself and his wife. The existence of any charge on the books against Mrs. Nicholson is denied by his sister-in-law, who says she had access to them while she worked in the store.

Failure to overcome the legal presumption against the existence of any indebtedness from the payee of the note to the real promisor arising from the circumstances disclosed makes the written agreement relied upon, if any, void and unenforceable for lack of consideration. A written promise to pay for gratuitous services, or to repay money advanced or expended in discharge of a moral duty, is not binding. Service so rendered or money so expended constitutes no valid consideration for the promise. The law raises no promise to pay in such cases. *Gooch v. Gooch*, 70 W. Va. 33, 73 S. E. 56, 37 L. R. A. (N. S.) 930; *Miller v. McKenzie*, 95 N. Y. 575, 47 Am. Rep. 85; *Mitcherson v. Dozier*, 7 J. J. Marsh (Ky.) 53, 22 Am. Dec. 116; *Coe v. Smith*, 1 Ind. 267; *Page, Contracts*, § 319; *Elliott, Contracts*, § 8403.

Upon these principles and conclusions, the decree complained of will be reversed, a decree entered here adjudicating the liability of the property mentioned and described in the bill and proceedings to sale for payment of the debt therein mentioned, and the cause remanded for execution of such decree.

(85 W. Va. 619)

STATE ex rel. WILKES INS. AGENCY v. DAMRON, Judge, et al. (No. 4025.)

(Supreme Court of Appeals of West Virginia. Feb. 17, 1920.)

(Syllabus by the Court.)

1. DISMISSAL AND NONSUIT  $\Leftrightarrow$ 43(6)—COURT MAY VACATE JUDGMENT AND REINSTATE CAUSE ON PAYMENT OF COSTS.

In a trial by jury, after plaintiff announces his case closed, defendant's counsel requests a peremptory instruction on account of an alleged fatal variance in the evidence, and, upon the court signifying his intention to grant the instruction, plaintiff's counsel requests permission to be allowed to reopen the case for the purpose of introducing additional testimony to overcome the variance, and, on the court's refusal of his request, plaintiff suffers a voluntary judgment of nonsuit, which the court immediately afterwards, on plaintiff's motion, sets aside and reinstates the cause on the trial docket, on plaintiff's payment of costs, over objection and exception of defendant—*held* not to be without jurisdiction or in excess of the court's legitimate powers.

2. DISMISSAL AND NONSUIT  $\Leftrightarrow$ 43(5)—ON MOTION TO REINSTATE CAUSE COURT MAY CONSIDER EVIDENCE HEARD PRIOR TO JUDGMENT.

In determining whether or not there is any merit in plaintiff's motion, the court may consider the evidence heard on the trial just prior to its judgment of nonsuit.

Ritz, J., dissenting.

Original prohibition by the State of West Virginia, on relation of the Wilkes Insurance Agency, against James Damron, Judge of the Circuit Court of Wyoming County, and others. Writ refused.

A. G. Fox, of Bluefield, A. A. Lilly, of Charleston, and Sanders & Crockett, of Bluefield, for relator.

Hartley Sanders, of Princeton, and Dillon & Nuckolls, of Fayetteville, for respondents.

WILLIAMS, P. Petitioner seeks to prohibit respondent, the judge of the circuit court of Wyoming county, from further proceeding in an action brought in said court by the Wyoming Banking Company against the petitioner on an alleged oral fire insurance contract. The writ is sought on the alleged ground of want of jurisdiction and excess of legitimate powers, which consisted

in reinstating the plaintiff's cause of action immediately after it had voluntarily suffered a nonsuit, without requiring it to show any cause for such reinstatement. It appears from the petition and respondent's answer that, after the plaintiff had introduced its evidence and announced that it had closed its case, defendant's counsel moved the court to direct a verdict for the defendant on the ground of a fatal variance between the declaration and proof. The court having signified its intention to sustain the motion, plaintiff's counsel asked to have the case reopened and that it be allowed to introduce additional evidence to clear up the variance, which permission the court refused to grant after the case had been closed. Thereupon plaintiff suffered a voluntary nonsuit, and immediately thereafter moved the court to set aside the judgment of nonsuit and reinstate the case on the docket, which motion was granted, over the objection of defendant, and it excepted. Quoting from respondent's answer:

"The court, in the exercise of its due discretion, believed that it would be fair and promote justice to give the plaintiff an opportunity upon another trial to correct said variance by proper evidence, and that therefore respondent was of the opinion that the nonsuit should be set aside and the case reinstated upon the condition that plaintiff pay the cost as set out in the order of the court entered therein."

[1] Petitioner's counsel insist that the court exceeded its legitimate powers, that section 11, ch. 127 (sec. 4842), has no application in such a case, and that there was no cause shown by plaintiff in support of its motion. A nonsuit is no bar to the cause of action and the matter of setting it aside and reinstating the case is a matter within the sound discretion of the trial court. But counsel insist that it was necessary for plaintiff to show good cause therefor, and that it did not do so. The reinstatement was ordered immediately after the court had heard plaintiff's witnesses, refused its request to be allowed to introduce further evidence after it had closed its case, and all these matters were fresh in the mind of the court. Upon reflection the court may have concluded that, in the interest of justice, it should have allowed plaintiff to introduce its evidence to correct the variance, and in order to correct, as far as possible, his ruling in respect thereto, prompted by a desire to do justice to the parties, as his answer states, he acted upon the knowledge which he had already obtained from the testimony of witnesses in the trial. He had a right to act upon his knowledge thus obtained, and it does not appear that any further proof was necessary as a foundation for his ruling. We cannot see that there was any lack of jurisdiction or abuse of judicial power. *Higgs v. Cunningham*, 71 W. Va. 674, 77 S. E. 273. That case

is authority for the proposition that the trial court is vested with a sound discretion in the matter of reinstating causes which have been dismissed for failure to prosecute. It was reviewed on writ of error, and the record showed that he was present by counsel and suffered a dismissal for failure to reply to a plea in abatement. Ten days later, at the same term, he appeared and moved to set aside the judgment and to be allowed to plead. The court overruled his motion on the ground that he had had ample time and opportunity to plead and showed no cause for his failure to do so; in other words, that he had shown no cause. This court held that although section 11, ch. 127, Code, applied, it did not entitle the applicant to have the dismissal set aside as a matter of right, but the court could exercise its judicial discretion to grant or refuse the motion, as might seem to it just and proper.

[2] Plaintiff had a right to suffer a nonsuit at any time before the jury retired, section 11, ch. 131 (sec. 4920), Code, and the court, during the term, having complete control over its judgments, 8 Encyc. Dig. Va. and W. Va. 511, had the inherent power to set it aside, and in doing so could consider the facts disclosed on the trial, of which he was already advised, in determining whether or not sufficient cause therefor existed. When the plaintiff is required to pay the costs, as in this case, and the defendant suffers no hardship, it would seem to be in furtherance of justice for the court to set aside a judgment of nonsuit.

Writ refused.

RITZ, J. (dissenting). I cannot agree with the conclusion reached by the majority in this case. The plaintiff, after a full trial of the issue, upon being advised by the court that he would sustain a motion to direct a verdict for the defendant, took a voluntary nonsuit. That this was his right there is no doubt. He could have stood on the case made and prosecuted a writ of error to the action of the court in directing the verdict, or he could take a voluntary nonsuit, as he did. After this nonsuit was taken, there was no case pending in the court. The plaintiff then moved the court to set aside the order of nonsuit. This motion was made at the same term of court at which the nonsuit was taken, and immediately after its entry, and the court, without having anything to support the motion, set aside the nonsuit and reinstated the case. My contention is that this was a clear abuse of the court's powers. I do not doubt for a moment but that the court had power to set aside a final order of nonsuit at the same term at which it was entered upon a showing of cause, but it is just like any other final order in a case. It cannot be set aside properly unless cause be shown therefor. It is not at all different

from any other final judgment, and as is held in *Post v. Carr*, 42 W. Va. 72, 24 S. E. 583, the adverse party has an interest in the judgment of the court finally disposing of the cause, and he is entitled to have such final disposition stand, unless cause is shown for setting it aside. But it is said that the judge in his return replies that he exercised his discretion by considering the evidence heard by him upon the trial of the case. He could not consider anything except what was offered on the motion. The evidence heard upon the trial of the case in which the nonsuit was taken, and which was off the docket of the court, was no more a part of the record or entitled to consideration than any other facts which might be within the knowledge of the court. The parties were entitled to have this showing made upon the motion so that advantage could be taken of the court's ruling, and if he exercised his discretion improperly the same could be reviewed.

In *Beck v. Thompson*, 31 W. Va. 459, 7 S. E. 447, 13 Am. St. Rep. 870, it was held that, on a motion to set aside a verdict because of the improper constitution of the jury, it must appear that the party making the motion was prejudiced thereby, and this showing of prejudice must appear from the evidence offered on the motion, and that the court could not consider upon this motion the evidence introduced upon the trial of the case. We approved that holding in *Garrett*

*v. Patton*, 31 W. Va. 771, 95 S. E. 437, and it occurs to me that it is entirely consistent with reason. Our holding there is to the effect that such discretion of the court in setting aside an order finally disposing of a case is reviewable. How can it be reviewed under the circumstances in this case? The matters considered by the judge are not part of the record, nor can they be made part of the record. It is impossible to put into the record his mental processes resulting from the consideration of matters known to him from purely outside sources, so that the result is that, instead of being the exercise of discretion, the circuit judge is permitted to do just as he pleases upon this question because there is no way in the world to review that discretion, and it has always been my view that, where an officer has the power to do as he pleases without the authority in any other tribunal to review his action, he is exercising arbitrary power instead of judicial discretion. In the case of *Dillon v. Bare*, 60 W. Va. 483, 56 S. E. 390, we held that, while ordinarily this court would not by extraordinary writ interfere with the conduct of officers where the action sought to be controlled called for the exercise of their discretion, it would control such action by the writ of mandamus where the same was performed by such officer without any basis for it. In other words, there cannot be the exercise of discretion unless there is something upon which to base it.

(149 Ga. 771)

**PURVIS v. CITY OF OCILLA et al.**  
(No. 1413.)

(Supreme Court of Georgia. Feb. 12, 1920.)

*(Syllabus by the Court.)*

1. CONSTITUTIONAL LAW — 3(2), 81 — PUBLIC POOL OR BILLIARD ROOM MAY BE STRICTLY REGULATED UNDER THE POLICE POWER; STATE'S POLICE POWER MAY BE DELEGATED TO A MUNICIPALITY.

The operation of a pool or billiard room for public entertainment is a business which, from its very nature, admits of strict regulation under the police power. *Trammell v. Yancey*, 142 Ga. 553, 83 S. E. 114; *Trammell v. Rome*, 142 Ga. 602, 83 S. E. 221; *Booth v. Illinois*, 184 U. S. 425, 22 Sup. Ct. 425, 46 L. Ed. 623; *Murphy v. California*, 225 U. S. 623, 629, 32 Sup. Ct. 697, 56 L. Ed. 1229, 41 L. R. A. (N. S.) 153.

(a) The police power may be exercised by the state, and it is now settled that the right to exercise it may be delegated by the state to a municipal corporation created by the state.

2. MUNICIPAL CORPORATIONS — 625 — ORDINANCE REGULATING BUSINESS OR TRADE MUST BE REASONABLE.

Where a municipality is authorized to regulate a lawful business, trade, or profession under the police power, but is without express charter authority to prohibit entirely such business, trade, or profession within the city, an ordinance enacted in pursuance of the power to regulate must be a reasonable exercise of the power. This is true where the power is conferred under the usual general welfare clause, and where it is conferred expressly and the mode of its exercise is not prescribed. *Manor v. Bainbridge*, 136 Ga. 777, 71 S. E. 1101, and cases there cited; *Cutsinger v. Atlanta*, 142 Ga. 555, 565, 83 S. E. 263, L. R. A. 1915B, 1097, Ann. Cas. 1916C, 280; 2 Dill. Mun. Cor. (5th Ed.) § 600.

3. LICENSES — 6(14) — MUNICIPAL CORPORATIONS — 594(1) — CITY MAY PROHIBIT KEEPING OF UNLICENSED POOL ROOM AND MAY REQUIRE GIVING OF BOND TO OBSERVE ORDINANCES AND REGULATIONS.

All reasonable regulations designed to confine the business of keeping pool rooms for public use within a municipality to responsible persons of good character are valid. To that end municipal authorities may require, as a condition precedent to one's engaging in such business: (1) The making of a written application and the granting of a license thereon; (2) the giving of a solvent bond, conditioned to keep an orderly house or room, to observe the ordinances of the city and the regulations prescribed for such business, and to pay all fines imposed for the violation of municipal authorities. *Shurman v. Atlanta*, 148 Ga. 1, 95 S. E. 698; *Campbell v. Thomasville*, 6 Ga. App. 212, 64 S. E. 815 (5, 7).

4. LICENSES — 38 — MUNICIPALITIES MAY MAKE VIOLATION OF ORDINANCE UNDER WHICH POOL ROOM IS LICENSED AN IPSE FACTO REVOCATION OF THE LICENSE.

Municipal authorities clothed with charter power may provide that any violation of the

ordinance under which a license to operate a pool room for public use is granted shall ipso facto revoke the license to conduct such business. Properly construed, such power authorizes the municipality to revoke the license only for cause. *Cassidy v. Macon*, 133 Ga. 689, 66 S. E. 941 (2), and *Shurman v. Atlanta*, supra, and *Campbell v. Thomasville*, 6 Ga. App. 212, 64 S. E. 815.

5. HOLIDAYS — 4 — LICENSES — 7(9) — MUNICIPAL CORPORATIONS — 63(1), 594(1), 625 — SUNDAY — 2 — MUNICIPALITY MAY REQUIRE POOL ROOMS TO BE CLOSED ON DAYS DESIGNATED BY MAYOR AND COUNCIL, AND MAY PROHIBIT SALE OF MERCHANDISE IN POOL ROOMS.

A municipality, under the usual general welfare clause of its charter, may provide that pool rooms conducted for public entertainment within the city shall not be kept open between the hours of 7 p. m. and 6 a. m., or on Sundays or holidays or "such days as the mayor and council shall direct." *Morris v. Rome*, 10 Ga. 534; *Watson v. Thomson*, 116 Ga. 546, 42 S. E. 747, 59 L. R. A. 602, 94 Am. St. Rep. 137; *Campbell v. Thomasville*, supra. If the mayor and council should arbitrarily enforce such provision, the courts would afford a remedy. *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220.

(a) A provision of a municipal ordinance making it unlawful for any person to sell, or offer for sale, any article of merchandise in a pool room, or to carry on or conduct any other business, trade, or calling at such place, is not an unreasonable exercise of the police power.

(b) A license (as distinguished from a tax for the purpose of raising revenue) of \$125 on the first table, \$100 on the second table, and \$75 on the third and each additional table kept in a pool room for public entertainment is prima facie valid.

6. MUNICIPAL CORPORATIONS — 594(1) — OPERATION OF BILLIARD ROOMS MAY BE RESTRICTED TO REASONABLE TERRITORIAL LIMITS.

The business of conducting pool or billiard rooms for public entertainment may, under the usual general welfare clause of a municipal charter, be confined to reasonable territorial limits within the municipality.

7. MUNICIPAL CORPORATIONS — 111(4), 625 — ORDINANCE PROVISION RESTRICTING BILLIARD ROOMS TO UNAVAILABLE LOCATIONS UNREASONABLE, BUT HELD NOT TO VITIATE ENTIRE ORDINANCE.

The general welfare clause of the charter of the city of Ocilla provides that "the mayor and aldermen of said city shall have full power and authority to pass or enact all ordinances or by-laws \* \* \* for the prevention of disorderly or immoral conduct, and conduct liable to destroy the peace and tranquility of any citizen thereof, or a sojourner therein, and every other by-law, resolution and ordinance that may seem necessary and proper for the security of the peace, health, order and good government of said city." Acts 1902, p. 525, § 35. Section 42 of the charter (page 539) confers upon the municipal authorities the power to "tax and license billiard and pool tables, \* \* \* any person or persons doing a brokerage business, or

pawnbrokers in said city, \* \* \* or any other business, trade, or profession carried on in said city of Ocilla, and they shall pass all ordinances necessary to carry into effect this section." Section 28 of the charter (page 535) confers upon the municipal authorities the power to "revoke at any time any license that may be granted by their authority, for the violations of the ordinances, rules and regulations granting the same, or when it shall to them appear that it is to the best interest of the city to do so." Under such charter provisions the city has the power to license and regulate pool or billiard rooms kept for public entertainment with the city; and, applying the principles stated in the foregoing headnotes, none of the provisions of the pool room ordinance enacted by the mayor and council of Ocilla appear to be unreasonable, except the provision confining the operation of pool rooms to certain designated portions of two named streets within the city. The limitations prescribed by the ordinance are, under all the facts appearing in the record, unreasonable.

(a) The provision of the ordinance restricting the territory in which pool rooms may be conducted within the city, and which we have held to be unreasonable, is not such a vital part of the ordinance, and is not so interwoven in the whole legislative scheme, as to render the entire ordinance void.

**8. INTOXICATING LIQUORS —11—MUNICIPAL CORPORATIONS —111(4)—LICENSING ORDINANCE PROHIBITING SALE OF LIQUORS PROHIBITED BY GENERAL LAW IS INVALID.**

Under the general law of this state, the sale of "all liquors and beverages or drinks made in imitation of or intended as a substitute for beer, ale, wine or whisky, or other alcoholic or spirituous, vinous, or malt liquors, including those liquors and beverages commonly known and called near beer," is prohibited. Acts 1915 (Ex. Sess.) pp. 77, 80, § 1. Section 3 of the act just cited provides that "it shall not be lawful or authorized for the state or any county or municipality therein, to license within this state, the sale, dealing in, or furnishing of any of said prohibited liquors or beverages, including imitations of or substitutes therefor." The ordinance enacted by the mayor and council of the city of Ocilla, fixing a license or tax of \$300 on all dealers in "near beer or any other imitation of beer, cider, apple juice, or any imitation of cider, or any nonalcoholic drink which is an imitation of an alcoholic drink," is void and unenforceable, because the sale of such beverages is prohibited by the general law of the state.

(a) While the sale of cider and apple juice is not prohibited by the general law of the state, this court will not presume that the municipal authorities intended to exact a tax of \$300 of dealers in cider and apple juice alone. The invalid part of the ordinance is therefore so interwoven with the valid as to destroy the whole municipal legislative scheme.

**9. INJUNCTION —105(2)—FACTS HELD WITHIN EXCEPTION TO RULE THAT EQUITY WILL NOT ENJOIN THREATENED CRIMINAL PROSECUTION.**

On its facts this case is not within the general rule that courts of equity will not enjoin

threatened criminal prosecutions, but it falls within the exception thereto. See *Carey v. Atlanta*, 143 Ga. 192, 84 S. E. 456, L. R. A. 1915D, 684, Ann. Cas. 1916E, 1151; *Baldwin v. Atlanta*, 147 Ga. 28, 92 S. E. 630.

Error from Superior Court, Irwin County; R. Eve, Judge.

Suit for injunction by Jacob Purvis against the City of Ocilla and others. Judgment for defendants, and plaintiff brings error. Reversed in part, and affirmed in part.

H. E. Oxford and Quincey & Rice, all of Ocilla, for plaintiff in error.

Rogers & Rogers and Philip Newbern, all of Ocilla, for defendants in error.

GEORGE, J. [1-9] With the exception of the ruling made in the seventh headnote, to the effect that the provision of the pool room ordinance designed to restrict the operation of pool rooms for public entertainment to defined areas within the city is unreasonable, none of the foregoing rulings require discussion. The Legislature may confer upon municipal authorities the power to prohibit outright the keeping of pool rooms for public use within the limits of the city. *Trammell v. Rome*, 142 Ga. 602, 83 S. E. 221. And this is true although the Legislature may have imposed a license or tax (for the purpose of raising revenue) upon the business of keeping pool rooms for public use. Acts 1918, pp. 43-49, § 2, subd. 22. But, in the absence of express legislative authority, the municipal authorities cannot, under the decisions of this court, prohibit the keeping of public pool rooms within the municipality; and this is true although the charter, in addition to the general welfare clause, contains a provision expressly authorizing the authorities to license or tax pool rooms. Under the rule recognized in this state the authority to license and regulate does not imply the power to prohibit, but rather implies that the business is to be allowed to continue under such reasonable regulations as the authorities may adopt. See *Sanders v. Commissioners of Butler*, 30 Ga. 679; *Gilham v. Wells*, 64 Ga. 192; *Watson v. Thomson*, 118 Ga. 546, 42 S. E. 747, 59 L. R. A. 602, 94 Am. St. Rep. 137; *Miller v. Shropshire*, 124 Ga. 829, 53 S. E. 335, 4 Ann. Cas. 574. Keeping in view the foregoing, we will consider only the undisputed facts in this case. On February 7, 1919, the mayor and council of Ocilla enacted an ordinance requiring the payment of a license of \$1,000 on each billiard or pool table kept for public use within the city. This ordinance expressly provided that no pool room should be allowed on Fourth street. The plaintiff was then conducting a pool room on Cherry street in the city of Ocilla. The ordinance permitted the keeping of the pool room on Cherry street. The

plaintiff filed a petition for injunction against the enforcement of the ordinance, upon the ground that the license required of him was unreasonable, oppressive, and prohibitory. A temporary restraining order was granted, and the city was required to show cause why the order should not be made permanent. Before the interlocutory hearing, and on February 21, 1919, the mayor and council repealed the ordinance and enacted a new ordinance, under the provisions of which every keeper of a pool room was required to pay a license of \$350 on the first, \$250 on the second, and \$100 on the third and each additional table. The new ordinance expressly provided that no person should be allowed or permitted to conduct a pool or billiard room except on Fourth street (between Beach street and the Seaboard Air Line Railway, approximately  $1\frac{1}{4}$  blocks) and on Irwin avenue (between Third and Fifth streets). The plaintiff filed an ancillary petition for injunction against the enforcement of the new ordinance, upon the ground set forth in his original petition, and upon the further ground that the provision restricting the locality within which pool rooms might be operated in the city was also unreasonable, unjust, oppressive, and prohibitory. Before the interlocutory hearing on the ancillary petition, the mayor and council further amended the pool room ordinance, and the ordinance as finally amended provided that every keeper of a pool room should pay a license of \$125 on the first, \$100 on the second, and \$75 on the third and each additional table. But the provision of the ordinance restricting pool rooms to the defined areas on Fourth street and Irwin avenue was re-enacted. This ordinance was made effective during the years 1919 and 1920. The plaintiff presented his second ancillary petition to enjoin the enforcement of the ordinance, and the order refusing the interlocutory injunction is under review in this case.

It appears that subsequently to the enactment of the original ordinance on February 7, 1919, the plaintiff leased a building for the purpose of conducting a pool room on Cherry street within the limits as then prescribed by the mayor and council, paid his rent, and secured a state and county license to carry on his business on Cherry street in the city of Ocilla. It also appears that on February 21, 1919, the date of the second ordinance, which excluded pool rooms from Cherry street, no building on either Fourth street or Irwin avenue, within the limits prescribed by the new ordinance, was obtainable, and that neither at the time of the enactment of the second ordinance nor at the time of the enactment of the third ordinance was it possible to obtain any building, by lease or otherwise, within the area as then prescribed by the municipal authorities. It fur-

ther appears that there are, strictly speaking, only two business streets in the city of Ocilla—Fourth and Cherry streets. Irwin avenue is the principal residence street of the city, although a few business houses are located thereon. The intersection of Fourth and Cherry streets is considered the center of the business district of the city. The two banks of the city are located on opposite corners at the point of intersection of these streets. The plaintiff's pool room is located 200 feet from the center of the business district and about 150 feet from the city hall, the headquarters of the city's police force. The police officers of the city can clearly see the pool room from the center of the business district. When the provision of the ordinance fixing the area in which pool rooms may be operated in the city is read in connection with the undisputed evidence in the record, the conclusion is inevitable that the real and primary purpose of the ordinance was not to regulate the business in question, but to prohibit the plaintiff and all others from engaging in it in the city. The case differs on its facts from the case of *Manor v. Bainbridge*, supra, where it was held that the fact that one sold "near beer" during 1909 and 1910 "under a license from the municipal authorities at a certain place, and that he made valuable improvements at such place for the purpose of operating there a 'near beer saloon,' did not make invalid a municipal ordinance passed in December, 1910, whereby it was made unlawful after that year to sell 'near beer' in the city limits except within specified territory, which did not embrace the place above referred to," and where it was further held that the ordinance of the city of Bainbridge restricting the area in which "near beer" might be sold was not shown to be unreasonable merely by proof that in the designated territory every "suitable" building for the sale of "near beer" was occupied at the time of the passage of the ordinance and at the time of the hearing of the interlocutory injunction, and that it would be impossible to procure a building in which to carry on the sale of "near beer" at any "reasonable" price. In the present case pool rooms were expressly excluded from Fourth street, but were allowed and permitted on Cherry street on February 7th. Fourteen days thereafter pool rooms were expressly excluded from Cherry street and permitted only on a certain part of Fourth street and within two specified blocks on another named street. We do not suggest that the mayor and council might not for sufficient reason rescind an ordinance permitting pool rooms on Cherry street and enact a new ordinance excluding pool rooms from Cherry street. From the record in this case it appears that the conditions on Cherry street were the same on February 7th and February 21st. Not only was it impossible to

obtain a suitable building for the plaintiff's pool room at a reasonable price on Fourth street and Irwin avenue, but no building was obtainable on either of these streets. These facts, and others which we have not discussed, but which appear in the record, serve to distinguish the present from the case of *Manor v. Bainbridge*, supra. Under the ruling made in the eighth headnote it follows that the court erred in refusing to enjoin the enforcement of the ordinance known as the soft drink ordinance, and that he also erred in refusing to enjoin the enforcement of that provision of the pool room ordinance which restricted the keeping of pool rooms to the area designated in the ordinance. There was no error in refusing to enjoin the enforcement of the other provisions of the pool room ordinance.

Judgment reversed in part, and affirmed in part.

All the Justices concur.

ATKINSON, J. (concurring specially). Under the facts of the case, so much of the ordinance as required pool rooms conducted for public entertainment to remain closed between the hours of 7 p. m. and 6 a. m. was unreasonable and void. *Johnson v. Philadelphia*, 94 Miss. 34, 47 South. 526, 19 L. R. A. (N. S.) 637, 19 Ann. Cas. 103.

(85 W. Va. 173)

KEATHLEY v. OHESAPEAKE & O. RY. CO.  
(No. 3767.)

(Supreme Court of Appeals of West Virginia.  
Nov. 18, 1919. Rehearing Denied  
March 24, 1920.)

(Syllabus by the Court.)

1. MASTER AND SERVANT §256(1)—DECLARATION IN SUIT UNDER FEDERAL EMPLOYERS' LIABILITY ACT SUFFICIENT.

A declaration in a suit by an employé against a common carrier, for personal injuries, under the Federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), which avers facts sufficient to show defendant was operating a train in interstate commerce and alleges also that plaintiff was employed as a brakeman on such train and was then and there engaged in interstate commerce, is good on demurrer, without other facts alleged to show such interstate employment.

2. CONTINUANCE §22, 23—ABSENCE OF WITNESS; DISCRETION WHERE STATEMENT OF WITNESS IS ADMITTED.

The judgment of the trial court overruling a motion for a continuance, based on the absence of a witness, being addressed to the sound discretion of the court, will not be reversed when it is doubtful whether the moving party has used due diligence, and whether the pres-

ence of the witness, not served with summons and absent from the country in the military service, can be obtained or his deposition procured for the succeeding term, and the court with the consent of the opposite party, obtained on condition of continuing the case without such consent, permits the use of an ex-parte statement of the witness, made before suit, to be read in evidence to the jury.

3. MASTER AND SERVANT §274(9)—CONTRIBUTORY NEGLIGENCE; ADMISSIBILITY OF EVIDENCE TO REPEL IMPLICATION OF NEGLIGENCE.

Where in such action two of the questions before the jury were whether plaintiff at the time of his injuries was observing due care, or was guilty of incurring the risk of open and apparent dangers by stepping on a parallel track behind a train going in the opposite direction to the one on which he was employed, and in front of a motor car following such train, in discharge of duties connected with the unloading of an intrastate car, and which truck he did not in fact see, evidence of a custom among employes using such motor trucks to keep a safe distance behind the train they were following, to avoid injury to themselves and others, was admissible as tending to repel the imputation of want of due care and incurrence of such risk by plaintiff.

4. MASTER AND SERVANT §273 — EVIDENCE AS TO CONTRIBUTORY NEGLIGENCE AND ASSUMPTION OF RISK IN ACTION UNDER FEDERAL EMPLOYERS' LIABILITY ACT.

And on the trial of such an action the testimony of one or more of the witnesses, including those employed on the motor truck doing the injury, that plaintiff with his back to the truck and going in the same direction, did not in fact see the on-coming truck, was competent and admissible on the question whether plaintiff was observing due care or had assumed the risk of open and apparent dangers.

5. DAMAGES §95, 173(2)—BRAKEMAN IN INTERSTATE COMMERCE; MEASURE; EVIDENCE.

The measure of damages in an action by an injured employé against a carrier engaged in interstate commerce is such sum as will fully and fairly compensate him for his pain and suffering, his mental anguish, the bodily injury sustained by him, his pecuniary loss, his loss of power and capacity to work, and its effect upon his future; and on these questions evidence of the wages he was receiving at the time he was injured, and what he should have been receiving in the same employment at the time of the trial, was properly submitted to the jury.

6. MASTER AND SERVANT §270(15)—ADMIS-SIBILITY OF RULES OF OTHERS AS BEARING ON QUESTION OF NEGLIGENCE.

When one of the issues before the jury is whether a common carrier has been guilty of negligence in not adopting and enforcing proper rules for operating motor trucks, evidence that other carriers had found it necessary or proper to adopt and enforce such rules, is proper to go to the jury on the question of negligence on the part of the defendant in the premises.



**7. COMMERCE ⇨27(6)—EMPLOYÉ ENGAGED IN INTERSTATE.**

If an employé at the time of his injury is engaged in interstate commerce, the fact that at the particular instant of his injury he was bent on or actually engaged in handling an intrastate shipment, will not necessarily characterize his employment as intrastate, if the discharge of his duty in that behalf also pertains to the operation of a train in interstate commerce.

**8. DAMAGES ⇨210(2)—INSTRUCTION LIMITING VERDICT TO DAMAGES SUED FOR.**

An instruction to the jury limiting the verdict, if for plaintiff, to the damages sued for, is not erroneous as suggestive of an improper basis of recovery.

**9. MASTER AND SERVANT ⇨295(1)—INSTRUCTION NEGATING ASSUMPTION OF RISK BY EMPLOYÉ ENGAGED IN INTERSTATE COMMERCE.**

An instruction on behalf of an interstate employé intended to negative assumption by him of an extraordinary risk and hazard but omitting the proviso "unless open and apparent," is not erroneous where such risk and hazard, by negligence of the defendant, was suddenly created, and he did not in fact see the danger, and had the right to assume and did assume he would not be subjected to such extraordinary danger as resulted in his injury.

**10. APPEAL AND ERROR ⇨207—TRIAL ⇨131 (2)—ARGUMENT OF COUNSEL; TIME AND MODE OF OBJECTION.**

Improper remarks of counsel for plaintiff in argument to the jury, supposed to be detrimental to defendant, should be promptly excepted to, and though objection be thus made by opposing counsel, accompanied by a motion to direct a verdict for defendant, denial of such motion will not constitute reversible error, unless the court refuses on motion or by instruction to direct the jury to disregard such improper remarks.

**Error to Circuit Court, Cabell County.**

Action by James K. Keathley against the Chesapeake & Ohio Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

B. Randolph Bias, of Williamson, for defendant in error.

Fitzpatrick, Campbell, Brown & Davis, of Huntington, for plaintiff in error.

**MILLER, P.** Defendant complains of the judgment against it in favor of plaintiff for twenty-five thousand dollars, for personal injuries sustained by him, while employed as a brakeman, predicated on the Federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. §§ 8657-8665]).

[1] The first point of attack is that the declaration, in one count, challenged by demurrer, overruled, is insufficient to support the judgment, in that it does not sufficiently aver that plaintiff, at the time of sustaining

his injuries, was engaged in interstate commerce. It is averred that defendant was at that time owner and operator of a railroad extending from Newport News, in Virginia, to and through West Virginia, and into the states of Kentucky and Ohio, with locomotive engines, freight cars, passenger and caboose cars, gasoline motor cars, and other railroad equipment and rolling stock, and was at the same time a common carrier by railroad engaged in commerce between the states of Virginia, West Virginia, Kentucky and Ohio; and that plaintiff at the time of sustaining his injuries was employed as a brakeman for hire on one of defendant's freight trains, known as "Extra 226," a local freight train running from Handley, West Virginia, to Huntington, West Virginia, and was then and there engaged in commerce between the states aforesaid. It is not contended that the facts averred with respect to defendant are insufficient to show it a common carrier and so engaged in interstate commerce, but that no facts are alleged respecting the employment of plaintiff showing that he when injured was engaged in interstate commerce. It is contended that in such an action facts showing that at the time of the accident defendant was engaged in interstate commerce must be averred. This is the law. 2 Roberts, Federal Liabilities of Carriers, § 682; Easter v. Virginian Railway Co., 76 W. Va. 383, 86 S. E. 37. The argument is that it is not sufficient simply to aver in connection with the facts averred respecting the defendant, as the declaration does in this case, that plaintiff was working on one of defendant's freight trains, and at the time of his injuries was engaged in interstate commerce. We think the point too refined and technical. The declaration in the Easter Case, which was held good on demurrer, was substantially like the one we have here. The statute itself, Barnes' Federal Code, § 8069, renders a common carrier by railroad, while engaged in commerce between the states, liable in damages to any person suffering injury while he is employed by such carrier in such commerce, resulting in whole or in part from the negligence of any of the officers, agents or employes. We think the declaration satisfies every requirement of the statute, and of the rules of good pleading, as construed by the authorities cited. 2 Roberts, Federal Liabilities of Carriers, § 689; Grand Trunk Western Ry. Co. v. Lindsay, 233 U. S. 42, 34 Sup. Ct. 581, 58 L. Ed. 838, Ann. Cas. 1914E, 168; Thornton's Federal Employers' Liability Act (2d Ed.) § 201. We hold the declaration good, and overrule the point of error.

[2] It is next complained that the court should have sustained defendant's motion for a continuance, based on the absence of the witness Waggoner, the fireman on the engine drawing the freight train on which

plaintiff was employed. Both sides had summoned this witness, the defendant on May 4, the plaintiff on May 8, preceding the trial begun June 4, 1918, and both learned about the same time, May 23, that Waggoner was enlisted in the military service. After trying to locate him at one or more of the military camps, in Ohio and Virginia, and to take his deposition, defendant learned a few days before the trial that he was in France or on the way there. On the hearing of the motion it was shown that defendant had Waggoner's statement in writing taken before suit, as to what he professed to know and what defendant expected to prove by him. It was also shown in opposition to the motion that plaintiff himself was in a precarious condition owing to his injuries; that his physicians, also witnesses, and other witnesses for plaintiff, some of them members of the train crews, were liable to be called into the military service of the United States, and their evidence lost to plaintiff, and plaintiff's rights thereby and otherwise prejudiced. But on the face of the showing the court was of opinion to continue the case unless plaintiff's counsel would consent that the written statement of Waggoner might be introduced in evidence in lieu of his deposition, which was agreed to, and over objection of defendant the parties were ruled to trial. On the trial the defendant made use of this ex-parte statement of Waggoner by introducing it as evidence, so that the defendant had the full benefit thereof on the trial, without any opportunity given plaintiff of cross-examination. Inasmuch as there were numerous other eyewitnesses to the accident, including the trainmen, as well situated and as well qualified and competent to testify to the facts as Waggoner, and defendant was given the benefit of his statement, we can not see that defendant was seriously prejudiced by the ruling of the court. It was not shown on this motion that defendant could not prove the same facts by other witnesses, that it expected to prove by Waggoner. The contention was that the place he occupied as fireman on the engine gave him better opportunity to see and observe the occurrences than any other witness. The statute, section 6, chapter 131 (sec. 4910), Code entitles a party to a trial at the next term after an order entered at rules, for an inquiry of damages, has been entered, unless good cause be shown for a continuance. A motion for a continuance is always addressed to the sound discretion of the court, and unless prejudice be shown by its action on such motion, the judgment should not be reversed. *Davis & Moore v. Walker*, 7 W. Va. 447. In *Riddle v. McGinnis*, 22 W. Va. 254, it was decided generally that to entitle a party to a continuance on the ground of the absence of a witness, not only must it be shown that due diligence was observed to obtain his presence, but also that the same facts can not be proved by oth-

er witnesses present, and that the party can not safely go to trial without the absent one. This is the general rule everywhere. 13 O. J. 151, § 61. The affidavit for a continuance in *Doane v. Pulp & Lumber Co.*, 77 W. Va. 454, 87 S. E. 859, cited and relied on by defendant's counsel, fully complied with the requirements of the rule. The evidence on the motion for a continuance in this case does not satisfy these requirements. Besides, as the defendant had the benefit of the ex-parte statement of Waggoner, it could not have been prejudiced by his absence. This point of error is also overruled.

[3-6] The next point of attack is that improper testimony was admitted to defendant's prejudice. The only testimony of this character pointed out is: First, that of the plaintiff and his witnesses, Dean and Clark, trainmen, and one J. L. Connors, who testified in effect that there was a custom among the operatives of motor cars, one of which struck plaintiff and did him the injuries complained of, to run them a certain or safe distance behind the trains they happened to be following, and gave their opinions that it was unsafe to operate such cars otherwise; Second, that the witness Heslep, one of the men on the motor car that struck plaintiff, a carpenter in the employ of the defendant company, was permitted to testify that Keathley did not see the approaching motor car. Not only did Heslep so testify, but Keathley stated the same thing, and Waggoner, in his statement introduced by defendant, also said the same thing. Can it be presumed that if plaintiff did see the car, he would have immediately stepped on the track in front of it, to be run over and killed or injured? Besides, how can defendant complain of this evidence, when it introduced the same fact into the record by the statement of Waggoner? Third, that the witness Connors was allowed to testify to the amount of wages Keathley was earning during the last few days he was employed; Fourth, that another witness, Winters, over objection was permitted to testify that other railway companies had adopted rules governing the operation of motor cars, designed to avoid dangers to employes and others, but to offset which defendant was permitted to show by several other witnesses that some railroads operated motor cars without such rules.

Recurring to the first class of testimony, relating to the custom of employes in operating motor cars, Dean says:

"It was the custom to stay far enough behind so that you will not injure yourself or any one else who might step on the track behind the train you are following."

And he gave it as his opinion that it would require three hundred feet or more. Clark said:

"Yes, there is a custom to keep a safe distance behind the train. What I would call a

safe distance would be from three hundred feet to as far back as you can get behind the train."

Connors said:

"The practice and custom is from three hundred to five hundred feet following a passenger train. That we are led to believe among ourselves that it has been made a custom by seeing them daily run in that distance."

Plaintiff himself testified:

"The custom and practice of all men operating motor cars, or motor trucks, on the railroad was to stay at a safe distance behind any train which they were following, at least three hundred feet, is my judgment."

The manifest purpose of this testimony, in the absence of any rules of the railway company on the subject, was to excuse plaintiff of the imputation of contributory negligence, going to reduce the amount of his recovery as provided in the federal statute, and also of the imputation of willfully incurring the risk of open and apparent dangers. Plaintiff's duty on a live local train was to go back and spot a car containing empty oil barrels and assist in unloading them at an oil station situated immediately across the track from his train. Necessarily this called for prompt action, for trains run on schedules, and if there was such a custom as claimed, did he not have the right to assume that the passenger train on the opposite track, going in the direction he was required to go, would not be followed so closely by a motor truck as to strike him the moment he stepped behind the train? The conductor of his train saw the motor car behind the passenger train when at a station some seventeen hundred feet ahead, nevertheless he assumed the motor truck would stop, or stay far enough behind for safety, but it did not, and he barely escaped injury as the truck passed him behind Keathley. After all, was this custom anything more than the creature of common sense and forethought, for the protection of the lives and limbs of employes? Suppose the men on the truck had run into the rear end of the preceding passenger train, would not the defendant company have been liable for failure to adopt rules governing such operations, showing the necessity for some rule or custom on the subject? We think there can be no doubt of this obligation. In *Schaffner v. National Supply Co.*, 80 W. Va. 111, 92 S. E. 580, we decided, point 12 of the syllabus, that where the question for determination in a particular case is whether or not there was want of due care, evidence of the customary and usual way of doing the act complained of as being negligently done, is admissible. See, also, *Easter v. Virginian Railway Co.*, supra, 76 W. Va. 398, 86 S. E. 37. We think plaintiff, to repel the imputation of assuming the risk of plain and ob-

vious dangers, was entitled to show that there was such a custom as the witnesses proved, and as to which they were not contradicted.

Second, and as pertaining to the same object on the part of plaintiff, we think it was competent for him to prove by the witness Heslep, in corroboration of his own evidence, that he did not see the on-coming motor car. It is said the witness could not have known this fact, situated as he was on the front end of the car. Why was he not competent to so state? He says Keathley was moving in the direction of the passenger train with his back to him. In that position it would have been next to impossible for Keathley to see the motor truck. As already observed, Waggoner says Keathley did not see the truck. He did not even hear Waggoner's calls, nor those of the men on the truck. He may have been guilty of contributory negligence in not looking both ways, but he was not bound to look; he had the right, we think, to depend on some rule or custom for his protection. Contributory negligence is not a defense under the federal statute. It may go in to reduce the recovery, but not to defeat the action.

[7-9] The third class of evidence, that relating to the wages plaintiff was earning when injured, and what would have been his earnings on the new scale in force at the time of the trial. The objection was that by this evidence plaintiff was laying the foundation for a recovery not warranted by the spirit of the act of Congress, which was intended to be compensatory, not speculative and indefinite. On this theory of defendant's counsel, what character of evidence was better calculated to enlighten the jury on the subject of compensatory damages than the wages plaintiff was receiving at the time he was injured; and on the theory of his continuance in the service, what evidence was better calculated to furnish a basis of what his future earnings would be? In determining the amount of damages in cases like this, as decided by the Supreme Court of the United States, the jury may take into consideration the pain and suffering of the plaintiff, his mental anguish, the bodily injury sustained by him, his pecuniary loss, his loss of power and capacity to work, and its effect upon his future, as to them may seem just and fair. *Chesapeake & Ohio Railway Co. v. Carnahan*, 241 U. S. 241, 243, 244, 36 Sup. Ct. 594, 60 L. Ed. 979, and cases cited; 8 Fed. Stat. Anno. (2d Ed.) note p. 1322. We see no error in this ruling of the court.

Lastly, as to the fourth class of evidence objected to, namely, that other railway companies had rules for operating motor cars. As already shown the defendant company was allowed to introduce evidence that some railway companies operated motor cars without rules promulgated in relation thereto. We decided in *Robinson v. City & Elm Grove Railroad Co.*, 71 W. Va. 423, 76 S. E. 851,

that a railway company is bound to adopt, promulgate and enforce rules necessary to reasonably protect its servants from the negligence of fellow servants or otherwise, and that when its failure to do so is the proximate cause of injuries sustained, it may be made to respond in damages therefor. The declaration in this case charged negligence in the omission to adopt and enforce rules as one of the grounds of liability. Whether such rules were reasonably necessary in a particular case is generally a question for the jury, and on this question of fact evidence that others engaged in the same business have found it necessary or prudent to provide rules for the management of the business, the failure of the master to provide such rules is evidence of negligence. 26 Cyc. 1159, and cases cited; *Labatt on Master and Servant* (Ed. 1904) § 213; *Schaffner v. National Supply Co.*, supra. We think the evidence so limited was admissible and find no error in the rulings of the court thereon.

We have now to dispose of several points of error relating to the giving and refusing of instructions to the jury. Three instructions were given on behalf of plaintiff. Exceptions were taken to all of them, but the main contention relates to number two. Concerning the first the only criticism is that it assumes that plaintiff at the time of his injuries was engaged in interstate commerce. It was agreed and stipulated by counsel that defendant in operation of the train was engaged in interstate commerce. Plaintiff was a brakeman on that train, and necessarily engaged in interstate commerce. The fact that the business on which he was bent at the particular instant of his injuries, the unloading of oil barrels, was an intrastate shipment, can not characterize his employment in general, so as to deny him recovery under the federal statute. We decided in *Dumphy v. Norfolk & Western Railway Co.*, 82 W. Va. 123, 95 S. E. 863, that an engineer employed to instruct other engineers how to operate electrical motors, injured when attempting to board a train drawn by a steam locomotive, as he was required to do in order to get back to his initial point of service the next day, was entitled to recover under the federal act, though not otherwise employed on that train. In *Erle Railroad Co. v. Winfield*, 244 U. S. 170, 37 Sup. Ct. 556, 61 L. Ed. 1057, Ann. Cas. 1918B, 662, it was held that an employé, while leaving the yard after his day's work, was still engaged in interstate or intrastate commerce according to the fact, and we decided the same thing in *Easter v. Virginian Railway Co.*, supra. On a parity of reasoning, if the plaintiff was an interstate employé on his train, how it can be said that he ceased to be such because at the particular moment he was about to take part in unloading an intrastate load; his duty in respect to this shipment nevertheless pertained to the operation of an interstate train, for it could

not proceed until that duty had been discharged.

The only objection urged to instruction number three is that the last clause limiting recovery to the sum sued for is suggestive of excessive damages. But it is not claimed that if plaintiff is entitled to recover at all, the amount of the verdict is excessive, nor was the motion for a new trial predicated on any such ground. We do not see how, considering the character of plaintiff's injuries, the verdict could be said to be the result of improper suggestions by the court in this instruction. Besides, it is quite proper for the court by instruction to limit the jury to the amount claimed in the declaration.

As stated, the main reliance for reversal is on instruction number two. This instruction reads:

"The court instructs the jury that the plaintiff, Keathley, did not assume any extraordinary risks and hazards caused by the negligence of the defendant or any of its officers, agents or employes, and if from all the evidence adduced the jury believe the injury to the plaintiff was caused by such extraordinary risks and hazards, resulting from such negligence and further believe that the plaintiff had not notice or knowledge of such risks and hazards then the jury should find for the plaintiff."

The only point of error urged is that it omits to condition the proposition relating to extraordinary risks, by excepting those which are open and apparent and which must be regarded as having been negligently incurred and assumed by the plaintiff. It is undoubtedly the law, in actions under the federal statute, that if an employé knowingly incurs the risk of open and patent dangers though extraordinary, he assumes such risks as well as ordinary ones, and is not entitled to recover for the injuries so sustained; for then his negligence and not that of the employer becomes the proximate cause of his injuries, relieving the master of liability therefor. *C. & O. Railway Co. v. De Atley*, 241 U. S. 310, 38 Sup. Ct. 564, 60 L. Ed. 1016; *Dumphy v. N. & W. Ry. Co.*, supra. In this case it is fully proven as a matter of fact that plaintiff did not see the on-coming car. If he had looked and had seen it in time, and then deliberately stepped on the track in front of it, giving the servants in charge of the car no time to stop it before striking and doing him the injury, a case of open and obvious danger would be presented. But we think the plaintiff had the right to assume, either upon the custom proven, or by proper rules regulating their movements if they were necessary, that defendant would not subject him to such extraordinary risks and hazards. We so decided in *Dumphy v. Norfolk & Western Railway Co.*, supra, point three of the syllabus, as did the Supreme Court of the United States in *C. & O. Railway Co. v. De Atley*, supra, and in other cases there cited. The case here presented is different from

those involving known defects in machinery with which an employé is working, or permanent dangers about the places of work, of employes, and with which they are continually made aware. Here the danger and hazard incurred was not of that permanent character, but was one suddenly imposed by the negligent operation of a dangerous agency, without rules for safety, and if the evidence is to be believed, perhaps also with defective appliances for its control. There was considerable evidence that the brake on the motor car was defective, and for that reason uncontrollable by the servants in charge of it. wherefore the injuries to plaintiff. As we view the facts there was no call for provisioning the instruction on the theory of open and patent dangers. If plaintiff, as we hold, had the right to assume that defendant would not suddenly subject him to the extraordinary risks and hazards, and he did not see them, as to which there is no evidence to the contrary, then the evidence did not justify the theory involved in the exception, and the instruction given was entirely proper.

The defendant proposed twenty-one instructions, of which numbers two, three, five, eight, nine, eleven, twelve, fourteen and seventeen were given. The remainder, including number one, a peremptory instruction to find for defendant, were refused. We have examined all these instructions with care, and are of opinion that those given cover with great liberality the whole of defendant's theories of the case, and that those not given were either covered by those given, or propound propositions having no proper application to the facts upon which right of recovery depends. Certainly defendant has no ground to complain that the law of the case according to its theories was not sufficiently and liberally presented to the jury by the instructions given in its behalf.

[10] During the argument before the jury counsel for the railway company took exceptions to some remarks of plaintiff's counsel, as follows:

"You gentlemen of the jury, put yourselves in the place of the plaintiff, in estimating damages; take into consideration what amount, under such circumstances, would compensate you if you were a young man in the bloom of health, with your wife, about to start on the sea of life."

Manifestly this language was improper, but when spoken the only motion by opposing counsel was to direct a verdict for defendant. There was no request to the court to direct the jury to disregard the remarks of counsel, or subsequent instruction requested to counteract any prejudice to defendant, if any, according to approved practice. *Landers v. Ohio River Railroad Co.*, 46 W. Va. 492, 33 S. E. 296; *Lunsford v. Dietrich*, 93 Ala. 565, 9 South. 308, 30 Am. St. Rep. 79; *Given v.*

*Diamond Shoe & Garment Co.*, 101 S. E. 153, decided at the present term. As the objectionable matter of the argument related to the quantum of the damages, and as the verdict was not objected to on that ground, we see no substantial error in the rulings of the court thereon, on the motion for a verdict based on that ground.

It follows from the foregoing that the judgment must be affirmed.

(85 W. Va. 545)

TIERNEY v. UNITED POCAHONTAS COAL CO. et al. (No. 3863.)

(Supreme Court of Appeals of West Virginia. Feb. 17, 1920.)

(Syllabus by the Court.)

1. CORPORATIONS  $\S$ 318—SALE OF ALL ASSETS WILL BE SET ASIDE AT SUIT BY MINORITY STOCKHOLDER UNLESS AT FAIR PRICE AND FREE FROM FRAUD.

The sale of all of the assets of a corporation, which is under the control and management of one individual, to another corporation, of which such individual is the sole owner, will be set aside at the suit of a minority stockholder of such selling corporation, unless it appears that the same was made for a fair and adequate price, and was free from fraud or unfair dealing.

2. EQUITY  $\S$ 148(1)—CONVENIENCE AS TEST OF MULTIFARIOSUSNESS.

There is no certain rule for determining when a bill is multifarious. If it appears that the matters in controversy between the parties can be more conveniently litigated in one suit, and that such procedure will not involve an undue burden or expense upon the defendants, a bill will not be held multifarious, even though it may unite more than one cause of action against the common defendants.

3. CORPORATIONS  $\S$ 320(3)—WHEN SUIT BY MINORITY STOCKHOLDER TO VACATE SALE OF ASSETS AS FRAUDULENT WILL BE BARRED BY LACHES.

The defense of laches will not bar a suit by a minority stockholder to set aside a sale made of the assets of a corporation upon the ground that the same is fraudulent and unfair, unless it appears that such stockholder has delayed an unreasonable time in bringing his action after he was in full knowledge and possession of all the essential facts necessary for him to determine whether or not he would accept the provisions of the sale, or repudiate the same.

4. CORPORATIONS  $\S$ 312(5)—PROPERTY ACQUIRED BY OFFICER AND DIRECTOR IS NOT ORDINARILY ACQUIRED IN BEHALF OF CORPORATION.

Ordinarily property acquired by an officer and director of a corporation will not be taken as an acquisition on behalf of such corporation, unless it already has an existing interest therein, or an expectancy growing out of an

existing right, or such acquired property is necessary and proper for the accomplishment of the purpose of the organization of such corporation, and the acquisition thereof by such officer would interfere with the carrying out of such corporate purpose.

**5. DEPOSITIONS §7—DEPOSITIONS IN EQUITY MAY BE TAKEN BY PLAINTIFF AFTER CAUSE HAS MATURED AND IN ADVANCE OF ANSWER.**

In an equity suit the plaintiff may properly take depositions to support the allegations of his bill, after the same has been filed and the cause matured, in advance of the filing of an answer by the defendant.

**6. BANKS AND BANKING §261(2)—DEFENDANTS IN SUIT BY NATIONAL BANK TO ENFORCE RIGHTS AS EQUITABLE OWNER OF INTEREST IN CORPORATION CANNOT QUESTION BANK'S RIGHT TO HOLD SUCH INTEREST.**

The defendants in a suit brought by a national bank to enforce its rights as the equitable owner of an interest in a corporation, because of the improper conversion of the assets of such corporation, will not be permitted to question the right of such bank to hold such stock.

Appeal from Circuit Court, McDowell County.

Suit by L. E. Tierney against the United Pocahontas Coal Company, the Flat Top National Bank, and others, in which defendant bank joined plaintiff in his contentions. Cause referred to a commissioner, and from a decree of the court for plaintiff and for defendant Flat Top National Bank, the other defendants appeal. Modified and affirmed.

Brown, Jackson & Knight, of Charleston, and Anderson, Strother, Hughes & Curd, of Welch, for appellants.

A. G. Fox, Russell S. Ritz, and Sanders & Crockett, all of Bluefield, for appellee Tierney.

French & Easley, of Bluefield, for appellee Flat Top Nat. Bank.

RITZ, J. Plaintiff, a minority stockholder in both the Indian Ridge Coal & Coke Company and Zenith Coal & Coke Company, brought this suit for the purpose of setting aside an alleged sale of the properties of these companies to the defendant United Pocahontas Coal Company, a corporation, upon the ground that said sale was in fraud of his rights, and deprived him of a substantial part of his interest in the two above-named companies. The bill prays that the sales be set aside, and the property of each of said companies restored to them if this could be done; if not, that the plaintiff be decreed to have an interest in the United Pocahontas Coal Company equivalent to the interest held by him in the dissolved corporations, and, in the event neither of these remedies could be administered, that a de-

creed be entered against the United Pocahontas Coal Company, the purchaser, and the individual defendants, directors of Zenith Coal & Coke Company and Indian Ridge Coal & Coke Company, for the actual value of his interest in these two companies at the time of the sale. The court below, upon the hearing, found that the sales made of the property and assets of Zenith and Indian Ridge Coal & Coke Companies to the United Pocahontas Coal Company were unfair and in fraud of the rights of the plaintiff, but found that because of the changed conditions in the properties since the sale it was impracticable, if not impossible, to set the sales aside and restore the properties to the former stockholders; that it is likewise impracticable to ascertain what interest would have to be given to the plaintiff in the United Pocahontas Company in order to represent the interests held by him in the Indian Ridge and Zenith Companies, and decided that the relief to be granted would be a decree against the United Pocahontas Company and the individual defendants, directors of the Zenith and Indian Ridge Companies, for the actual value of the plaintiff's interest in those companies at the time of the sales of their assets to the United Pocahontas Company, but found that he was not sufficiently advised as to the exact value of plaintiff's stock at the time of the sales to the United Pocahontas Company to enter a decree that would do justice between the parties, and for the purpose of informing himself as to this matter referred the cause to a commissioner to report upon certain specific inquiries. The defendant Flat Top National Bank was also the owner of stock in the Indian Ridge Coal & Coke Company, and it joined the plaintiff in his contention that the sale of this company's property was not in good faith, and was violative of the rights of the minority stockholders. From the decree holding the sales to be in violation of the rights of the plaintiff and the defendant Flat Top National Bank, this appeal is prosecuted by the defendants United Pocahontas Coal Company and the individuals composing the board of directors of the Indian Ridge Coal & Coke Company and Zenith Coal & Coke Company, who made the sale and transfer of the assets of these companies to the United Pocahontas Company.

In order to an understanding of the controversy involved in this litigation it will be necessary to state briefly the facts antecedent to the transaction under review. The Indian Ridge Coal & Coke Company was organized in the year 1893 for the purpose of mining the coal from a tract of land situate on North fork in McDowell county. The company did not own the land, but leased it from the trustees of the Flat Top Coal Land Association, agreeing to pay a royalty of 10 cents for each

ton of coal mined, with certain provisions as to a minimum royalty and as to the conduct of its mining operation. The moving spirit in the organization of this company was the defendant Worth Kilpatrick, and he has been its guiding influence and mainstay during the entire period of its operation. Fifty thousand dollars of stock was sold at par, and with this money the company's operations were commenced. Subsequently a stock dividend of 50 per cent. was declared, and there was issued to the then stockholders of the company \$25,000 of additional stock, making an outstanding capital of \$75,000. This was the condition in the year 1901 when the plaintiff purchased 15 shares of this stock for the sum of \$2,250. There was some difficulty about having the stock transferred to him which is emphasized in the evidence, but which we consider of little, if any, importance in the determination of the matters involved. One C. Botsford was also a stockholder in this company from the beginning. Ten shares of his stock he had deposited as collateral to secure a debt to the Flat Top National Bank, and upon his failure to pay this debt the stock was sold, and the bank was under the necessity of purchasing the same at the sale, and in this way it became one of the stockholders of the company. All of the stock except this 25 shares held by the plaintiff and the Flat Top National Bank was held by the defendant Worth Kilpatrick and those acting with him at the time of the alleged sale of the company's assets to the defendant United Pocahontas Coal Company.

The defendant Zenith Coal & Coke Company was organized in the year 1903 by one W. H. Coffman. Its operations were conducted on two tracts of land about equal in area, and containing in the aggregate about 1,000 acres of coal, one leased from Burkes Garden Coal & Coke Company, and the other held under a lease from Pocahontas Coal & Coke Company. The capital stock of this company issued and outstanding was the sum of \$456,000, divided into 4,560 shares. It does not very satisfactorily appear what amount of actual money was used in the development of this operation. It does appear that of the capital stock \$400,000 was issued to W. H. Coffman, in consideration of the transfer by him to the company of the two leases above referred to, and presumably the remaining \$56,000 of stock was sold for the purpose of realizing funds for the development of the mine. Prior to the time that the Indian Ridge Coal & Coke Company became a stockholder in the Zenith Coal & Coke Company W. H. Coffman was practically the sole owner thereof; in fact, he was the actual owner of all of the stock; four of his associates being qualified to act as stockholders and directors by the issuance to them of one share of his stock for that purpose. During the time that Coffman was producing

coal at the Zenith plant he also acted as sales agent for the Indian Ridge Coal & Coke Company, and became largely indebted to that company for coal furnished by it upon his orders for which he had not paid, as well as for moneys advanced to him by the Indian Ridge Company. It seems that Coffman also borrowed considerable sums of money from other sources for the development of the Zenith mine, and to secure the payment of this money, as well as the money which he owed to the Indian Ridge Coal & Coke Company, he deposited with a trustee 3,300 shares of the stock of Zenith Coal & Coke Company which had been issued to him. The indebtedness secured by this stock not being paid, the stock was sold by the trustee in satisfaction thereof, and the Indian Ridge Company purchased the same at the sale for about \$26 a share. There was not realized from this sale a sufficient amount to pay the debt due the Indian Ridge Company by Coffman, and to further secure it he executed a deed of trust upon certain real estate situate in the City of Bluefield. This lien was subsequently foreclosed, and this real estate likewise purchased by the Indian Ridge Company, and the title thereto held by it. After the acquisition by the Indian Ridge Company of this 3,300 shares of stock of Zenith Coal & Coke Company it was reorganized, and the same board of directors and officers elected for it as controlled the Indian Ridge Company, and thereafter, until the sale of the properties of these two companies as hereinafter stated, both of them were managed and controlled by the same board of directors and the same officers. The officers of the Indian Ridge Company procured other stocks of the Zenith Company from time to time until, within a short time after its acquisition of the control of this company, it had procured by purchase sufficient additional stock to make it owner of 4,403 shares out of a total of 4,560 shares. The remaining 157 shares were held by the plaintiff, L. E. Tierney, 155 shares, and one George B. Stupolsky, 2 shares, and this was the proportion in which the stock of this company was held at the time of the purported sale of its property and assets to the defendant United Pocahontas Company.

In the year 1914 the defendant Worth Kilpatrick procured a lease for an additional tract of land from the Pocahontas Coal & Coke Company, which lay principally in Wyoming county, and which adjoined the lease operated by the Zenith Coal & Coke Company. This tract of land contained approximately 1,200 acres of coal, and at the time he acquired the lease he contemplated operating the same by transporting the coal over the premises of the Zenith Coal and Coke Company, inasmuch as it was impracticable to mine it in any other way. About this

same time Kilpatrick also bought all of the stock of the Burkes Garden Coal & Coke Company, the lessor of the Zenith Company as to about one-half of its property, and paid therefor. For the purpose of operating the 1,200 acres of land leased by him from the Pocahontas Coal & Coke Company he organized the defendant United Pocahontas Coal Company. He was not one of the corporators of this company, but he states that he was the sole owner thereof until the absorption by it of the properties of the Zenith and Indian Ridge Companies, and that at the time of the taking over of these properties by the United Pocahontas Company no other person had any financial interest in it. The lease of the 1,200 acres was made to the United Pocahontas Company, and Kilpatrick, being the sole owner of the Burkes Garden Company, also, for the consideration that he had paid for this property, transferred it to the United Pocahontas Company. So that the status of the affairs of these three companies at the time of the sale to the United Pocahontas Company of the Indian Ridge and Zenith properties was that Kilpatrick was the sole owner of the United Pocahontas Company; that its property consisted of a leasehold on the 1,200 acres of coal above referred to and the ownership in fee of about 500 acres operated under a lease by the Zenith Coal & Coke Company. The stock of the Zenith Coal & Coke Company was all owned by the Indian Ridge Coal & Coke Company, with the exception of 155 shares owned by the plaintiff, and 2 shares owned by another party as aforesaid, thus giving the absolute control of this company to the Indian Ridge Coal & Coke Company. At this time a majority of the stock of the Indian Ridge Company was held by the defendant Worth Kilpatrick; in fact, it was all held by parties acting in accord with Kilpatrick, except 15 shares held by the plaintiff, and 10 shares held by the defendant Flat Top National Bank. It will thus be seen that at the time of the sales of which complaint is made in this case Kilpatrick, by virtue of his ownership of a majority of the stock of the Indian Ridge Company, controlled that company, and also controlled the Zenith Company by virtue of the ownership of practically all of its stock by the Indian Ridge Company, and he was the sole owner of the United Pocahontas Company. It being apparent to Kilpatrick that these three properties could be operated as one more economically and advantageously, he conceived the idea of having the United Pocahontas Coal Company purchase the properties of the Indian Ridge and Zenith Companies with a view to combining them all in one operation. To this end, in May, 1915, the United Pocahontas Coal Company made a proposition to each of the other companies to purchase its properties and assets. The proposal made by the United Pocahontas Coal

Company to the Indian Ridge Company was to purchase its entire property and assets, save cash on hand, and the stock held by it in the Zenith Coal & Coke Company, for the sum of \$18,000 in cash, and \$200,000 par value of the preferred stock of the United Pocahontas Coal Company, making a total of \$218,000. At this point it may be material to state that the stock of the United Pocahontas Coal Company consisted of 5,000 shares of the par value of \$100 each, divided into \$300,000 of 6 per cent. preferred stock and \$200,000 of common stock. At the same time the United Pocahontas Coal Company made a proposition to the Zenith Company to purchase the entire property and assets of that company, save cash on hand, for the sum of \$5,500 in cash, and \$100,000 par value of the preferred stock of the United Pocahontas Coal Company and the assumption of its indebtedness. These propositions were submitted to the respective stockholders of the Zenith and Indian Ridge Companies, and were by them accepted. The propositions further carried a condition that the sales would be made as of the 31st of March, 1915, that being the end of the fiscal year of each of these corporations, and in case of the acceptance of the propositions the operations would be conducted by the Indian Ridge and Zenith Companies respectively until such time as the transfers could be perfected; it being necessary to secure the assent of the lessors before formal transfers could be made. After the acceptance of these propositions of sale steps were taken to have the properties formally transferred to the United Pocahontas Coal Company. This was not consummated until about the 1st of January, 1916, and after this time the Indian Ridge and Zenith Companies were formally dissolved and their charters surrendered. The earnings accruing from the operation of the plants of these companies after the 31st of March, 1915, were turned over to the United Pocahontas Company in accordance with the terms of the sales made to it.

The plaintiff contends that this sale made by the Indian Ridge Coal & Coke Company of its own properties, and of the properties of the Zenith Coal & Coke Company, to the United Pocahontas Company, was for a grossly inadequate price, so inadequate as to require that the plaintiff be relieved from its effect. A great amount of evidence has been taken for the purpose of showing the obrepitious conduct of the officers of the Indian Ridge and Zenith Companies toward the plaintiff during the time he was a stockholder in those companies, as well as to show just what assets passed to the United Pocahontas Coal Company by these sales and the value of such assets. Further, as a part of the arrangement, after the consummation of the sales aforesaid and the receipt by the Zenith Company of the 1,000 shares of pre-



ferred stock of United Pocahontas Coal Company, this stock was purchased by the Indian Ridge Company for the sum of \$100,000, and a dividend was then declared by the Zenith Coal & Coke Company out of the cash it had on hand received from the sale of the preferred stock aforesaid, as well as its other moneys, to its stockholders, amounting to about \$29 a share, and a dividend also declared by the Indian Ridge Company of \$300 of preferred stock in the United Pocahontas Company to the holder of each share of stock in the Indian Ridge Company, as well as a dividend in cash covering the remaining assets. The contention of the United Pocahontas Company and the individual defendants is that the price paid for the property and assets of the Indian Ridge and Zenith Companies was an adequate, full, fair, and complete price, and that the transaction is absolutely free from any fraud or unfair conduct upon the part of any party connected therewith, while the contention is on the part of the plaintiff and the Flat Top National Bank that this sale was made for a grossly inadequate price, and that the price paid was only a very small percentage of the actual value of the assets of this company, and that it amounted simply to a scheme or device upon the part of the defendant Worth Kilpatrick and his associates to convert the assets of these companies into another corporation in which the plaintiff was not a stockholder, and to compel him to take for his stock in the Indian Ridge and Zenith Companies much less than its real value.

It is shown that during the time the Indian Ridge Company was operated, to wit, from the year 1893 to the year 1915, a period of 22 years, it paid an average dividend of 10 per cent. per annum upon its capital of \$75,000, which would be equivalent to 15 per cent. upon the \$50,000 actually invested, and it is argued from this that \$218,000 for the property was not only a fair price, but was more than the same was reasonably worth; that a coal property which did not earn more than this rate upon its capital could not be considered a very attractive investment. This argument might be sound if it were not for the fact that it has no basis in the evidence. Instead of the earnings of the Indian Ridge Company being limited to the dividends paid to its stockholders, it appears that only a comparatively small part of these earnings were paid out in dividends. At the time the assets were transferred to the United Pocahontas Company the Indian Ridge Company had on hand, in addition to its equipment, bills receivable amounting to \$149,691.07; amounts due it for coal sold amounting to \$10,164.67; its Bluefield real estate, amounting to \$26,405.31; cash on hand amounting to \$49,290.94; stock in the Zenith Coal & Coke Company amounting to \$132,090;

besides its merchandise inventory, amounting to \$6,000—or a total of assets on hand which represented earnings of the company amounting to \$373,641.99: so that it is apparent that the Indian Ridge Company, at the time of making this sale, could have declared a dividend of over 500 per cent. out of its actual earnings to its stockholders, and spreading this over the period of 22 years would be equivalent to a dividend of something like 22½ per cent. a year in addition to that already declared and paid out; or, if we estimate this dividend upon the actual amount of money paid in, to wit, \$50,000, then it could have declared a dividend of over 700 per cent. on that capital, which would make an average dividend of more than 30 per cent. a year, which, added to the dividend already declared and paid out, would show earnings of more than 45 per cent. a year during all of the time that this company was in business. It would seem that this would be a reasonably attractive investment to a purchaser, even at the price of \$218,000. But it is asserted that, while the proposition shows \$218,000 paid for the assets of the Indian Ridge Coal & Coke Company, this included very much more than its mining operation, and it appears from the record that this is true. In addition to getting the mining plant and the leasehold, the purchaser acquired the bills receivable, amounting to \$149,691.07; amounts due for coal sold amounting to \$10,164.67; the Bluefield real estate, amounting to \$26,405.31; and the merchandise inventory, amounting to \$6,000—or a total of \$192,261.06, from which was deducted the debts of the Indian Ridge Company, leaving a balance of about \$177,000 of assets turned over to the United Pocahontas Company which were not part of the mining plant of the Indian Ridge Company; and taking this from the purchase price of \$218,000 would leave \$41,000, the actual consideration for the mining plant. It appears that the items of bills receivable above referred to were amounts due the Indian Ridge Coal Company by the Zenith Company and by the defendants Kilpatrick and Armstrong, which were perfectly solvent, and which were subsequently realized upon. The same is true of the item due for coal sold, and the merchandise inventory was represented by goods actually on hand. The value of the item Bluefield real estate is not so certainly established, but it was carried upon the books of the company at the value above indicated, and it may be said that it was reasonably worth this amount, as it does not seem to have been the habit of this company to carry anything upon its books at an excessive valuation. So that the question, so far as the Indian Ridge property is concerned, is whether or not \$41,000 can be said to be a reasonable price for the plant and leasehold of this company. It appears that the com-

pany's lease consisted of about 900 acres of coal, of which one-third had been mined out, leaving two-thirds thereof. It is true at that time 22 years of the life of the lease had run, leaving only 8 years more for operation under its terms, but there is a clause providing for renewal of the lease for another 30 years upon the same terms, which it is argued the Indian Ridge Company is not in position to take advantage of because of breaches by that company of some of the terms of the lease. We do not think there is very much in this argument, inasmuch as the defaults that are pointed out happened long years ago, and it is not to be assumed that they could be taken advantage of by the lessor after having acquiesced in the conduct and management which might be construed to be breaches of the lease for all these years. It is argued by the defendants that the leasehold is of no value, that the only thing to be considered is the physical properties put upon the lease by the Indian Ridge Company, and it contends that \$41,000 is a reasonable price for these properties, and that they were not worth any more than that sum at the time of the sale. We cannot agree with the conclusion that this leasehold is of no value, and should not have been given some value in this transaction. It appears that the defendant Kilpatrick took a lease adjoining these properties at a royalty of 15 cents a ton, while this lease carried a royalty of only 10 cents a ton, and certainly, if an adjoining lease with apparently no better conditions than existed at the Indian Ridge mine could be handled under a royalty of 15 cents a ton, the leasehold of the Indian Ridge property at only 10 cents a ton must be of considerable value to the owner. Further than this, it appears that this lease was assessed upon the land books of McDowell county for the year 1915 at a valuation of \$10,000, and it is not to be assumed that it did not have at least this value at that time.

Considerable criticism is also made of the method resorted to by the directors of the Indian Ridge Company in fixing the value of its equipment at \$41,000. It appears that there had been spent on this plant more than \$200,000, and that on the very day of the sale it was depreciated more than \$100,000, and something like \$100,000 within a few years prior to that time, leaving only \$41,000 the value as shown by the books of the company at the time of the sale. These items of depreciation are justified by the officers of the company upon the ground that for many years no depreciation was charged off on the books, and it had been determined that the true value should be shown by the books some time before this sale was made, but this purpose had not been entirely accomplished. While it is admitted that a plant like this suffers substantial depreciation each year, it

is contended by the plaintiff that the depreciation charged in many instances is excessive and entirely unjustified. It appears from the books that in the case of some of the items of equipment the entire amount expended thereon was charged off, and that in others practically the whole thereof was charged off as depreciation. The item of money expended for railroad sidings is charged off entirely upon the theory that after the siding was constructed it belonged to the railroad company, and was of no value to the Indian Ridge plant. This could hardly be justified; for it must be true that this money was expended for the purpose of furnishing means with which to market the coal mined, and the company will have the use of the siding during the entire life of the mine. While it has no property in it, it is a facility which the company had to spend money to obtain, and it is entirely unjustified to charge off the entire cost at any particular period. The proper way would be rather to divide the entire cost of this siding over the probable life of the mine, and charge off the proper aliquot part each year of the operation. It is not necessary for us to go into the various items of depreciation for the purpose of determining whether or not they were entirely justified. We think the evidence justified the court's finding that the sale of this property of the Indian Ridge Company at the price at which it was made to the defendant United Pocahontas Coal Company was so unfair to the plaintiff and the Flat Top National Bank as to justify the decree that the plaintiff and the defendant bank were entitled to treat the same as not binding upon them, and to have a recovery for the actual value of their interests in the plant at the time of the sale.

The proposition for the purchase of the Zenith Coal & Coke Company's plant was to give \$105,500 therefor, \$5,500 in cash, and \$100,000 in preferred stock of the defendant United Pocahontas Coal Company, and to assume the current and fixed indebtedness of the Zenith Company, amounting to the sum of \$115,992.33, which would make a consideration of \$219,492.33 paid for the entire assets of the company, except the cash on hand. Included in these assets were certain items such as bills receivable, stock of merchandise, and accounts due the company, amounting to the sum of \$36,121.86, which would leave approximately \$185,000 paid for the mining plant and leasehold. This valuation is arrived at from the books of the company, and is the exact amount which the books show the physical properties, such as tipples, houses, and equipment, were worth at the time of the sale. Considerable deductions were made from the actual cost of these several items for depreciation, and in some cases the entire value of an item is charged off as depre-

cation. This is notably true in the case of the amount expended for building railroad tracks to the mines, amounting to about \$25,000. The defendants contend that this was all properly charged off the books for the reason that after the tracks were built they belonged to the railroad company, but the observation we made in regard to the tracks built by the Indian Ridge Company is applicable here. The tracks are there and can be used, or may be used, by the company during all the life of the plant for the purpose of shipping this coal to market, and there is no reason why the entire cost of them should be charged off at one time. It likewise appears that the leasehold of this company was carried on the books for many years at the sum of \$400,000, but before the sale this item was charged off, and the leasehold treated as of no value whatever. We have not undertaken in this review to cover in detail all of the evidence bearing upon these questions, but simply to refer to it sufficiently to indicate the propriety of the finding of the lower court upon the fairness of these sales. If a decree had been entered below for a certain amount to be recovered by the plaintiff, it would then be necessary for us to review in more detail the facts to determine whether or not the amount decreed was justified, but, as before stated, the decree below only finds that the plaintiff and the Flat Top National Bank are not bound by these sales, and are entitled to have decree for the actual value of their stock at the time of the purported sales, and referred the cause to a commissioner to ascertain this amount; the evidence not being sufficiently definite in that regard to advise the court as to the proper amount to be decreed.

[1] In a case like this, where the purchaser of the property is also in effect the seller, the utmost good faith is required. The defendant United Pocahontas Coal Company, the purchaser of this property, was entirely owned by the defendant Kilpatrick, and for the purpose of this litigation he is the purchaser. He was likewise in effect the seller; for he owned a majority of the stock in the Indian Ridge Coal & Coke Company, and the Indian Ridge Company, in which he owned such majority of the stock, owned practically all of the stock of the Zenith Company. It will not do to say that Kilpatrick believed he was acting for the benefit of all of the stockholders of the Zenith and Indian Ridge Companies. There is a higher criterion fixed which must be satisfied before the transactions can meet with the approval of a court of equity. His interest as purchaser was in direct conflict with his interest as the seller of the properties. On the one hand, he was interested in getting as large a price as possible, while as the purchaser of the property he was interested in procuring it at the least

possible price. Which one of these interests was the dominating one at the time he made the trade? It appears that he was the sole owner of the purchasing corporation, while his interest in the selling companies was not so large. It might therefore be supposed that he would be influenced to favor the purchasing company because his interest was that way, and this influence upon the actions and conduct of men, because of their interest, is so subtle and insidious that it at times affects the judgment and conduct of those who could not be charged with any deliberate purpose to wrong and defraud. The courts recognize that this is true and do not allow such transactions to stand until they have been subjected to the closest scrutiny and found to be fair to all of the interests affected by them. 3 Cook on Corporations, § 662; Hope v. Salt Co., 25 W. Va. 789; 7 R. C. L. title "Corporations," § 287 et seq.; 4 Fletcher, Cyclopaedia Corporations, § 2360. Indeed, it has been held by some courts that such transactions are absolutely void, and that an officer of a corporation purchasing its assets can take no advantage from such a sale. We do not think this is the correct doctrine. If such a transaction is entirely fair, and prejudices the rights of no interested party, there is no reason why it should not be upheld, as well as such a sale to an entirely disinterested party, and it may be said in passing that a reasonable test to be made of the fairness of such a sale is: Would the proposition from one disconnected with the whole affair have been accepted by those acting for the selling company? Having come to the conclusion that the finding of the lower court to the effect that the purchase price was substantially less than the actual value of this property, under the doctrine above laid down, the plaintiff is not bound thereby.

[2] The defendants contend that the bill in this case is multifarious because it joins in one suit the plaintiff's demand for his interest in the Zenith Company as well as the demand for his right in the Indian Ridge Company. The relation of these companies to each other is sufficiently clear from what we have already said. Practically all of the stock of the Zenith Coal & Coke Company belongs to the Indian Ridge Company, and for the purpose of the transaction involved here the stockholders of the Indian Ridge Company were the real actors. They acted for themselves in disposing of the Indian Ridge Company's assets, and then they acted for the Zenith Company in disposing of its assets because of their control of the Indian Ridge Company, so that it may be said that the wrongful act of which complaint is made was the act of the Indian Ridge Coal & Coke Company and its stockholders. Then, too, the transaction involved the purchase by the Indian Ridge Company of the preferred stock

turned over to the Zenith Company by the United Pocahontas Company. The directors and officers of the Zenith Company were practically the same as the directors and officers of the Indian Ridge Company, and they were directors and officers of the Zenith Company, not because they were stockholders of that company, but because of their interest in the Indian Ridge Company. It will thus be seen that, while it involved the delivery to the defendant United Pocahontas Coal Company of the assets of the two companies, it really was accomplished by one act, and that the act of the stockholders of the Indian Ridge Company. Even were this not the case, it appears from the record that all of the claims of the plaintiff have been conveniently litigated in this one suit, and that to have brought two suits for the accomplishment of the purpose would, instead of saving expense, involve the duplication of much of the work necessary to be done. There is no certain rule for determining when a bill is multifarious. If justice can be conveniently administered by the method adopted, the objection of multifariousness will not lie, unless it is so injurious to the complaining party as to render it inequitable and unjust to so proceed. *Johnson v. Sanger*, 49 W. Va. 405, 38 S. E. 645; *Jordan v. Liggan*, 95 Va. 616, 29 S. E. 330. In this case it not only appears that the controversies can be conveniently disposed of in one suit, but it sufficiently appears that resort to one suit offers a much more convenient and less expensive method of disposing of them than if resort had been had to separate suits.

[3] The defendants further contend that plaintiff is barred in this case because of laches. They say that his delay in instituting this suit for more than two years after the alleged sales deprives him of any right to question the validity of those transactions. If the plaintiff had knowledge of these sales at the time they were made, and showed no excuse for the delay in bringing this suit, there might be some basis for this contention; but laches is a defense in a case like this only when the stockholder with full knowledge of the facts has without excuse delayed an unreasonable length of time in bringing his action. These two elements, knowledge and delay, are the essential elements of such a defense. Until the stockholder has full and complete knowledge of all the essential facts which would be likely to induce him to institute the action, the time has not arrived from which it may be said laches will begin to run. 3 Cook on Corporations, § 731. It appears in this case that the plaintiff did not attend the meetings of the stockholders of either Zenith or Indian Ridge Companies at which these sales were made, and he says that he did not know of such meetings. It appears, however, that these sales were made at the regular annual

meetings of those corporations, and that due notice was given thereof by publication in a newspaper, as required by the by-laws, and the defendants say that the plaintiff will be charged with knowledge of everything that happened at those meetings. It may be said that the plaintiff must take notice of the provisions of the by-laws in regard to meetings, and that he will be bound by any action of the stockholders had at a meeting of which notice has been given in accordance with the terms of the by-laws, so long as such action is otherwise proper. But can a minority stockholder be charged with knowledge of a transaction by which all of the assets of the corporation are disposed of at an inadequate price? A minority stockholder may be entirely satisfied with the management and control of the corporate business, and not care to participate in its annual meetings, when he would have very serious objection, however, to the company disposing of all of its property to one of the large stockholders and an officer and director at a price very much less than its actual value. It would seem that, where the action of the stockholders which was brought in question involves their good faith, laches will not begin to run against one affected by it until he has actual knowledge of the transaction. In this case he did not have such actual knowledge until November, 1915. During the intervening time the business of these two companies was conducted just as it had been theretofore, and it was not until then that the secretary and treasurer of the companies sent notice to the stockholders informing them that the sales had been consummated, and advising them the amount to which each stockholder in the respective companies was entitled. As soon as Tierney received this notice, he questioned the right of the stockholders to make these sales, and called upon the president and the secretary and treasurer of the Zenith and Indian Ridge Companies to allow him to audit the books of these companies with a view of determining whether or not he would accept the provision made for him. He was advised that this privilege would be accorded, and he at once, or at least within a very short time, employed an auditor for the purpose. This auditor communicated the fact of his employment to the secretary of the two companies, and asked that the books be turned over to him for the purpose of making the audit. An appointment was made by the secretary for this purpose, and subsequently, and before the day appointed had arrived, the secretary postponed this examination to a later date, and when this day arrived the auditor was then informed by the president of the companies that they had been dissolved in accordance with the law, and that he could not permit any examination of their books by an outside party. Upon this refusal of the officers or

the Indian Ridge and Zenith Companies to permit an examination of the books and records of the companies by Tierney, so that he might determine what action he would take, he instituted a suit for the purpose of compelling them to allow him to make such examination. It does not appear that there was any delay in the prosecution of this suit. A final judgment was rendered therein in the nisi prius court compelling the officers of the two companies to permit Tierney to make the examination. The president and secretary of the company then carried the case on appeal to the Supreme Court of Pennsylvania, which resulted in a judgment of affirmance. Shortly thereafter, and in the summer of 1917, the books were turned over to the auditor for examination. This examination was completed about the 1st of September of that year, and as soon as completed was submitted to the plaintiff. Upon going over the same with his attorneys he concluded that the sales were for a grossly inadequate price, and were greatly to his disadvantage, and immediately communicated this conclusion to the defendant Kilpatrick, and brought this suit for the purpose of obtaining relief. The defendant Flat Top National Bank during all of this time did nothing to prosecute its claim, but it was understood between it and the defendant Kilpatrick that it could delay the determination of what it intended to do until Tierney completed his examination, and that its conclusions would be based upon the result of that examination, and it appears that as soon as this information was furnished its directors, of which the plaintiff Tierney was one, as well as its president, the bank repudiated the sales, and demanded what it considered full compensation for its interest in the Indian Ridge Company. It will be seen that Tierney had no knowledge at all of these sales until the fall of 1915, and that he did not then have such full information as to the financial condition of the two companies as justified him in coming to a conclusion as to whether the sales were fair or not, and that he had to resort to litigation in order to procure this information, and that as soon as it was procured this suit was instituted. Under these circumstances neither the plaintiff nor the bank, which was acting in concert with him in this matter, can be charged with any laches. They both acted just as soon as they were able to get the information necessary for intelligent action.

[4] It is urged by the plaintiff in this suit that the action of the defendant Kilpatrick in acquiring the Wyoming lease, which was subsequently executed to the defendant United Pocahontas Coal Company, must be held to be for the benefit of the Zenith and Indian Ridge Companies, and this contention is also made with regard to the acquisition of the stock of the Burkes Garden Coal & Coke Com-

pany. The relation of these companies to the Zenith and Indian Ridge Companies has been before stated. The Burkes Garden Company was the lessor of the Zenith Company as to about one-half of the property it was operating, and the Wyoming county lease lies adjacent to the Indian Ridge and Zenith leases, and the coal therefrom can be mined most conveniently over the property of the Zenith Company. Do these facts of themselves justify the conclusion that the acquisition of this property by Kilpatrick was for the benefit of the Indian Ridge and Zenith Companies? It must be borne in mind that because one is a stockholder and officer of a corporation he is not thereby bound to act only on behalf of that corporation. It is true that, if he acquires an interest in an estate in which the corporation already has an existing interest, or where he acquires an interest outside, which the corporation had contemplated and desired acquiring, by overreaching the corporation, or taking advantage of knowledge which he has as an officer of it, such acquisition will be taken to be for the benefit of the corporation, but there is a wide field left for individual activity, and it may be generally said that the legal restrictions which rest upon corporate officers in their acquisitions of property are limited to the property wherein the corporation already has an existing interest, or in which it has an expectancy growing out of such existing right, or to cases where the officers' interference by acquiring the property will in some degree prevent or hinder the corporation in effecting the purpose of its creation. 4 Fletcher, Cyclopaedia Corporations, § 2281. It appears here that neither the Indian Ridge Company nor the Zenith Company had any interest in the lease acquired by Kilpatrick, nor does it appear that the acquisition of it by Kilpatrick in any way interfered with either of these corporations, nor does it appear that either of them had in contemplation the acquisition of this property, and that Kilpatrick by acquiring it prevented them from carrying out such a purpose. While the court below did not specifically hold that these acquisitions were for the benefit of the Indian Ridge and Zenith Companies, he did in effect so hold, for he required the commissioner, in ascertaining the value of the properties, to include the value of these properties, and to examine the books of the United Pocahontas Company for the purpose of ascertaining such values, and, of course, this inquiry could only be directed upon the basis that these properties really belonged to the Zenith and Indian Ridge Companies, or one of them. In this the circuit court was in error.

It is argued that the Indian Ridge and Zenith Companies could not properly be made parties to this suit for the reason that they had been legally dissolved prior to the insti-

tution thereof. In view of the action of the court below in granting to the plaintiff only a decree for the value of his equitable interest in the corporations, this objection becomes immaterial. There is no relief given against either of these companies, nor is their presence necessary to the granting of the relief which the court did give. It is therefore immaterial whether or not they are properly or improperly before the court.

[5] An exception was taken to the reading of certain depositions taken on behalf of the plaintiff before the filing of the answers; the ground of such exception being that the depositions were prematurely taken. There is no merit in this objection. The plaintiff had a right to file his bill and support the same by proof if he desired to do so, to the end that he might be entitled to a decree at the first term of the court should the defendant come in at that time with an answer denying the allegations of the bill. If this were not the case, the defendant could always reserve his answer until the first term of court, and then by filing the same compel a continuance of the case. Of course, it would be improper to take proof until there is a pleading filed by the party taking it which it is intended to support, but we perceive no reason why a plaintiff should be compelled to await the convenience of a defendant as to the taking of his proof. Rather should his vigilance in having his case ready for a hearing at the earliest day possible be commended. *James v. Piggott*, 70 W. Va. 435, 74 S. E. 667.

[6] A suggestion is made that the Flat Top National Bank is acting in excess of its powers in holding this stock of the Indian Ridge Company; that it was its duty to dispose of the same within a reasonable time after it acquired it. Whether this is true or not is not material here. The question of the authority of the bank to enforce its rights as the equitable owner of an interest in the Indian Ridge Coal & Coke Company cannot be brought in question by these defendants. If in holding this stock it is acting in excess of its powers, only the United States government, or perhaps some of its own stockholders, can raise that question. *Bank v. Whitney*, 108 U. S. 90, 28 L. Ed. 443.

It is suggested that, inasmuch as this suit under the holdings of the lower court will simply result in a money decree for the value of the interest of the plaintiff and the Flat Top National Bank in the Indian Ridge and Zenith corporations, an action at law would be entirely adequate, and that equity cannot for that reason take jurisdiction. The interest of a stockholder in a corporation is an equitable one. He cannot ordinarily maintain an action at law against the corporation to recover that interest. Courts of equity have jurisdiction to enforce his rights, whether it be to recover the value of such equitable

interest from one who has secured the same in an improper manner, or to set aside an unauthorized and improper transfer and restore the corporate assets. The nature of his interest in the subject-matter being purely equitable, equity has jurisdiction, even though his only purpose is to collect the value of that equitable interest. In the decree in this case the commissioner is authorized and directed to employ mining engineers and such other assistants as may be required and necessary to make explorations and thoroughly prospect the property owned by the Indian Ridge and Zenith Companies, and to tax the costs and expenses of such explorations in his report. There is nothing in this case which indicates the necessity for any such investigations or explorations in order to determine the value of these properties. In the case of Indian Ridge Coal & Coke Company, the property has been worked for more than 20 years, and in the case of the Zenith Company the property has been operated for more than 15 years, and it would seem that, where these active operations have been carried on under leases during all these years, sufficient information would be available to ascertain their true value without going to the expense of further prospecting and exploration. We are of opinion that there is nothing in the record justifying that part of the decree.

The court also directs the commissioner to ascertain all of the property of every kind and character of the defendant United Pocahontas Coal Company; to ascertain the number of shares of common and preferred stock of said company which have been issued, and by whom the same are held; the amount of money paid for said stock, and by whom paid; the names of the persons acting as directors of the said company; the value of the leasehold held by said company known as the Wyoming leasehold; and the value of the Burkes Garden Coal & Coke Company property above referred to. In view of our finding that these acquisitions by the United Pocahontas Company were not for the benefit of either the Indian Ridge or Zenith Companies, these inquiries would be entirely useless, and would simply be imposing unnecessary expense and burden upon the parties to this suit. The decree will be corrected so as to eliminate therefrom these requirements.

The defendants are also required to produce the books and records of the United Pocahontas Company for the examination of the commissioner, and for his assistance in determining the value of the properties of that company. Inasmuch as we have indicated above that this is not a proper inquiry to be made in this case, this request for the production of books and records is likewise an improper one, and that requirement will be eliminated from the decree.

Our conclusion is to affirm the decree after modifying it in the manner above indicated, with costs to the appellants.

(85 W. Va. 578)

HOOD et al. v. CITY OF WHEELING et al.  
(No. 4048.)

(Supreme Court of Appeals of West Virginia.  
Feb. 17, 1920.)

*(Syllabus by the Court.)*

1. STATUTES §16(1)—BILL ADVANCED TO SECOND READING MAY BE THEN AMENDED IN USUAL MODE OR BY ADOPTION OF SUBSTITUTE BILL.

A bill regularly introduced and recommended by the proper committee to pass, read once and advanced to be read a second time on a subsequent day, may while at that stage of its progress be amended, either in the mode most frequently pursued, or by a substitute offered and adopted in lieu thereof, provided the substitute is not inconsistent with the main purpose and object of the original bill.

2. STATUTES §16(3)—READINGS ON ORIGINAL BILL MAY BE INCLUDED AS PART OF REQUIRED READINGS OF SUBSTITUTE BILL.

A substitute bill, if germane to and not inconsistent with the main purpose and object of the original bill, need not itself be read three times on three different days, pursuant to the requirement of section 29 of article 6 of the Constitution, but may include as part of its required readings those had before the substitution was made.

3. STATUTES §16(1)—TITLES OF ORIGINAL AND SUBSTITUTE BILL NOT INCONSISTENT BECAUSE TITLE OF LATTER CONTAINS MORE DETAIL.

The titles of a bill to amend the charter of a city and of a substitute therefor having in view the same general scope and object are not necessarily incongruous or inconsistent merely because the title of the latter contains a more detailed statement of the legislative history of the origin and subsequent amendments of the charter.

4. STATUTES §100—TITLE OF AMENDATORY ACT CONTAINING PROVISIONS GERMANE TO OBJECT OF ORIGINAL ACT SIMPLY REFERRING TO SECTION OF ORIGINAL ACT INTENDED TO BE AMENDED IS SUFFICIENT.

Where the title of an original act sufficiently expresses its object in the manner required by the Constitution, an act amendatory thereof or to be substituted therefor, if its provisions are germane to the purpose expressed in the title of the original and not inconsistent therewith, may, by its title, simply refer to the section of the original act which it is intended to amend, and this will be a sufficient compliance with section 30 of article 6 of the Constitution.

5. STATUTES §185—WHERE COURT CAN UNMISTAKABLY PERCEIVE OBJECT OF BILL IT MAY SO CONSTRUCT IT AS TO EFFECTUATE LEGISLATIVE INTENT.

Where the language of a bill enacted into law is ambiguous, obscure, doubtful, and uncertain in its meaning, purpose, and effect, a court ordinarily cannot supply words, phrases, or clauses to remove the defects or supply the omissions to ascertain the legislative intent; yet where the act is in substance complete as it stands, and the court can readily and unmistakably perceive the object and purpose to be effected, this rule does not apply to forbid the interpretation or construction that will effectuate the legislative intent.

6. STATUTES §120(2)—TITLE OF BILL TO AMEND CITY CHARTER NEED NOT SHOW INTENT TO ANNUAL CHARTER RIGHTS OF TOWNS LOCATED IN TERRITORY TO BE ANNEXED.

Where the title of a bill to amend the charter of a city, when read in connection with the section to be amended, discloses the object and purpose of the bill to be the annexation to the city of territory clearly defined by the bill, and within which are several towns incorporated pursuant to the provisions of chapter 47 of the Code of 1913 (secs. 2382-2494), the title need not necessarily disclose an intention or design to effect the annulment of the charter rights, powers, and privileges of such incorporated towns; that being the inevitable result and ultimate consequence of the annexation.

7. STATUTES §90(2)—ACT PROVIDING FOR EXTENSION OF CITY'S BOUNDARIES TO INCLUDE OUTLYING TOWN REPEALS CHARTERS OF SUCH TOWNS AND DOES NOT AMEND THEM.

An act amending the charter of a city by providing for an extension of its boundaries, the inevitable effect of which, if approved by the voters, is to bring within its limits incorporated towns lying within the territory annexed, is in effect a repeal of the charters of such outlying towns, not an amendment thereof, and therefore not in conflict with section 39 of article 6 of the Constitution.

8. MUNICIPAL CORPORATIONS §34—SUBSTANTIAL COMPLIANCE WITH ACT DIRECTING SPECIAL ELECTION ON QUESTION OF EXTENDING BOUNDARY IS SUFFICIENT.

Where an act of the Legislature directs that a special election be held to determine the question of the extension of municipal boundaries, and provides the general form of the resolution and notice to be given, a substantial compliance therewith is sufficient if it gives adequate notice of the time and places of voting and sufficiently designates the voters authorized to participate.

Appeal from Circuit Court, Ohio County.

Bill for injunction by T. E. Hood and others, taxpayers, in behalf of themselves and others similarly situated, against the City of Wheeling and its Mayor and Members of the City Council. From a decree dissolving an injunction plaintiffs appeal. Affirmed.

J. H. Brennan and John P. Arbenz, both of Wheeling, for appellants.

M. J. Cullinan and J. J. P. O'Brien, all of Wheeling, for appellees.

LYNOH, J. The charter of the city of Wheeling, granted by the General Assembly of Virginia in the year 1836, and afterwards amended by that body and by the Legislature of this state from time to time and finally at the regular 1919 session, provided in the amendment adopted that year for an extension of the territorial boundaries of the city, subject, however, to the approval of the electors duly qualified to vote and voting at the election thereby authorized to be held and conducted within the time and in the manner required by such charter. If and when so approved, the areal boundaries of the city were to be, and as approved by the electors at the election so provided for, held, and conducted for the purpose were, enlarged so as to include territory other than and additional to that theretofore included within the city limits. The boundaries of the enlarged area the amendment definitely prescribed by geometrical courses and measurements, within the calls of which were Warwood, Fulton, Leatherwood, Woodsdale, Edgewood, Pleasant Valley, Elm Grove, and Patterson, all of which were towns incorporated by the circuit court of Ohio county pursuant to the provisions of chapter 47 of the Code (secs. 2382-2494). Plaintiffs, who sue on behalf of themselves and others similarly situated, reside, are taxable, and own taxable property within the newly incorporated boundary and within some of the towns therein included. Defendants are the city of Wheeling, its mayor, and members of the city council.

In their original bill plaintiffs, upon the facts alleged by them therein, sought but failed to obtain from the circuit court of Ohio county, or the judges thereof sitting together in vacation, an injunction to prohibit defendants from holding and ascertaining the result of the election later held and conducted to determine the will of the voters respecting the incorporation of the proposed new territory within the corporate boundaries of the city. Afterwards plaintiffs amended their bill, and therein alleged the same and other supplemental facts and circumstances disclosed by the changed conditions due to the election held in the interim and at which the voters assented to the enlargement of the corporate area of the city; and in addition to the relief asked in the first instance, so far as available in the second, again sought and failed to obtain a decree to enjoin defendants from making further preparation for perfecting the annexation and assuming official management and control of the included territory and the incorporated towns therein located, and appropriating to the use of the city their treasures and other property owned by them, and

from admitting Charles H. Dowler and Arthur C. Stifel, elected to represent such new territory, to membership in the city council, and in general from doing or performing any other act or acts to cause to cease the right and power of the officers and agents of these towns to exercise the duties conferred upon them by chapter 47, and from levying, collecting, and appropriating to the use and benefit of the city taxes assessed against the persons and property of the taxpayers residing within the territory so annexed to the city, and from incurring and paying any indebtedness or liabilities in any wise related to the matters alleged in either bill, other than those already in good faith contracted and now due and payable by defendants, and all other acts of every kind and character done pursuant to the provisions of the amended charter. The injunction so prayed for and refused a member of this court subsequently awarded, and it the circuit court later dissolved; hence this appeal.

[1] Of the two questions raised for the purpose of impeaching the validity or regularity of the passage of the bill amending the charter, one relates to its title, the other to the constitutional requirement for three successive readings thereof in the House of Delegates. Mr. Weiss, of Ohio county, the patron of the bill, known in the journal of that body as House Bill No. 152, introduced it in the House, of which he was a member, wherein it was read by its title, referred to and amended by the committee on counties, districts, and municipal corporations, and by it reported to the House, with the recommendation that it do pass, wherein it was read as so required and ordered to its second reading. While pending on the second reading the author moved, and the House concurred in the motion, to substitute in lieu of the bill then pending what plaintiffs argue is an entirely new bill, having a different title and dissimilar provisions, thereby rendering the latter so obnoxious to the purposes of the former as to constitute it a new and distinct bill; one which cannot avail itself of the reading theretofore had of House Bill No. 152, but which must itself conform to the constitutional requirement for three successive readings.

The title of House Bill No. 152 was: "A bill to amend and re-enact section 2 of chapter 21 of the Acts of 1915 ('Greater Wheeling Charter'), and approved by a majority of the voters of the city of Wheeling at an election held" for the purpose. That of Substitute House Bill No. 152 was: "A bill to amend and re-enact section 2 of that part entitled 'Greater Wheeling Charter' of an act of the Legislature of West Virginia, passed on the 20th day of February, 1915, entitled: 'An act to amend, revise and consolidate into one act' " acts amending and re-enacting



the city charter by the General Assembly of Virginia and the Legislature of West Virginia, thereby disclosing the history of the different successive amendments since the year 1836, and in such detail as forbids their restatement in an opinion, as they occupy a full half page of the volume containing the municipal charters enacted by the Legislature of 1919, where they may be seen and read.

Section 2 of the Greater Wheeling Charter, referred to in both bills, provided the procedure for enlarging the boundaries of the city, which was to be done only by and with the consent of a majority of the qualified voters of the territory proposed to be annexed, and in the case of a municipal corporation requiring its separate consent by majority vote. House Bill No. 152 continued and enlarged the general provisions for the extension of the boundaries of the city from time to time, by proper resolution of the council thereof and election held thereunder, and retained in substance the provision of the original section providing against the annexation of territory of municipalities without their separate consent by majority vote. The substitute bill, however, repealed the original section 2 and provided for a special election for extension of the city's boundaries within certain defined limits, without continuing the general authority theretofore existing to extend from time to time, and further providing for the annexation of all the defined territory in case a majority of all the votes cast, both in Wheeling and in the territory proposed to be annexed, should be in favor of annexation.

[3] There is, it is true, as counsel say, some disparity between the titles. They are not the same, but are they so utterly dissimilar and variant as to warrant a declaration of the invalidity of the title of the substitute? A careful examination and comparison of the titles does not disclose or reveal such inconsistency between them as subjects the latter to condemnation on that account. Both indicate a purpose to make changes in the provisions of section 2 of the Greater Wheeling Charter of 1915, an inspection of which shows that it relates to the manner and procedure for extending the city's boundaries from time to time. So far, at least, there appears nothing warranting the criticism urged against the title of the substitute. They purport to amend the same section of an earlier act. Their purposes and objects are consistent and relevant. There is no substantial variance between the designs manifested in the titles.

[4, 5] Plaintiffs further object to the sufficiency of the title of the substitute because of its failure to show, as one of the objects of the proposed amendment of section 2, the annulment of the charters and powers conferred upon the incorporated towns lying

within the superadded territory and their incorporation into the city of Wheeling. But the title of the substitute did give full and ample notice, at least such notice as is usually deemed sufficient, to warn plaintiffs and others similarly situated, and on whose behalf they sue, of an intention to alter the provisions of section 2 of the charter known to relate to the extension of boundaries, and an investigation of the bill based upon such warning would have disclosed an intention to annex to Wheeling the territory therein specifically identified. The title of the act involved in *Roby v. Sheppard*, 42 W. Va. 286, 26 S. E. 278 (chapter 63, Acts 1895), amending and re-enacting the charter of the city of Benwood, was no more specific than the title here in question, yet it was sustained as sufficiently broad to warrant taking from another town part of its territory and population and annexing it to the city of Benwood. See, also, *Attorney General v. Amos*, 60 Mich. 872, 27 N. W. 571. Plaintiffs and those in behalf of whom they complain thus had the source of information and knowledge sufficient to show a purpose to effect, with the approval of the voters, the total annulment of the rights of the officers and agents of these towns to exercise the powers conferred upon them by virtue of their incorporation. They knew such must be the immediate and inevitable consequence and effect of the extension of the corporate boundaries of Greater Wheeling, if and when the voters approved it. The title of an act need not reveal the legitimate and inevitable consequences of the duly authorized enlargement of the boundaries of cities, towns, and villages. As said in *Heath v. Johnson*, 36 W. Va. 782, 15 S. E. 980:

"When the title of an original act of the Legislature sufficiently expresses its object in the manner required by the Constitution, an act amendatory thereof may, by its title, simply refer to the section of the original act which it is intended to amend, and this will be a sufficient compliance with section 30 of article 6 of the Constitution."

See, also, *Roby v. Sheppard*, supra; *Carnegie National Gas. Co. v. Swiger*, 72 W. Va. 557, 563, 79 S. E. 3, 46 L. R. A. (N. S.) 1073; 25 R. O. L. 869. The titles of the original acts referred to in the title of the substitute bill sufficiently state the general scope of their subject-matter. The constitutional provision does not require that the details of the legislation be disclosed; otherwise it would be necessary for the title of an act, of itself, to contain the entire act. 25 R. O. L. 855.

Nor is there merit in the contention that the title fails to state the purpose of the bill to repeal section 2 and in lieu thereof to enact another to be known by the same designation. The statement of a purpose to amend and re-enact is sufficient to include

the former, for there is no substantial difference in result whichever course is followed. The operative effect of the old law ceases, if amended and re-enacted in toto, with the same promptness and result as if it is repealed and a substitute enacted.

Then again counsel criticize the omission of part of a verb from the enacting clause of the bill which provides that section 2 "be and the same is hereby repealed and a new section be and is hereby in lieu thereof, to be known as section 2, as follows." This leads to the inquiry whether the omission of some word in the clause, charged by plaintiffs to be fatal, is indeed fatal. We do not so consider it. The insertion of the word "enacted" between "hereby" and "in," so as to make the clause read, "and a new section be and is hereby enacted in lieu thereof," or the insertion of some other word having an equivalent meaning, would render the clause clear and unequivocal. But even without such word, when the words "be and is" receive due emphasis in connection with the phrase "to be known as," the language is sufficiently clear for all necessary purposes.

The irregularity relied on and urged in argument as a ground for the award of the injunction prayed for by plaintiffs is, as we have seen, the failure to read in the House three times, in as many succeeding days, the bill introduced and adopted in lieu of the first while it was pending on the second reading. The new or "substitute House Bill No. 152" supplanted and superseded the original. Thereafter and until enacted into law it was called and known by that name and number. It was read in lieu of the bill so supplanted and advanced to the third reading. The defect in this procedure, if any there was, may be said to have inhered in the measure through all subsequent stages of its legislative history. But was there such departure from the regular parliamentary practice as defeated the purpose of its enactment? Was it necessary to treat it as at the proper stage for the first reading, and to read and advance it for the second and third readings, pursuant to the rule ordinarily prevailing as to the regular passage of bills?

By the action of the House the substitute took the place and position occupied by the bill it supplanted. It thereby became the only bill and operated as an amendment of the former. The mere absence of the words "substitute in the nature of an amendment" does not have the significance imputed to it by plaintiffs. Every substitute is of such nature if germane to the original bill. A bill amended in whatever form is advanced to a higher, not relegated to a lower or subordinate, status, except by the adoption of a motion to that effect. As disclosed by the journal. said bill, "on second reading, coming up

in regular order for consideration, Mr. Weiss moved the following 'Substitute House Bill No. 152' be substituted for and in lieu of House Bill No. 152," and after unsuccessful motions to recommit and to lay over, "the question recurring upon the motion of Mr. Weiss to substitute for and in lieu of House Bill No. 152 'Substitute House Bill No. 152,' the same was put by the chair and prevailed. The bill (Substitute House Bill) was then read a second time and ordered to its engrossment and third reading." The action of the House seems to conform with the rule prescribed by the authorities, and to settle beyond doubt the question relating to the regularity of the passage of the bill amending the city charter.

As somewhat but not entirely analogous in its facts *Smith v. Mitchell*, 69 W. Va. 481, 72 S. E. 755, Ann. Cas. 1913B, 588, furnishes ample illustrations of the propriety of the application of the rule regarding the substitution of one bill for another, when relevant to the same general subject. As disclosed in the opinion, the Senate and House had under consideration at the same time two bills, identical in title and content, which had for their purpose the amendment of the charter of the city of Point Pleasant. The House bill was passed first and reported to the Senate. The Senate bill was read twice on different days, and on second reading the Senate substituted the House bill for it, and under that name the bill was read on another day and passed by the Senate. This, it was argued in that case, violated and disregarded the express constitutional requirement for three full and distinct readings of a bill in each house on three different days before it could become a law. Section 29, art. 6, Const. After commenting upon the theory and wholesomeness of this rule and its obvious purpose to prevent hasty and illy considered legislation, it is remarked in the opinion:

"The two readings of the Senate bill and the third reading of the substituted House bill did this just as effectually as if the House bill had not been substituted for the Senate bill, and the Senate bill had been retained and read a third time and passed. \* \* \* We can hardly call it a substitute because it is identical in matter with Senate Bill 99. But suppose even that the bills were not so identical; still the substitute bill, if so germane to the original bill as to be a proper substitute, would not have to go back and be read three times. A substitute is an amendment."

And the court quotes the following with approval from *Miller and Gibson v. State*, 3 Ohio St. 475:

"But, for argument's sake, let it be admitted that the bill as amended was read but once in the Senate; is the act for that reason void? That, counting two readings before the amendment and the final reading, the bill was read three times, is conceded, for these readings are

shown by the journal, and it is also conceded that, in general, three readings of an amendment are not necessary. But inasmuch as the amendment in this case is styled in the journal a 'new bill,' it is said that three readings were necessary. Why necessary? The amendment was not the less an amendment because of the name given it. It is not unusual, in parliamentary proceedings, to amend a bill by striking out all after the enacting clause and inserting a 'new bill.' \* \* \* When the subject or proposition of the bill is thereby wholly changed, it would seem to be proper to read the amended bill three times, and on different dates; but where there is no such vital alteration, three readings \* \* \* are not required."

The inaptness of the decision in *Smith v. Mitchell* is apparent, according to the able argument of counsel for appellees, because of the difference between the facts of the two cases. There the substituted bill was identical in title and content with the Senate bill whose place it took; here it was not so identical. Appellants admit, as we understand, that had not the substitute carried a different title, and had its author caused its contents to be inserted under the title and enacting clause of the original bill, the proceedings in this respect at least would have been less irregular. This the House did not do, but accepted the substitute and its own title and enacting clause. Just what difference, if any, this makes is not clear, because the usual course pursued in respect to the title of a bill is to defer alterations or changes in it to conform with the objects and purposes of the bill until it has reached the final stage of its passage; and such deferment in effect occurred. For as appears on pages 556 of the House Journal and 657 of the Senate Journal, the substitute "was read a third time and passed with its title." By these acts the title was approved, thereby validating whatever may be said regarding its original status.

[2] From what has been said the conclusion readily comes that a substitute bill or amendment, if so germane to the original bill as to be a proper substitute or amendment, does not have to go back and be read three times, but may include as part of its required readings those had before the substitution or amendment was made. *Capito v. Topping*, 65 W. Va. 587, 64 S. E. 845, pt. 9, Syl., 22 L. R. A. (N. S.) 1089; *Smith v. Mitchell*, supra, 69 W. Va. 481, 72 S. E. 755, Ann. Cas. 1913B, 588; *Brown v. Road Commissioners*, 173 N. C. 598, 92 S. E. 502; *Southern Ry. Co. v. Memphis*, 126 Tenn. 267, 148 S. W. 662, 41 L. R. A. (N. S.) 828, Ann. Cas. 1913E, 153; *Attorney General v. Amos*, 60 Mich. 372, 27 N. W. 571; *Southern Ry. Co. v. Mitchell*, 139 Ala. 629, 37 South. 85. Was there such disparity or lack of harmony as constitutes grounds for the charge that the provisions of the substituted bill were not germane and relevant to those of the orig-

inal or displaced bill, and therefore not a proper amendment of the latter? Their provisions are not the same, but sameness is not essential. Provisions wholly discordant from the text may be, and not infrequently are, inserted by way of amendment, provided the main purpose and essential character of the original are not necessarily impaired or modified. The charge here is that while the bill first introduced conferred upon the Wheeling council the right virtually to amend the charter by enlarging the city boundaries, but only with the separate consent by majority vote of the territory or municipalities to be annexed, the substitute provided for a special election for extension of boundaries within specified limits, without continuing the general authority accorded in the original bill to extend them from time to time; and further provided that a majority of the votes cast, not only in the territory to be annexed but also in the city of Wheeling, should determine the result of the election. But such changes either the House or the Senate could, and perhaps would, have made by an amendment offered and adopted when the bill had reached the stage proper for that purpose. If the ordinary motion to amend would avail, so may a substitute. Both attain the same end and accomplish the same object—the perfection of bills to suit the intention of their sponsors and the demands of the persons to be affected. The changes were germane and relevant, and do not render the bills so dissimilar as to necessitate additional readings of the substitute.

[6, 7] Another ground urged to show plaintiffs' right to a reversal of the decree complained of is the nullification of the charters of the towns located within the territory so incorporated into the city of Wheeling, in violation of section 39, art. 6, of the Constitution, which prohibits the Legislature from amending by special act the charter of any city, town, or village containing a population of less than 2,000 inhabitants. But nothing in our Constitution prohibits "the Legislature from passing a special law repealing the charter of a municipal corporation, or uniting the territory of several municipal corporations, \* \* \* and thus repealing their former charters." *South Morgantown v. Morgantown*, 49 W. Va. 729, 40 S. E. 15. In the case cited an act of the Legislature (chapter 144, Acts 1901) creating a new corporation to include all the territory theretofore covered by four towns was sustained. Many of the issues raised and elaborately discussed by counsel representing both parties to that controversy seems so clearly pertinent and significant as to justify delay in noting the principles declared by the opinion to have substantial merit. According to that opinion, a mere grant of a charter to a municipal corporation does not create an indissoluble contractual relation between the

state and the municipality, but rather a temporary instrument ordained to assist the state in the administration of governmental functions within a certain prescribed area, and vests in the corporation no right which a subsequent Legislature may not annul. "The power of the Legislature to divide large municipalities, to annul their old charters, to reorganize them, to consolidate small ones, as well as to detach portions of territory from one and annex them to another, to meet the wishes of its residents, or to promote the public interest, as understood by the Legislature, is conceded to the Legislature \* \* \* in the absence of constitutional prohibition." And section 39, art. 6, Const., though limiting the amendment of charters, "does not stay the hands of the Legislature in the repeal of a charter." This detachment and annexation of territory occurred in *Roby v. Sheppard*, 42 W. Va. 286, 28 S. E. 278, a case which involved the right and power of the Legislature to incorporate into Benwood part of McMechen, also an incorporated town having a population of less than 2,000. Neither the title of the act amending the Benwood charter, nor the act itself, afforded any notice of an intention to give to Benwood any part of the territory of McMechen, except such notice or source of information respecting the diminution of the area of the one and the enlargement of the area of the other as the altered boundary lines themselves disclosed; and the court said (point 1 of the syllabus):

"A statute amending the charter of a town containing upwards of 2,000 population, which takes from another town of less population than 2,000 some of its territory, is not a special act amending the charter of a town of less population than 2,000 prohibited by section 39, art. 6, of the Constitution."

For these reasons we think there is no merit in plaintiffs' argument upon this point.

[8] A further question is likewise urged upon our attention by plaintiffs, namely, that of the sufficiency of the resolution providing for, calling and giving notice of the election upon the question of annexation, as provided for in the amending act, in order to afford the voters to be affected thereby an opportunity to express their approval or disapproval of the proposed extension of the city boundaries. The resolution, the sufficiency of which as regards electors residing within the former limits of the city is denied, recites in the form of a preamble the passage of the amending act and the requirement for the submission to the duly qualified electors "of all the territory to be included in said boundaries" the question of the extension thereof; and as further showing what voters are intended, "all of which is within Ohio county, W. Va., in addition to the lands, grounds, waters, water courses,

and territory included within the city of Wheeling as at present bounded." This resolution, as we read and consider it, furnishes ample notice and warning of an intention to hold an election within the city of Wheeling as formerly bounded, as well as within the territory proposed to be annexed, and invites all persons qualified to exercise the franchise right therein to vote upon the question so submitted to them. The purpose could have been made more explicit, it is true; nevertheless it is difficult to perceive how a reasonably intelligent voter could have mistaken the real and ostensible purpose of the election or the persons who were called upon to express by their ballots their views upon the question so submitted for decision. There is nothing in the record to show misconception of the purpose of the voters intended.

Of course, if notice is not given substantially as and when required by law, and it appears that by reason of the omission a fair opportunity was not afforded the electors to vote, the election cannot stand where the result might otherwise have been different. *Hill v. Skinner*, 169 N. C. 405, 86 S. E. 351. But here notice was given substantially as required by the statute. Though of the total voters, shown by a previous registration to be 11,634, less than a majority voted in favor of the proposition, it does not appear that any qualified voter failed or refused to vote because of the inadequacy of the notice. The total vote cast seems to have been as large, if not larger, than is customary at special elections, and there further appears the extreme inclemency of the weather on election day due to an incessant downpour of rain during the hours fixed by law for holding general and special elections. It is not denied that residents of the territory to be annexed had ample notice.

In 9 R. O. L. 992, this statement occurs:

"Frequently irregularities (in the giving of notice) occur in following statutory requirements and the validity of the election is brought into question."

After a discussion of the rule applicable to general elections the author continues:

"It is equally clear in the case of special elections, wherein the necessity for notice is so much more urgent, that the rule as to compliance with statutory requirements in the giving of notice should be much more strictly enforced. Considerable liberality, however, is allowed even in these elections, and it is a rule of pronounced authority that the particular form and manner pointed out by a statute for giving notice is not essential, provided, however, there has been a substantial compliance with statutory provisions."

In line with this policy also are: *Hill v. Skinner*, cited; *State v. Salt Lake City*, 35 Utah, 25, 99 Pac. 255, 18 Ann. Cas. 1130; *Seymour v. Tacoma*, 6 Wash. 427, 83 Pac.

1059; State v. Doherty, 16 Wash. 382, 47 Pac. 958, 58 Am. St. Rep. 39; Wheat v. Smith, 50 Ark. 266, 7 S. W. 161; Staples v. Astoria, 81 Or. 99, 158 Pac. 518; Patton v. Watkins, 131 Ala. 387, 31 South. 93, note, 90 Am. St. Rep. 43, 71; State v. Town of Westport, 116 Mo. 582, 22 S. W. 888; Com. v. Smith, 132 Mass. 289; Adsit v. Osmun, 84 Mich. 420, 48 N. W. 31, 11 L. R. A. 534; 10 Am. & Eng. Enc. Law, 626, 631. See, also, Griffith v. County Court, 80 W. Va. 410, 92 S. E. 676.

The crucial point, the one urged with most emphasis by appellants in argument, is the alleged incompetency of the notice purporting to advise the electors resident within the city of Wheeling of the impending election to ascertain their will upon the question about to be submitted to them for decision. The charter as amended did not definitely prescribe the date of the election, but required that it be held "not before October 1, 1919, and not later than December 1, 1919," and authorized the city council to specify the exact date therefor. This they did by resolution appointing November 26, 1919, for that purpose. The act itself amply warned the electors not only in the territory to be annexed, but also in the city of Wheeling, of a prospective demand for an expression of opinion upon a subject in which their interests were about to be affected as residents and property owners, and to be aware of the time and place later to be appointed for them to express their decision upon the merits of the proposition, submitted to them. Unto them the charter was law, and bound them to take due notice of its requirements. The first part of the published notice, read by itself, is ambiguous and seems to call only upon the voters in the territory to be annexed for an expression of approval or disapproval. But when read in its entirety and as a related whole, and especially with the specific provision that "the voting places and precincts for such election shall be as follows," accompanied by an enumeration of voting places within each ward of the city of Wheeling, as well as those in the outlying territory, the notice is sufficiently definite to show that all voters in the entire community, those already incorporated into the city and those proposed to be united with it, were called upon to vote. The notice was amply sufficient to advise all persons of reasonable intelligence to attend at the time and places so designated, and to pass judgment upon the propriety of the proposed annexation, and could not reasonably mislead any one. Furthermore, we think there is no substantial warrant for the objection urged respecting the filing of certain affidavits.

For the reasons stated we affirm the decree without further discussion.

**FARLEY v. CRYSTAL COAL & COKE CO.**  
et al. (No. 3925.)

(Supreme Court of Appeals of West Virginia.  
Feb. 17, 1920.)

*(Syllabus by the Court.)*

1. TORTS  $\S$ 22—TORT-FEASORS ACTING INDEPENDENTLY IN PERPETRATION OF SIMILAR WRONGFUL ACTS AT THE SAME TIME NOT JOINTLY LIABLE FOR INJURY SUBSEQUENTLY RESULTING FROM COMBINATION OF ACTS AND NATURAL CAUSES.

Two or more tort-feasors acting independently, without concert, collusion, or pursuit of a common design, in the perpetration of like wrongful acts at the same time, working like injury to the same subject, are not jointly liable for injury subsequently resulting to any person from combination of the consequences of such wrongful acts by the operation of natural causes.

2. TORTS  $\S$ 22—INDEPENDENT TORT-FEASORS NOT JOINTLY LIABLE UNLESS INJURY RESULTS DIRECTLY FROM CONTEMPORANEOUS WRONGFUL ACTS.

In the case of wholly independent action of tort-feasors, there is no joint liability, nor liability of one of them for entire damages, except in those instances in which the injury results immediately or directly from the coincident and contemporaneous wrongful acts.

3. WATERS AND WATER COURSES  $\S$ 71—PERSONS ACTING INDEPENDENTLY IN POLLUTING A STREAM TO DAMAGE OF RIPARIAN OWNER NOT JOINTLY LIABLE.

Two or more persons who, acting separately and independently, have wrongfully cast in a stream coal, cinder, and other materials and polluted and defiled it, in consequence of which the property of a riparian owner has been injured and damaged, are not jointly liable for the damages so wrought, nor is any one of them liable for such damages in their entirety.

4. CASE OVERTULED.

In so far as the decision in Day v. Louisville Coal & Coke Co., 60 W. Va. 27, 53 S. E. 776, 10 L. R. A. (N. S.) 167, conflicts with the propositions above stated, it is disapproved and overruled.

5. PARTIES  $\S$ 92(3)—FAILURE OF DECLARATION AGAINST SEVERAL TORT-FEASORS TO SHOW JOINT LIABILITY IS GROUND FOR DEMURRER FOR MISJOINDER.

Failure of a declaration against several tort-feasors, joined in one action, to show any ground of joint liability, is good cause of demurrer thereto for misjoinder of parties.

6. APPEAL AND ERROR  $\S$ 1178(7) — WHERE DECLARATION SHOWS NO GROUND OF JOINT LIABILITY OF TORT-FEASORS, JUDGMENT FOR PLAINTIFF WILL BE SET ASIDE, AND CAUSE REMANDED, WITH LEAVE TO AMEND OR TO PROSECUTE ONE DEFENDANT ALONE.

If on such a declaration there has been a verdict and judgment for the plaintiff, the appellate court, on writ of error, will reverse the judgment, set aside the verdict, and remand

the case, with leave to the plaintiff to amend his declaration so as to show a joint right of action, if he desires to do so, or to prosecute his action against one of the defendants and dismiss it as to the others.

**7. NEW TRIAL §—86 — WHERE ALLEGATION AND PROOF SHOW THAT TORT-FEASORS ACTED SEPARATELY, WITH RESULTING INJURY FROM CONTEMPORANEOUS TORTS, VERDICT FOR PLAINTIFF SHOULD BE SET ASIDE.**

If, in an action against two or more tort-feasors, the proof shows they acted separately and independently, in the perpetration of the wrongful acts alleged and proved against them, and the injury the plaintiff has suffered from such acts is a merely consequential result of the coincident and contemporaneous torts, and not a direct and immediate one, a motion to set aside a verdict for the plaintiff therein, as being contrary to the law and the evidence, should be sustained.

Error to Circuit Court, Mercer County.

Action by L. B. Farley against the Crystal Coal & Coke Company and five others. Demurrer to declaration overruled, verdict and judgment for plaintiff, and defendants bring error. Reversed, verdict set aside, demurrer sustained, and case remanded.

Reynolds & Reynolds and John R. Pendleton, all of Princeton, for plaintiffs in error.

John M. McGrath and Hugh G. Woods, both of Princeton, for defendant in error.

**POFFENBARGER, J.** The judgment complained of, amounting to \$1,650, stands upon a declaration in an action against six different coal mining corporations, whose mines and works are located at different places on tributaries of the Bluestone river, charging them with having polluted and defiled said river, by casting into it directly and indirectly cinder, coal, slag, and other materials from their mines and coke ovens and fetid and putrid matter from their tenant houses and privies, and so altered its condition by means of such deposits as to cause more frequent and disastrous overflows of the bottom lands along its course, the filling up of its bed, narrowing of its channel and deposits on its shores, and with having injured and damaged the plaintiff's farm by such means. A demurrer to the declaration was overruled and is relied upon in the assignments of error. If it was well taken and should result in a reversal, it will be unnecessary to consider all of the other numerous assignments of error.

The coal works of three of the defendants are located on Crane creek, those of one of them on Flipping creek, and those of the other two on Widemouth creek. All of these streams flow into the Bluestone river at distances above the location of the plaintiff's farm not stated in the declaration. The deposits of the river, according to the allega-

tions in the declaration, have filled up practically all of the holes in the stream, narrowed its channel, cast great quantities of cinder, coal, and sand over portions of its bottom lands, made heavy deposits along its shores, destroyed the plaintiff's fords of the river, by means of which he went from one part of his farm to another, caused mucky deposits along the shores of the stream, preventing cattle from going to it with safety for water, and on the edges of the bottom lands of plaintiff's farm, increased the frequency and volume of overflows of the bottom lands, turned the waters black and so polluted them that they are unfit for use, and otherwise injured and damaged the plaintiff's farm. There is no allegation that the defendants acted in concert, collusion, or pursuit of a common design in the performance of the acts which are alleged to have injured and defiled the stream and damaged the plaintiff's land. It simply alleges that they did the specified wrongful acts, and that the injury and damage to the plaintiff's land resulted therefrom.

[1-3] For legal justification of joinder of these defendants in one action and right to recover upon a declaration so framed, the plaintiff relies upon the decision of this court rendered in *Day v. Louisville Coal & Coke Co.*, reported in 60 W. Va. at page 27, 53 S. E. 776, 10 L. R. A. (N. S.) 167. That action was prosecuted against a single coal mining corporation, one of the defendants in this action, by the owner of another farm situated on the same stream, for injury and damage thereto by reason of acts of the same kind as those alleged in this declaration. But joint and several liability of all persons and corporations guilty of the wrongful acts charged in the declaration was asserted and adjudicated in that action in the determination of the extent of the liability of the defendant therein. It was held to be liable for the entire damages to his farm, wrought by the consequences of the acts of the defendant and all other persons and corporations whose wrongful acts of like kind had combined with those of the defendant in the infliction thereof. The substance of the court's conclusion respecting that phase of the case is embodied in point 2 of the syllabus, reading as follows:

"When the negligent acts of two or more persons, though acting independently of each other, concurrently result in injury to the property of another, they are liable either jointly or separately."

In this case the soundness of that decision is questioned by the demurrer to the declaration, and also by the motion to set aside the verdict. The lack of concert, collusion, common design, or any other element of connection among the defendants is clearly re-

vealed by the evidence. They are wholly independent concerns operating at different points on the tributaries of the river.

A careful examination of the opinion delivered in the case above referred to, *Day v. Louisville Coal & Coke Co.*, readily discloses failure on the part of the court to observe and apply a well-defined and firmly grounded exception to the general rule of liability of joint tort-feasors given in the opinion, or, stated more accurately, a limitation of the rule of joint liability and liability for entire damages. This exception or limitation is that there is no joint liability nor liability for entire damages when the tort-feasors act independently, without concert, collusion, or common design, and the injury to the plaintiff is consequential only, or remotely resulting, as contradistinguished from direct and immediate. The rule as quoted in the opinion from *Shearman & Redfield on Negligence* puts in this element of directness, saying:

"Persons who co-operate in an act directly causing injury are jointly liable for its consequences."

Nor does Cooley on Torts in the quotation from it omit this element. It says:

"If the damage has resulted directly from concurrent wrongful acts or neglects of two persons, each of these acts may be counted on as the wrongful cause, and the parties held responsible, either jointly or severally, for the injury."

The same quotation from *Shearman & Redfield* is found in *Boyd v. Watt*, 27 Ohio St. 259, and the opinion filed in that case puts in the element of directness. Another quotation in *Day v. Louisville Co.*, taken from *Grand Trunk R. Co. v. Cummings*, 106 U. S. 709, 1 Sup. Ct. 493, 27 L. Ed. 266, says:

"Where separate and independent acts of negligence of two parties are the direct causes of a single injury to a third person, and it is impossible to determine in what proportion each contributed to the injury, either is responsible for the whole injury."

The decisions cited and relied upon in the opinion in *Day v. Louisville Coal & Coke Co.* all involved cases of direct injury by the wrongful acts complained of. In *Boyd v. Watt*, the action was founded upon a statute giving right of action to any person who had caused intoxication of another person, to the injury and damage of the plaintiff. The defendant undertook to limit his liability on the ground of contribution to the result by other persons, without his knowledge or consent. In its disposition of the case the court said:

"If defendant was using the means calculated to produce the injury, the law presumes he intended to produce it. If others, with or without concert, were concurrently co-operating with

him, using like means, they were acting with the same common design, and if the injury resulted, each is liable, though each was acting without the knowledge of what the other was doing."

It is to be observed that the unlawful act was done directly and immediately to the subject of the injury, the person to whom the liquor was unlawfully sold. The intoxication constituting the groundwork of the action was the immediate and direct consequence of the result of the unlawful act. In the opinion of the court it was not a case of direct injury to one subject resulting in consequential injury to another. In *Johnson v. Chapman*, 43 W. Va. 639, 28 S. E. 744, the injury was the direct and immediate result of the wrongful act. Two contiguous buildings had fallen upon a third because of the coexistent and concurring negligence of the separate owners to keep their separate walls in repair. They caused or permitted their buildings to fall upon that of the plaintiff and inflict immediate and direct injury upon it. In *Grand Trunk Railway Co. v. Cummings*, 106 U. S. 700, 1 Sup. Ct. 493, 27 L. Ed. 266, the injury was inflicted by a collision of railway trains, wherefore it was necessarily immediate and direct.

Viewed from a merely practical standpoint, this distinction may not be important. Whether inflicted directly or immediately by the joint, coincident, or cotemporaneous action of the wrongdoers, or effected by combination of the consequences arising from the wrongful acts, the injury is equally serious, and the difficulty of apportioning the responsibility among the wrongdoers equally great. Nevertheless the courts and text-writers, looking at it from a legal point of view, all regard it as important. It is marked in the edition of *Shearman & Redfield on Negligence* published in 1898. In section 123 of that edition it said that persons who act separately, each causing a separate injury, cannot be made jointly liable, even though the injuries thus committed are all inflicted at one time and are precisely similar in character, and in the note appended to that section cases of several different classes, sustaining the proposition and decided by the courts of various states are cited. Among them are cases of the class of this one, injury by pollution and defilement of streams. In each of them the subject of the injury was different from that upon which the wrongful acts were directly inflicted. Another class involves cases of infliction of injury by animals of different owners, though occurring at the same time and as part of a single transaction. The cases cited for this proposition in that work and others are to be found in the note to *Day v. Louisville Coal & Coke Co.*, in 10 L. R. A. (N. S.) 167, 169, among them being *Partenhimer v. Van Order*, 20 Barb. (N. Y.) 479; *Westgate v.*

Carr, 43 Ill. 450; Cogswell v. Murphy, 46 Iowa, 44. Another class of cases asserting the same doctrine and put under the same exception to the rule are those involving actions for injuries inflicted by dogs owned by different persons, at the same time and as a single transaction. Van Steenberg v. Tobler, 17 Wend. (N. Y.) 562, 31 Am. Dec. 310; Russell v. Tomlinson, 2 Conn. 206; Adams v. Hall, 2 Vt. 9, 19 Am. Dec. 690; Auchmuty v. Ham, 1 Denio (N. Y.) 495; Buddington v. Shearer, 20 Pick. (Mass.) 477; Dyer v. Hutchins, 87 Tenn. 198, 10 S. W. 194; State v. Wood, 59 N. J. Law, 112, 35 Atl. 654. It is to be observed that in all these cases the negligent act was not directed to the subject of the injury. It was the wrongful act of permitting the stock to go at large or of maintenance of the sheep-killing dog. In point of law there was no immediate or direct connection between the wrongful act and the injury; the latter being merely a remote consequence of the wrongful act. In the actual infliction of the injury there was no joint action of the parties. There was nothing more than a combination, effected by natural causes, of the consequences or results of the wrongful acts, in which the parties did not act. This, of course, does not absolve them from liability, but it does away with the ground or basis of joint liability and liability for entire damages. Each is liable only for the consequences of his own wrong and must be sued alone for the damages.

The distinction between actions at law for recovery of damages and suits in equity for injunctive relief in such cases is well defined. Draper v. Brown, 115 Wis. 361, 91 N. W. 1001; Lockwood Co. v. Lawrence, 77 Me. 297, 52 Am. Rep. 763; People v. Ditch and Mining Co., 66 Cal. 138, 4 Pac. 1152, 56 Am. Rep. 80; West Arlington v. Mt. Hope, 97 Md. 191, 54 Atl. 982; Strobel v. Kerr Salt Co., 164 N. Y. 303, 58 N. E. 142, 51 L. R. A. 687, 79 Am. St. Rep. 643; Evans v. W. & W. R. Co., 96 N. C. 45, 1 S. E. 529. Precedents in cases of the latter class are inapplicable and need not be considered. A damming of the waters of a stream so as to cast them back upon the lands of an upper riparian owner by two or more persons may be a case of direct injury. Wright v. Cooper et al., 1 Tyler (Vt.) 425. If the waters are depleted or absorbed by an upper owner to the detriment of a lower, the injury may be direct. In the one case the immediate effect is to cover the injured owner's land with water, and in the other to take away what belongs to the lower owner.

[4] An overwhelming weight of authority now stands against the decision in Day v. Louisville Coal & Coke Co. in so far as it authorizes a joinder of defendants upon the facts stated in the declaration in this case, and imposes liability of one of the parties

for entire resultant damages, whatever it may have been at the date of rendition thereof. Pulaski, etc., Coal Co. v. Gibboney Sand Bar Co., 110 Va. 444, 66 S. E. 73, 24 L. R. A. (N. S.) 1185; Swain v. Tennessee Copper Co., 111 Tenn. 430, 78 S. W. 93; Miller v. Highland Ditch Co., 87 Cal. 430, 25 Pac. 550, 22 Am. St. Rep. 254; West Muncie Strawboard Co. v. Slack, 164 Ind. 21, 72 N. E. 879; Bowman v. Humphrey, 124 Iowa, 744, 100 N. W. 854; Loughran v. Des Moines, 72 Iowa, 382, 34 N. W. 172; Blaisdell v. Stephens, 14 Nev. 17, 33 Am. Rep. 523; Chipman v. Palmer, 77 N. Y. 51, 33 Am. Rep. 566; Mansfield v. Bristol, 76 Ohio St. 270, 81 N. E. 631, 10 L. R. A. (N. S.) 806, 118 Am. St. Rep. 852, 10 Ann. Cas. 767; Schuylkill Nav. R. & C. Co. v. Richards, 57 Pa. 142, 98 Am. Dec. 209; Seely v. Alden, 61 Pa. 302, 100 Am. Dec. 642; Norton v. Colusa Parrot M. & M. Co. (C. C.) 167 Fed. 202. It is equally clear that a well-defined legal principle, or exception to a general principle or rule, which this court overlooked or misapprehended in the decision of that case, stands against it. In this state the development of natural resources and location of mills and factories along its numerous streams has only fairly commenced; wherefore it is highly important that the rights of riparian owners and persons conducting divers kinds of business along the water courses and their remedies for wrongful acts respecting them and the adjacent lands be correctly defined. Being clearly of the opinion that the decision in the Day Case is unsound in principle and contrary to the great weight of judicial opinion, we disapprove and overrule it, in so far as it imposes liability for entire damages upon one of several wrongdoers and authorizes a joinder of defendants, in an action for damages, under the circumstances here shown.

Reversal of the judgment and annulment of the verdict necessarily result from the conclusion just stated and the character of the evidence hereinbefore indicated.

[5-7] A demurrer always lies for any substantial defect disclosed on the face of the declaration, and this is true as to parties.

"If too many persons be made defendants, and the objection appear on the pleadings, either of the defendants may demur." 1 Chitty, Pl. 44.

This quotation applies only to declarations in actions ex contractu. The rule at common law in cases ex delicto may not have been quite so liberal. Whether it was or not, according to Chitty, depends upon the interpretation of his language. At page 85 he says:

"If several persons be made defendants jointly, where the tort could not in point of law be joint, they may demur."

There are some instances in which two or more persons can never be jointly liable for



a tort, on account of its nature. This may be the class of cases to which the text just quoted applies, and it has been judicially applied to that class of cases. *Orr v. Bank*, 1 Ham. (Ohio) 36, 13 Am. Dec. 588; *Russell v. Tomlinson et al.*, 2 Conn. 206; *Johnson v. McKeown*, 1 McCord (S. C.) 578, 10 Am. Dec. 698; but a more liberal interpretation is put upon it in *Franklin Ins. Co. v. Jenkins*, 3 Wend. (N. Y.) 130, in which the defendants might have been made jointly liable upon proper allegations. These decisions are not inconsistent; the former class of cases being clearly within the text and the latter possibly so. It is to be observed that the text makes no necessary reference to the inherent character of the tort. "Where the tort does not in point of law be joint" may mean where the tort as alleged in the declaration could not in point of law be joint. This is the more reasonable interpretation, because it reconciles the terms with a basic and fundamental rule of pleading, namely, that the declaration must state a case with reasonable certainty. Here an allegation of joint or concerted action by the defendants is an essential element of the right of recovery as claimed by the declaration. Being required in the proof, such action should be charged in the declaration. The argument of convenience also supports this conclusion. It is highly burdensome to impose upon a citizen defense against a charge not stated in the declaration, because it cannot be made good by proof. Our conclusion is that the declaration is defective, and that the defect is cognizable on demurrer.

But, inasmuch as the defendants may be severally liable in all such cases, the plaintiff should have his election to proceed against one of them in this action and dismiss it as to the others, if he cannot truthfully charge joint action in the perpetration of the wrongs complained of. There is no good reason for requiring him to dismiss as to all of them and bring an entirely new action. It was said in *Orr v. Bank*, cited, that entry of a *nolle prosequi* as to the bank would have saved the declaration on demurrer.

Upon these principles and conclusions, the judgment will be reversed, the verdict set aside, the demurrer sustained, and the case remanded.

(179 N. C. 232)

HANCOCK v. DAVIS et al. (No. 185.)

(Supreme Court of North Carolina. March 3, 1920.)

1. DEEDS ¶11 — DEED IS INVALID WHERE PURPORTED GRANTOR HAD DIED BEFORE DATE OF DEED.

Where, several years before the date of a deed, there had occurred the death of one whose

purported signature was on the deed as grantor, the deed conveyed nothing.

2. HUSBAND AND WIFE ¶16 — NO ADVERSE POSSESSION POSSIBLE AGAINST EACH OTHER.

During the continuance of the family relation, neither a husband nor a wife can acquire title by adverse possession as against the other of land of which they are in joint occupancy.

Appeal from Superior Court, Carteret County; Kerr, Judge.

Action by S. P. Hancock against Israel Davis and others. Judgment for plaintiff, and defendants appeal. Reversed.

The action was brought to recover a lot of land in the town of Beaufort. His honor charged the jury, if they believed the evidence, to answer the issues in favor of plaintiff.

C. R. Wheatley and Abernethy & Davis, all of Beaufort, for appellants.

J. F. Duncan, of Beaufort, and D. L. Ward, of New Bern, for appellee.

BROWN, J. The evidence shows that John E. Henry entered into possession of the lot in controversy prior to 1870, having no paper title thereto. He remained in possession up to his death in 1912. This action was commenced in 1917. The lot was listed for taxes by John E. Henry in 1870 and sold for taxes on January 7, 1871, and bid off in the name of W. R. Henry, infant son of John E. Henry, and brother of defendant Mary Davis, who was John E. Henry's daughter. W. R. Henry was born in 1866, and died in 1873, according to the evidence. No deed was made to W. R. Henry at the time of sale, but the then sheriff, John D. Davis, gave a receipt for the taxes in name of W. R. Henry. On April 18, 1891, John D. Davis, not then being sheriff, executed a tax deed to W. R. Henry for the lot.

The plaintiff offered in evidence a deed to Agnes Henry, dated October 30, 1891, purporting to be signed by W. R. Henry for the lot and probated upon the oath of John E. Henry. On October 21, 1913, Agnes Henry executed a deed for the lot to plaintiff, Hancock. Agnes Henry was the third wife of John E. Henry, and was married in 1887. The defendant Mary Davis is the child of John E. Henry by a prior marriage, and so far as the record discloses is his only heir at law.

Plaintiff offered mortgage from John E. Henry and Agnes Henry to S. P. Hancock, March 17, 1906, recorded in Book 5, page 308, which said mortgage has been canceled and fully satisfied of record, as appears from the face of the same. The defendants objected to the introduction of this mortgage on the grounds that it was not material and was prejudicial; objection overruled, and defend-

ants excepted. As the mortgage was duly canceled, we fail to see its bearing on this controversy.

We are of opinion that his honor erred in refusing the motion to nonsuit, as in any view of the evidence, plaintiff failed to make out title to the lot. John E. Henry was in possession of the lot from prior to 1870 to his death. Assuming that he had acquired title by possession, no one except defendants have shown a title from him. Mary Davis was his only heir at law, and after her father's death held the property subject to what dower right the widow may have had. The widow held no conveyance from John E. Henry.

[1] The deed signed by W. R. Henry conveyed no title, for he died in 1873, some years before Davis executed the deed. If Agnes Henry had anything, she had only a paper writing which might be color of title. Assuming that it was, it never ripened into a good title by adverse possession.

[2] John E. Henry lived on the lot up to date of his death in 1912, and died without either devising or conveying the property to his wife Agnes. She did not hold adversely after she received the deed purporting to be executed by W. R. Henry. She resided with her husband on the lot, and was there as his wife, and could not hold adversely to him. This subject is discussed in the recent case of *Kornegay v. Price*, 100 S. E. 883, where it is said:

"It seems to be well settled that, owing to the unity of husband and wife, adverse possession cannot exist between them so long as the coverture continues. But, where the marital relations have been terminated by divorce or abandonment, it seems that one may acquire title from the other by adverse possession. 1 A. & E. Ency. p. 820, § 11. In *First National Bank v. Guerra*, 61 Cal. 109, it is held that a wife cannot claim adversely to her husband or those claiming under him so long as he remains the head of the family. It is held further, in *Hendricks v. Rasson*, 53 Mich. 575, 19 N. W. 192, that the husband cannot hold, adversely to his wife, premises belonging to her."

To same effect is 1 *Ruling Case Law*, p. 755, where more cases are cited. The author says:

"It is well settled that neither a husband nor a wife can acquire title by adverse possession, as against the other, of land of which they are in joint occupancy during the continuance of the family relation."

According to the evidence, in any view of it, the title never passed out of John E. Henry until his death. The land then descended to defendant Mary Davis, his daughter and only heir at law, subject to the widow's right of dower. The motion to nonsuit is allowed. Reversed.

(179 N. C. 185)

## DAVIS v. DAVIS. (No. 15.)

(Supreme Court of North Carolina. Feb. 18, 1920.)

1. DIVORCE ~~§~~66—BRINGING OF ACTION IN COUNTY OF APPLICANT'S RESIDENCE NOT JURISDICTIONAL.

Revisal 1905, § 1559, requiring summons in divorce action to be returnable before court of county in which applicant resides, is not jurisdictional, in view of sections 419-425, and action brought in wrong county may be removed instead of dismissed, a failure to move for removal being a waiver of the objection to the county in which the action is brought.

2. VENUE ~~§~~17—FAILURE TO MOVE FOR REMOVAL TO PROPER COUNTY WAIVER OF OBJECTION.

Generally an action brought in the wrong county may be removed instead of dismissed, and failure to make the motion for removal is a waiver of the objection to the county in which it is brought.

3. DIVORCE ~~§~~79—FILING OF VERIFIED COMPLAINT WITH AFFIDAVIT FOR SERVICE BY PUBLICATION SUFFICIENT TO SHOW CAUSE OF ACTION.

Where plaintiff in divorce action filed his duly verified complaint, stating cause of action at the same time that he filed the affidavit for publication and before order for service by publication was made, the order was not defective notwithstanding failure of affidavit of publication to state facts showing cause of action, as the filing of the complaint simultaneously with such affidavit was a compliance with Revisal 1905, § 442, requiring it to be shown by affidavit that a cause of action exists before an order for the service and summons by publication can be made; such complaint being also an affidavit.

4. PROCESS ~~§~~96(4)—AFFIDAVIT FOR SERVICE BY PUBLICATION HELD FATALLY DEFECTIVE.

Affidavit for service by publication, alleging defendant to be a nonresident, without alleging that defendant could not, after due diligence, be found in this state, held fatally defective; an allegation of nonresidence not being the equivalent of an allegation of diligence.

5. DIVORCE ~~§~~186—MOTION TO AMEND AFFIDAVIT OF SERVICE BY PUBLICATION AFTER DEFAULT DECREE FOR ADULTERY REMANDED TO SUPERIOR COURT FOR TRIAL ON MERITS.

On husband's appeal from order setting aside, because of defective affidavit of publication, his divorce decree obtained for wife's adultery, the Supreme Court would not exercise its discretion, given by Revisal 1905, § 1545, to amend affidavit, notwithstanding showing by husband that he had remarried, had a child by second wife, was a man of good character, and was acting in good faith, but, the divorced wife having had no opportunity to be heard on issue of adultery, and the Supreme Court having no means of investigating the truth of charge, the case would be remanded to superior court to pass on motion for amendment after taking evidence on issue of adultery and submitting question thereof to jury.

Appeal from Superior Court, Beaufort County; Lyon, Judge.

Action by S. D. Davis against Ruth Davis Order setting aside a decree granting an absolute divorce to plaintiff, and plaintiff excepts and appeals. Remanded, with directions.

This is an appeal from an order setting aside a decree which granted an absolute divorce to the plaintiff.

Upon the hearing of the motion the following facts were found:

"(1) That on February 5, 1919, the plaintiff, through his attorney, P. H. Bell, filed with the clerk of this court an affidavit as the basis for an order of publication of summons, which affidavit is in the following form, to wit: 'S. D. Davis, being first duly sworn, says that Ruth Davis is a necessary party defendant to the above-entitled action, and, further, that the said Ruth Davis is not a resident of the state of North Carolina, and prays that an order for publication of notice of said action be granted so that notice may be given as required by law.'

"That the said affidavit was duly sworn to before a notary public on January 30, 1919.

"(2) That contemporaneously with the filing of the said affidavit, to wit, on February 5, 1919, the complaint setting up and stating a cause of action for divorce, with affidavit in due form accompanying same, was filed with the clerk of this court.

"(3) That on the 5th day of February, 1919, the clerk of this court made the order of publication appearing in the record.

"(4) That notice of said action, in the form appearing in the record, was published in the Washington Daily News, a daily paper published in Washington, Beaufort county, N. C., the first publication thereof being in the issue of February 6th and the last publication in the issue of March 6th, and meanwhile having appeared in the following issues: February 8th, 11th, 12th, 15th, 19th, 20th, March 1st, 3d, 4th, 5th, and therefore that the said notice appeared at least once each week for four consecutive weeks, the last publication being more than 30 days before the first day of the April term, 1919, of the superior court of Beaufort county which first day was April 7, 1919.

"(5) That at the time of bringing the suit the plaintiff had been a resident of the state of North Carolina for more than two years, and, while not a resident of the county of Beaufort, that in the selection of the said county as the venue of the action he was acting in good faith, without purpose to take any advantage of the defendant, and that such venue was selected by his attorney in good faith and to expedite the trial and determination of the case.

"That at the time of bringing of the action and at all times material to the controversy the defendant was not a resident of this state, and has never been in this state, nor was she ever in the state until after the judgment was rendered in this action, but was in the state of Oklahoma.

"(6) That the defendant did not appear in the action, nor was any motion made on her behalf for a change of venue.

"(7) That the movant abandons the averment

that the plaintiff had not been a resident of the state of North Carolina for two years prior to the commencement of the action, and the jury so found in its verdict.

"(8) That the jury found, as appears in the record, that defendant, as alleged in the complaint, had committed adultery while the wife of the plaintiff; that the plaintiff is a man of good repute, a minister of the gospel, prominent among his race, and respected by both races, and that since said judgment was rendered he has remarried, and that the woman whom he married last is now with child; that he has the custody and support of the children begotten of the defendant by him."

It was also admitted that at the time the affidavit was filed with the clerk of the superior court of Beaufort county as the basis for the order of publication said clerk had no knowledge as to whether the defendant was in North Carolina, or otherwise, except as contained in the affidavit.

The motion to set aside the decree was on the ground:

(1) That as the plaintiff was a resident of Wilson county when the action was commenced the superior court of Beaufort county was without jurisdiction.

(2) That the affidavit on which the order of publication was based is fatally defective, for that it does not allege facts showing that the plaintiff has a cause of action.

(3) That said affidavit is also defective because it fails to allege that the defendant could not after due diligence be found in the state.

The motion was allowed, and the plaintiff excepted and appealed.

Ward & Grimes and Small, MacLean, Bragaw & Rodman, all of Washington, N. C., for appellant.

W. A. Lucas, of Wilson, and Wiley C. Rodman, of Washington, N. C., for appellee.

ALLEN, J. The first objection of the defendant to the validity and regularity of the decree of divorce is based on section 1559 of Revisal, which provides that, "In all proceedings for divorce, the summons shall be returnable to the court of the county in which the applicant resides," the defendant contending that this is jurisdictional.

[1, 2] It is evident that the General Assembly did not so intend because it placed the section under the title of venue and not of jurisdiction, and nothing appears to show the purpose to take an action for divorce out of the general principle, which prevails, that any action brought in the wrong county may be removed instead of dismissing it, and that a failure to make the motion for removal is a waiver of the objection to the county in which it is brought.

In section 419 of the Revisal it is declared that actions for the following causes must be tried in the county in which the subject of the action or some part thereof is situated, and then follows the enumeration of certain

causes of action, and the same language is used in section 420 in regard to certain actions.

In the following sections, 421, 422, and 423, provision is made for the trial of actions upon official bonds, domestic corporations, and foreign corporations, and then follows section 424, providing for the place of trial "in all other cases," thus showing a clear purpose to establish the venue of all actions, including divorce, and then the rule is laid down in section 425, applicable to all actions that—

"If the county designated for that purpose in the summons and complaint be not the proper county, the action may, notwithstanding, be tried therein, unless the defendant, before the time of answering expires, demand in writing that the trial be had in the proper county, and the place of trial be thereupon changed by consent of parties, or by order of the court."

It has been held repeatedly that these statutes relate to venue and not jurisdiction, and that if an action is brought in the wrong county it should be removed to the right county, and not dismissed if the motion is made in apt time, and if not so made that the objection is waived, and we do not think that section 1559 was intended to change this principle or that it has any such effect.

[3] The second objection would be well taken if the plaintiff relied alone on the affidavit set out in the findings of fact, because section 442 of the Revisal requires it to be shown by affidavit that a cause of action exists before an order for the service of a summons by publication can be made, and the facts constituting a cause of action are not stated in the affidavit but it appears that at the time of filing the affidavit for publication, and before the order was made, the plaintiff filed his complaint, duly verified, stating a cause of action, and that both papers were before the clerk at the same time, which is, in our opinion, a compliance with the statute as the complaint properly verified was also an affidavit.

[4] The third objection must be sustained. *Wheeler v. Cobb*, 75 N. C. 21, which is approved in *Faulk v. Smith*, 84 N. C. 503, is directly in point. In that case it was held that an affidavit, filed to procure an order of publication, which stated that the defendant was a nonresident, was fatally defective because of failure to allege that the defendant could not, after due diligence, be found within the state, and the court held that the defendant in that case was in fact a nonresident, which are identical with the facts in this record. *Bynum, J.*, speaking for the court says:

"The service of summons by publication is fatally defective, in that it does not conform to the requirements of the statute. The foundation and first step of service by publication is an affidavit that 'the person on whom the summons is to be served cannot, after due diligence, be found within the state.' Bat. Rev. c. 17, § 83.

This requirement was omitted in the affidavit, why it is hard to conceive, as it was made by the attorney himself, who, as a prudent practitioner, should have had the statute before him in drafting the affidavit. For this court had repeatedly held that the provisions of this statute must be strictly followed. *Spiers v. Halstead*, 71 N. C. 210. Everything necessary to dispense with personal service of the summons must appear by affidavit. The mere issuing of a summons to the sheriff of the county of Pasquotank, and his indorsement upon it the same day after it came to hand that 'the defendant is not found in my county,' is no compliance whatever with the law; for it might well be that the defendant was at that time in some other county in the state, and that the plaintiff knew it, or by due diligence could have known it, and make upon the defendant a personal service of the summons. Every principle of law requires that this personal service should be made, if compatible with reasonable diligence."

The same principle was declared in *Sheldon v. Kivett*, 110 N. C. 408, 14 S. E. 970, in which *Clark, J.*, says of an affidavit, which alleged nonresidence, but omitted to state that the defendant could not, after due diligence, be found within the state, "The original affidavit was defective in the particulars in which it was amended."

It was also held by the Circuit Court of Appeals in *Flint v. Coffin*, 176 Fed. 872, 100 C. C. A. 842, in an opinion by *Goff, J.*, concurred in by *Waddill and Connor, JJ.*, that—

"Under Revisal N. C. 1905, § 442, which in certain cases authorizes the making of an order for service of process on a defendant by publication, where it is made to appear by affidavit to the satisfaction of the court that such defendant 'cannot after due diligence be found within the state,' as construed by the Supreme Court of the state, an affidavit, alleging or showing due diligence, and that defendant cannot be found within the state is an essential condition precedent to a valid service by publication, and an affidavit in an attachment suit which merely alleges that defendants are residents of another state, and cannot be found within the state, but fails to show any diligence or search whatever, is fatally defective, and a publication based thereon does not give the court jurisdiction."

The reason for thus holding is that the statute requires an affidavit to be filed, stating that the defendant cannot, after due diligence, be found in the state before an order for publication can be made, and an allegation of nonresidence is not the equivalent of an allegation of diligence, as many nonresidents spend many months in the state and can, with proper diligence, be served personally.

We would therefore affirm the judgment upon the record made in the superior court, but the plaintiff moves here to be allowed to amend his affidavit.

It is held in *Kivett v. Sheldon*, *supra*, that the power to amend an affidavit for publica-

tion in the particular in which the one before us is defective exists in the superior court, and in *Robeson v. Hodges*, 105 N. C. 50, 11 S. E. 263, that—

"This court has the power to make amendments or to remand the case that they may be made in the court below (Code, § 965), but only to the same extent and in such cases as the superior court could allow amendment."

[5] If, however, there was no authoritative decision on the question, *Revisal*, § 1545, is clear that the Supreme Court has the power to amend any process, pleading, or proceeding in form or substance, or to remand in order that the amendment may be made in the superior court, if, upon a full development of the facts, it appears to be proper and just for it to be done, and this is a proper case for the exercise of the power in one way or the other, as it appears from the findings of fact that the plaintiff is a man of good character; that he was acting in good faith; that the application for publication was drawn by his attorney; that the defendant had never been in the state, and could not have been found therein; and that the plaintiff, relying upon the decree, has since married, and has a child by his second wife.

This makes out a strong case for the plaintiff, and one which would justify the exercise of the power of amendment at once in his behalf, but it must be kept in mind that the defendant has had no opportunity to be heard on the allegations of the complaint, and that the verdict and decree convict her of adultery, and that we have no means of investigating the truth of this charge, while in the superior court additional evidence may be heard, and the court can, for the purpose of being advised as to the facts, submit the question to a jury.

We therefore conclude that the motion to amend should be considered, and, in order that both parties may have full opportunity to introduce evidence and to present their several contentions, that the motion should be referred to the superior court to be heard and passed on as if originally made therein, and to that end the cause is remanded to the superior court.

Remanded.

(179 N. C. 132)

**SAWYER v. CAMDEN RUN DRAINAGE DIST.** et al. (No. 12.)

(Supreme Court of North Carolina. Feb. 18, 1920.)

**1. PROCESS §=96(4)—AVERMENT THAT DEFENDANT CANNOT BE FOUND IN STATE AFTER DILIGENT SEARCH ESSENTIAL TO SERVICE BY PUBLICATION.**

An allegation that a defendant cannot be found in the state after diligent search is an es-

sentia averment in affidavit for service of original process by publication.

**2. DRAINS §=57—DRAINAGE DISTRICTS LIABLE FOR TORTS COMMITTED ON PROPERTY NOT EMBRACED IN DISTRICT, NOT BEING "MUNICIPAL CORPORATIONS."**

Drainage districts established under the statute, though possessed of certain municipal powers, are not regarded as "municipal corporations" in the constitutional sense of the term, nor protected as governmental agencies from suits by individuals except when authorized by law, being classed with railroads and other quasi corporations, and as such are liable for wrongful invasion of the proprietary rights of third persons, and for wrongs and torts committed on the property of adjoining proprietors whose lands are not embraced in the district.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Municipal Corporations.]

**3. DRAINS §=57—DRAINAGE DISTRICT LIABLE TO OWNER OF LAND OUTSIDE OF DISTRICT FOR DAMAGES FROM CUTTING OF CANAL THROUGH LAND.**

Owner of land outside of drainage district, as finally established under Laws 1909, c. 442, and amendments thereto, could recover from drainage district for damages caused by cutting of canal through his land at the instance and for the benefit of the drainage district, though the land was within the district as originally proposed.

**4. DRAINS §=57—OWNER OF LAND NOT WITHIN DISTRICT ENTITLED TO DAMAGES FOR CANAL CUT THROUGH LAND, THOUGH NOT AWARDED BY JUDGMENT ESTABLISHING DISTRICT.**

Final judgment in drainage district proceedings, under Laws 1909, c. 442, purporting to determine only the question of the benefits and burdens as to land within the district, did not preclude owner of land included in district as originally proposed, but not as established by such judgment, from recovering damages for construction of canal through such land.

Appeal from Superior Court, Camden County; Lyon, Judge.

Action by A. Sawyer against the Camden Run Drainage District and others. Judgment for plaintiff, and defendants except and appeal. No error, and judgment affirmed.

The action is to recover damages for injury to plaintiff, caused by cutting a drainage canal through the same, at the instance and for the benefit of the defendant drainage district, the said lands lying outside and below the boundaries of the district.

There was denial of liability, and on issues submitted the jury rendered the following verdict:

"Did the defendant wrongfully enter upon lands of plaintiff, and cause to be constructed right of way and canal and cut timber as alleged in complaint? Answer: Yes.

"(2) Is plaintiff's cause of action barred by the statute of limitation? Answer: No.

"(3) What damage, if any, is plaintiff entitled to recover? Answer: \$505.50 including interest."

Judgment on the verdict for plaintiff, and defendants excepted and appealed.

Thompson & Wilson, of Elizabeth City, for appellants.

Aydlett & Sawyer and Ehringhaus & Small, all of Elizabeth City, for appellee.

HOKE, J. The facts in evidence tended to show that, in January, 1911, certain land-owners instituted proceedings to establish defendant drainage district under chapter 442, Laws 1909, and amendments thereto, and filed their petition, setting forth the desired boundaries, which included petitioners' lands and a large number of others who were named as parties defendant; that among the latter were the heirs of C. W. Grandy, whose individual names are given, and who then owned a large body of land within the designated territory, containing 450 or 500 acres; that these heirs, being residents of Norfolk, Va., publication was had on affidavit setting forth the nature of the proceedings; that said defendants (naming them) "were all nonresidents, that they were necessary and proper parties defendant in the cause, and that service of summons could not be made on them except by publication according to law"; that the preliminary survey and plat showed that the proposed canal would extend for a considerable distance through the tract of land owned by said defendants, but, in the final decree, establishing the drainage district, only 37½ acres of the land was included in the district, and the judgment determining the question of the benefits and burdens is referred to in the report as modified and changed in the final decree. Plaintiff, having by proper deed acquired the title of these heirs of C. W. Grandy, sues for the damages caused by cutting the canal through that portion of his land not included in the drainage district, and in our opinion his recovery for such damage must be sustained.

[1, 2] The authorities seem to be decisive that under our statute as now framed, the allegation that a defendant cannot be found in the state after diligent search is an essential averment to a valid service of original process by publication. *Davis v. Davis*, 102 S. E. 270, at the present term. But, if it be conceded that the affidavit in the present instance contains averments that are the full equivalent of terms referred to, and that the holders of plaintiff's title have been made parties, it is held in this jurisdiction that these drainage districts, established under the provisions of our present statutes, are liable for wrongs and torts committed on

the property of adjoining proprietors whose lands are not embraced in the district. While they may have certain municipal powers bestowed upon them, the better to carry out their purpose, being organized primarily for the benefit of individual owners, they are not regarded as municipal corporations in the constitutional sense of the term, nor protected as governmental agencies from suits by individuals, except when the same may be authorized by law. They are classed rather with railroads and other quasi public corporations, and may be held liable, as stated, for wrongful invasion of the proprietary rights of third persons. *Leary v. Commissioners*, 172 N. C. 25, 89 S. E. 803; *So. Assembly v. Palmer*, 166 N. C. 75, 82 S. E. 18; *Commissioners v. Webb*, 160 N. C. 594, 76 S. E. 552; *Powell v. Railroad*, at the present term, 100 S. E. 424; *Bradbury v. Drainage District*, 236 Ill. 36, 86 N. E. 163, 19 L. R. A. (N. S.) 991, 15 Ann. Cas. 904; *Bunting v. Drainage District*, 99 Neb. 843, 157 N. W. 1028, L. R. A. 1918B, 1004; *Peck v. Chicago*, 270 Ill. 34, 110 N. E. 414. Speaking to the question in *Leary's Case*, and in answer to the position taken by defendants that they were liable neither as a board nor as individuals, Chief Justice Clark said:

"We think they are liable in both capacities. It is true that the drainage district is a quasi-public corporation (*Sanderlin v. Luken*, 152 N. C. 738 [68 S. E. 225]; *Drainage Commissioners v. Farm Association*, 165 N. C. 697 [81 S. E. 947, Ann. Cas. 1915C, 40]), but it is not a governmental agency, and occupies the same relative position as a railroad company or other similar quasi public corporation created for private benefit, but endowed with the right of eminent domain and other public functions by reason of the public benefit."

[3, 4] In our opinion, plaintiff's cause comes within the principle, and on the facts presented and the pleadings as now framed he has rightfully recovered for the trespass upon his land outside of the drainage district. Although the preliminary survey showed that the canal would go through this outside land or a good part of it, and the report declared that "no one would be damaged by the proposed improvement," the final judgment restricted and modified this survey and plat, and restricted the boundaries of the district to 37½ acres, and this judgment only purported to determine the question of benefits and burdens as to land within the district as established and not otherwise. Plaintiff therefore has had no adjudication of his right to damages as to this outside land, and no provision is made or opportunity given for the assertion of a claim at his instance till his property was invaded and the injury suffered. True, in section 7 of the statute, provision is made for condemning outside lands when the same cannot be acquired by purchase, this to be done by an-

cillary proceedings in which the question is directly presented and passed upon, but the record shows no such procedure. On the contrary, the commissioners, through their officers and agents, have entered on this outlying land and cut the canal, shutting off access to certain timber thereon without condemning the same or giving plaintiff an opportunity to be heard, as the statute provides and requires. This being true, plaintiff, at his election, may, by his action, recover for the permanent damage done him, *Mason v. Durham*, 175 N. C. 638, 96 S. E. 110. There is no error, and judgment for plaintiff is affirmed.

No error.

(179 N. C. 176)

SPENCER v. WILLS et al. (No. 10.)

(Supreme Court of North Carolina. Feb. 18, 1920.)

**1. DRAINS** ¶14(4), 39, 82(2) — PARTIES TO DRAINAGE PROCEEDINGS CONCLUDED BY DETERMINATION OF COURT DURING SUCH PROCEEDINGS AS TO ASSESSMENTS, BENEFITS, AND BURDENS.

Parties to drainage proceedings are estopped from questioning, by independent suit, the judgment establishing the district, or the assessments made, or burdens and benefits affecting the property, unless at the proper time and in the course of the proceedings objection is successfully maintained.

**2. DRAINS** ¶57—INJURED PROPRIETOR ENTITLED TO DAMAGE SUSTAINED BY DEPARTURE FROM PLANS OR FROM NEGLIGENCE IN CARRYING THEM OUT.

The rule that parties to drainage proceedings are concluded by the determination in such proceedings as to assessments, benefits, and burdens did not preclude an injured proprietor, within or without district organized under Laws 1909, cc. 509 and 442 and amendments, from maintaining suit against contractors for damages done, where there has been an unauthorized and substantial departure from the plan established by the decree and orders in the cause, or where the damage complained of is attributable to negligence in carrying out the proposed work.

**3. MUNICIPAL CORPORATIONS** ¶723—LIABLE FOR DAMAGES CAUSED BY NEGLIGENCE.

Local corporations created by request or consent of the persons residing in the territory incorporated, and principally for their benefit, although they are clothed with powers of a public nature, are liable for damages caused by their negligence.

**4. DRAINS** ¶57—DRAINAGE DISTRICT LIABLE FOR DAMAGES CAUSED BY NEGLIGENCE IN CONSTRUCTION OF WORK.

A drainage district is liable for damages caused by its negligence in the construction of its works.

**5. EMINENT DOMAIN** ¶56—LAND TO BE CONDEMNED ONLY WHERE NECESSARY TO THE IMPROVEMENT FOR WHICH IT IS TAKEN.

Condemnation by right of eminent domain is not allowed except so far as it is necessary for the proper construction and use of the improvement for which it is taken.

**6. EMINENT DOMAIN** ¶243(2)—DAMAGES ALLOWED IN CONDEMNATION PROCEEDING BARS FURTHER CLAIMS FOR DAMAGES.

If the application for condemnation specifies the desired taking and use of certain real estate, and shows that it is necessary for the improvement contemplated, all damages caused by such taking, properly exercised, will be included in the damages allowed in such proceedings, which will be a bar to any further claims for such damage.

**7. EMINENT DOMAIN** ¶243(2) — DAMAGES AWARDED IN CONDEMNATION PROCEEDINGS NOT A BAR TO RECOVERY FOR DAMAGES CAUSED BY NEGLIGENT CONSTRUCTION OF IMPROVEMENT.

Damages caused by the negligent construction of the improvement for which land has been condemned are not contemplated in the condemnation proceedings, and are not barred thereby, since such damages cannot be anticipated, and a right of action accrues therefor when the damage occurs.

Appeal from Superior Court, Hyde County; Lyon, Judge.

Action by S. H. Spencer against A. V. Wills and others. Judgment for plaintiff, and defendant appeals. Affirmed.

The action is to recover damages for alleged negligence of defendant in cutting a spillway in the side of canal, whereby a large amount of water was thrown in and upon the lands of plaintiff, causing substantial injury to said land. There was denial of liability by defendant, and on issues submitted the jury rendered the following verdict:

"(1) Were the plaintiffs' lands and crops damaged by reason of the negligent construction of the spillway by the defendants as alleged? Answer: Yes.

"(2) What damage has the plaintiff sustained to their crops of 1915? Answer: \$241.00.

"(3) What permanent damage has the plaintiff sustained to lands? Answer: \$1,100.00.

"(4) Are the plaintiffs estopped in this action? Answer: No—answered by the court."

Judgment on the verdict for plaintiff, and defendant excepted and appealed.

H. G. Connor, Jr., of Wilson, for appellant. Thos. S. Long and Spencer & Spencer, all of Swan Quarter, and Daniel & Carter, for appellee.

HOKE, J. There are facts in evidence on the part of plaintiff tending to show that Mattamuskeet drainage district has been

established pursuant to the statutes regulating the subject, Laws 1909, c. 509, and chapter 442 and amendments thereto, and in 1915 defendants, as contractors under the authorities of said district, were engaged in cutting East main canal, leading from the lake to East swamp, a distance of a mile or more, plaintiff being a resident of the district, and his land lying just south of the canal. That the work was being done with a floating dredge, which operated in the canal, and requiring from 4 to 5 feet of water therein to make it work properly; that after the defendants had cut through plaintiff's land and some distance towards the swamp, a dam was built in the canal between the dredge and the lake, in order to hold the necessary amount of water, and, the work having proceeded to the boundary and on to the East swamp, owing to the excessive rainfall at the time, the canal was flooded with too much water, and it became necessary to relieve the pressure by letting out a portion of the water; that to do this a spillway was cut in the side of the canal, above the dam, 4 to 5 feet wide and 18 inches to 2 feet deep, and extended by a ditch 200 to 300 feet into lands of plaintiff as far as a certain road thereon, known as Quaker road; that this ditch, an extension of the spillway, at some little distance from the canal, cut through a ridge or elevation that had afforded some protection to the arable portion of plaintiff's land, and was stopped at the road without any outlet, and through said spillway and drain large quantities of water from East swamp and adjacent territory was thrown in and upon plaintiff's lands, destroying the crops for the current year, souring the land, both cultivated and woodland, so as to cause substantial and permanent damage to same. It was further in evidence, both from witnesses of plaintiff and the defense, that the water flowing out of the spillway, with 10 or 11 hours' work by proper ditches, could have been carried back into the canal below the dam, and thus prevented from affecting plaintiff's land to any appreciable extent. There was evidence on part of defendant tending to show that the water let out of this spillway could not have injured plaintiff's land, but the damage complained of was caused by the excessive rains upon said land and the rise of waters in the lake, so that plaintiff's land was deprived of its usual and proper drainage. It was further shown that, while this spillway was no part of the plan of drainage as set forth in the surveys, plats, etc., it was made to relieve the canal of the excess of water with the knowledge and approval of commissioners that defendants intended to cut a spillway for the purpose indicated, and these commissioners had afterwards accepted this canal and other dependent portions of the work without objection as to the way the canal had been relieved.

Upon this, the evidence chiefly relevant and sufficiently full to afford a proper apprehension of the questions presented, the jury, accepting plaintiff's version of the matter, has found that the plaintiff's lands were injured by reason of the negligent manner the spillway was constructed, and on such finding we are of opinion that his recovery for the damage suffered has been properly awarded. In *Sawyer v. Camden Run Drainage District*, 102 S. E. 273, a case at the present term, we have held that these districts, organized under our law applicable to the subject, are not to be considered as governmental agencies to the extent that they are protected from civil actions, except where authorized by statute, but are more properly classed with railroads and other quasi public corporations of like kind, and ordinarily liable for their torts and wrongs, citing *Leary v. Commissioners*, 172 N. C. 25, 89 S. E. 803, and other authorities; the *Leary Case* holding further that, in proper instances, both the company and its participating officers and agents personally may be sued. It is contended for the defendants that the principles of the *Leary* decision and others of like kind do not apply here because, in that case, the injured claimant was an outsider, whereas in the present case he is a party to the proceedings, and concluded by the orders and decrees in the case and as to the work done pursuant to the same.

[1] In various decisions appertaining to the subject, we have held that parties to proceedings of this character and in reference to their lands situate within the district are estopped from questioning by independent suit the judgment establishing the district or the validity and amount of the assessments made in the cause or the matter of burdens and benefits affecting the property. These and other like rulings must be challenged at the proper time and in the course of the proceedings, and, unless objection is successfully maintained, the parties are concluded. *Craven v. Commissioners*, 176 N. C. 531, 97 S. E. 470; *Lumber Co. v. Commissioners*, 174 N. C. 647, 94 S. E. 457; *Griffin v. Commissioners*, 169 N. C. 642, 86 S. E. 575; *Newby v. Drainage district*, 163 N. C. 24, 79 S. E. 266; *Shelton v. White*, 163 N. C. 90, 79 S. E. 427.

[2] But the principle does not apply nor operate to prevent an injured proprietor within or without the district from maintaining suit to recover for the damages done, where there has been an unauthorized and substantial departure from the scheme and plan established by the decrees and orders in the cause, nor where the damage complained of is attributable to the negligence of the company or its officers or agents in carrying out the proposed work. It is impossible to anticipate or make adequate provision against damages arising from these sources,



and they are not therefore usually considered as being within the scope and purview of the suit. Here, as in case of condemnation proceedings, the burdens and benefits are considered and passed upon, and the damages determined on the theory that the work shall be done substantially as planned and with reasonable care, and, if there is breach of duty in these respects, causing damage, the injured proprietor can assert his claim by independent suit. Assuredly so unless the law should make adequate provision therefor by appropriate proceedings in the cause. In *Lumber Co. v. Drainage Commissioners*, 174 N. C. 647, 94 S. E. 457, decided intimation is given that an action would lie by an injured proprietor within the district for damages caused by negligence in carrying out the work, and such right is directly upheld in *Bunting v. Drainage District*, 99 Neb. 843, 157 N. W. 1028, L. R. A. 1918B, 1004.

[3-7] The correct doctrine on this subject is very well stated in the digest of that well-considered decision by Sedgwick, Judge, appearing in L. R. A. 1918B, 1004, 1005, as follows:

"(1) Local corporations created by request or consent of the persons residing in the territory incorporated, and principally for their benefit, although they are clothed with powers of a public nature, are liable for damages caused by their negligence.

"(2) A drainage district organized and acting under Rev. Stat. 1913, article 5, c. 19, is liable for damages caused by its negligence in the construction of its works.

"(3) Condemnation by right of eminent domain is not allowed, except so far as it is necessary for the proper construction and use of the improvement for which it is taken.

"(4) If the application for condemnation specifies the desired taking and use of certain real estate, and shows that it is necessary for the improvement contemplated, all damages caused by such taking, properly exercised, will be included in the damages allowed in such proceedings, which will be a bar to any further claims for such damage.

"(5) In such case damages caused by the negligent construction of the improvement are not contemplated in the condemnation proceedings, and are not barred thereby.

"(6) Damages caused unnecessarily by negligence and improper construction of the improvement cannot be anticipated, and a right of action accrues therefor when the damage occurs."

The general principle has been approved and applied with us in actions for damages caused by change in the grade of streets. Ordinarily such damages are supposed to have been allowed for in the original dedication, but the position does not prevail as a protection against negligence in doing the work (*Harper v. Lenoir*, 152 N. C. 723, 68 S. E. 223, citing *Meares v. Wilmington*, 31 N. C.

73, 49 Am. Dec. 412, and other cases), and so, in land condemned for railroad purposes, the damages naturally incident to the construction of the road, carried out according to the survey and plans, etc., are covered by the original award, but for injuries caused by negligence in construction or maintenance of such places recovery may be had. *Duval v. Atlantic Coast Line R. Co.*, 161 N. C. 448, 77 S. E. 331, and cases cited. We were referred by counsel to *McGillis et al. v. Willis*, 39 Ill. App. 311, as a decision against plaintiff's right to recover in this instance, but in our opinion that case is not an authority for his position. In so far as it recognizes the principle that these drainage districts are governmental agents, and so protected from ordinary civil suits, the case is not, as we have seen, in accord with our own decisions on the subject, and in that respect it seems to be entirely inconsistent with subsequent decisions of the Illinois Court of Appeals, notably *Bradbury et al. v. Vandalla Levee & Drainage District*, 236 Ill. 86, 86 N. E. 163, 19 L. R. A. (N. S.) 991, 15 Ann. Cas. 904, and in which it is held, as here, that these drainage districts are but quasi public corporations, and liable for their torts and wrongs at the suit of an injured proprietor. As a matter of fact, however, the contractors and officers and agents were relieved of liability in the case referred to because they were doing the work as planned, and in the necessary and proper manner, and no question of negligence was presented.

On careful consideration, we find no error in the record, and the judgment for plaintiff is affirmed.

No error.

(179 N. C. 718)

STATE v. PERRY et al. (No. 91.)

(Supreme Court of North Carolina. Feb. 25, 1920.)

INTOXICATING LIQUORS — 236(19)—EVIDENCE SUSTAINING VERDICT OF GUILTY OF ILLICIT DISTILLING.

In a prosecution for illegally manufacturing intoxicating liquor, evidence held sufficient to warrant the submission of the guilt or innocence of accused to the jury and to sustain a verdict of guilty.

Appeal from Superior Court, Chatham County; Connor, Judge.

W. E. Perry and another were convicted of manufacturing intoxicating liquor and aiding and abetting the same, and they appeal. No error.

W. P. Horton and A. C. Ray, both of Pittsboro, for appellants.

Jas. S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

**BROWN, J.** The only error assigned is the judge's failure to give judgment as of nonsuit against the state. The evidence is as follows:

"Rev. George Perry testified that he is now, and was during the month of September, 1919, the pastor of the Methodist Episcopal Church at Bynum, in Chatham county; that for the purpose of aiding in the enforcement of the law prohibiting the manufacture and sale of intoxicating liquor he had accepted an appointment as a deputy sheriff of Chatham county; that on the night of the 7th of September, 1919, in consequence of information which came to him, he with five other citizens of the community, went to a place in the woods in Chatham county, where they found several boxes of still beer, which was in proper state of fermentation for being converted into whisky; that near by they discovered a furnace, under which were ashes and coals; that there were buckets and tools at the place, and around the furnace there were tracks and paths, indicating that there had been several persons there; that he and the members of his party concealed themselves, and about 2 o'clock in the morning of September 8th Mid Cooper and the defendant Herbert Horton came to the place where the boxes of beer and the furnace were, bringing with them a whisky distillery which they placed on the furnace; that the said Cooper and defendant Horton remained there some time, both being engaged in setting the distillery in order, connecting up the different parts, adjusting the cap upon the still, and collecting wood; that after examining the beer they both left; that the witness and members of his party remained in the woods, concealed, until some time thereafter, when the defendants, Perry and Horton, came back to the distillery; Cooper did not return with them; that both defendants began to work about the distillery, cutting and gathering wood, and placing same near the furnace; that they inspected the beer from time to time; that while they were thus engaged witness and members of his party attempted to arrest both defendants; both defendants, however, fled when they saw witness and his party and escaped."

The defendants set up an alibi. There was evidence offered by the state tending to corroborate the evidence of the witness Perry. The learned counsel for the defendant very earnestly contend that this evidence is not sufficient to justify the submission to the jury the determination of the guilt of the defendants in that it fails to identify the defendants or to prove that they were engaged in the manufacture of intoxicating liquor. We have listened to their argument and weighed it carefully. It is true, as contended by them, that one who has a mere intent to commit a crime is neither guilty of the crime intended, nor any other crime. But the testimony in this case offered for the state tends to prove something more. It does not necessarily convict the defendants of the manufacture of intoxicating liquor, but all the circumstances, taken as a whole, are amply sufficient to go to the jury to be considered and weighed by

them in determining the guilt or innocence of the defendants. This evidence tends to prove that the witness Perry, with others, went to a place in the woods where it was suspected the illicit manufacture of liquor was carried on. They found boxes of still beer in fermentation for conversion into whisky. Near by they discovered a furnace under which were ashes and coals; all the implements necessary for the distillation of liquor were present. Around the furnace were tracks and paths indicating that several persons had been there. The witness Perry and others with him concealed themselves in the neighborhood of the still, and about 2 o'clock in the morning the defendants came to the place where the beer and furnace were with a whisky distillery which they placed on the furnace.

It is useless to recite more of the testimony of the witness. The entire evidence is set out and speaks for itself.

We are all of opinion that the learned judge of the superior court did right in submitting the guilt or innocence of the accused to the jury. It is not necessary for the state to prove directly that the distillery was in operation at that very moment. The circumstances in evidence are sufficient to warrant the jury in coming to the conclusion that the defendants were engaged in the business of illicit distilling.

No error.

(179 N. C. 247)

**HUDSON v. COZART et al.** (No. 61.)

(Supreme Court of North Carolina. March 3, 1920.)

1. **VENDOR AND PURCHASER** §18(3)—**OPTION HELD TO REQUIRE OFFER TO PERFORM AND TENDER OF PURCHASE PRICE.**

An option to purchase land requiring the execution of a deed on request on a specified date and payment of the price on that date, and providing that it should be void if not exercised on or before such date, required an offer to perform and a tender of the purchase price within the time specified and at or before execution of the deed.

2. **TENANCY IN COMMON** §39—**TENANTS NOT AUTHORIZED TO MAKE AGREEMENTS OR RECEIVE NOTICE ON BEHALF OF OTHER TENANTS.**

Ordinarily tenants in common merely from the relationship are not authorized to make agreements or receive notices substantially affecting the estate or interest of each other in the common property.

3. **TENANCY IN COMMON** §43 — **TENDER TO PART OF COTENANTS JOINING IN OPTION HELD TO MATURE CLAIM AGAINST ALL.**

Where an option for the purchase of property given by the five tenants in common therein required the optionee as a part of the consideration to erect thereon a tobacco redrying

plant, thus necessitating his holding title to the entire property, each tenant was the agent for the others for the purposes of a tender by the optionee, and a tender of the purchase price to two of them matured the optionee's claim as to all.

**4. SPECIFIC PERFORMANCE §121(11) — OPTIONEE NOT ENTITLED TO SPECIFIC PERFORMANCE WITHOUT OFFERING AND PROVING READINESS AND WILLINGNESS TO ERECT PLANT AS AGREED.**

Where an option for the purchase of land required the optionee to pay a specified price and build on the land a tobacco redrying plant, the building of such plant, though to be done after execution of the deed, was a part of the consideration, and the optionee could not have specific performance without averring and showing readiness and willingness to carry out this part of the contract.

**5. SPECIFIC PERFORMANCE §10(1) — RELIEF NOT TO BE GRANTED AS TO SOME TENANTS IN COMMON WHERE ACTION HAD BEEN DISMISSED AS TO OTHERS.**

Where an option for the purchase of land granted by a number of co-owners required the optionee as part of the consideration to build a tobacco redrying plant on the land, the contract was indivisible, and specific performance might not be enforced partially nor as to separate provisions, and could not be granted as to some of the tenants in common where the suit had been dismissed as to others.

**6. SPECIFIC PERFORMANCE §101—OPTIONORS BY REFUSING TO CONVEY DID NOT WAIVE OPTIONEE'S AGREEMENT TO ERECT PLANT ON LAND.**

Where an option for the purchase of land required the optionee as a part of the consideration to erect a tobacco redrying plant in time for the tobacco market of 1916, the refusal of the optionors to convey did not waive the erection of such plant, though they thereby waived the requirement as to time.

Appeal from Superior Court, Wilson County; Devin, Judge.

Action by W. C. Hudson against U. H. Cozart, W. P. Anderson, and others. From a judgment for plaintiff, the defendants named appeal. Reversed, and action dismissed as to such defendants.

The action is to enforce the specific performance of a contract to convey a parcel or lot of land in the city of Wilson, pursuant to an option to purchase the same, contained in a written agreement executed by defendants to the plaintiff.

On the hearing it was admitted that the said lot was owned by the five named defendants, the interest being as follows: One-third by S. W. Smith; one-third by W. P. Anderson; one-sixth by U. H. Cozart; and one-twelfth each by Eagles and Carr. It further appeared that the defendants had executed the written agreement, and that no deed for the lot had been made. The defend-

ant S. W. Smith made no answer to the complaint of plaintiff, duly verified, and the bill was taken pro confesso as to him. The four other defendants having joined issue, there being no evidence of a personal tender of the purchase price within the time required by the option on defendants Eagles and Carr, the action, on motion, was dismissed as to these defendants, and, issues having been submitted as to the liability of U. H. Cozart and W. P. Anderson, the jury rendered verdict as follows:

"(1) Did the defendants execute and deliver the contract as alleged in the complaint? Answer: Yes.

"(2) Was the plaintiff at all times ready, able, and willing to comply with the provisions of the contract? Answer: Yes.

"(3) Did the plaintiff tender performance of the contract prior to March 15, 1916, to the defendants Cozart and Anderson? Answer: Yes."

Judgment for specific performance as to these defendants, and, it appearing that said defendants are married men and that their wives had not signed the written agreement conferring the option, the decree provided for a proportionate abatement of the purchase price unless the wives of said defendants should voluntarily join in the execution of the deeds for the property. Defendants Anderson and Cozart, having duly excepted, appealed.

H. G. Connor, Jr., and Wm. A. Lucas, both of Wilson, for appellants.

F. S. Spruill, of Rocky Mount, and W. A. Finch, of Wilson, for appellee.

HOKE, J. On the trial it appeared that the five defendants named, owning a lot in the city of Wilson, on the 31st of January, 1916, entered into a written agreement, under seal, conferring on the plaintiff an option to buy the designated parcel of land; the portions of the agreement more directly relevant to the inquiry being as follows:

"And the said parties of the first part, plaintiffs, hereby contract and agree to execute and deliver to the said party of the second part, his heirs and assigns, at or upon his request, on the 15th day of March, 1916, a good and sufficient deed for the said tracts or parcels of land described above, with full covenants and warranty: Provided and upon condition nevertheless that the said party of the second part shall well and truly pay to the parties of the first part, their heirs and assigns, in cash, the sum of \$5,000 on the said day of March, 1916, in good and lawful money, and being in full payment as the entire purchase money for aforesaid described lots or parcels of land together with all appurtenances now situate on same.

"It is understood and agreed by the parties to these presents that said sale is to be made at the option of the said party of the second part and to be exercised on or before the 15th day

of March, 1916, and it is further agreed that, in case the said party of the second part does not demand of the parties of the first part the deeds herein provided for as herein agreed and tender payment as set forth above, on the 15th day of March, 1916, this agreement shall be null and void and the parties of the first part, their heirs and assigns, shall be at liberty to dispose of the said lots or parcels of land in such a manner as if this contract had never been made, and neither the parties of the first part nor the party of the second part shall have any claim whatsoever on the other in either law or equity.

"It is also further agreed by that party of the second part that he will erect upon the property described above a redrying plant, said plant to be erected by the opening of the tobacco market in the fall of 1916, and at the time of delivering said deed or deeds, should this option of purchase be exercised by the party of the second part, upon request of the parties of the first part the party of the said part shall make such assurances in good faith that may be accepted by the parties of the first part as to the erection of the aforesaid redrying plant, that the deed or deeds may be properly delivered to the party of the second part, and the failure on the part of the party of the second part to make unto the parties of the first part the assurances as be reasonably required by them as to the use of the aforesaid lots or parcels of land will render this agreement null and void, neither party having any recourse at law or equity."

The plaintiff, a witness in his own behalf, testified further on the issues:

"That on March 14th, one day before the last day of the option, I got a notary public, saw Mr. U. H. Cozart, one of the defendants, on the street, and told him I was ready to sign the deed; told him I had the money ready in the First National Bank. He said, 'Wait and I will see Anderson,' and refused to sign the deed. I met them, Anderson and Cozart, and they were talking. They were standing in front of the First National Bank, in which I had the money. Anderson said he was not going to sign the deed. Mr. Cozart went into the bank and saw Col. Bruton, I suppose, and refused to sign. I was ready, able, and willing to pay the money, and still am."

On this, the only oral evidence offered, the action having been dismissed as to Eagles and Carr, the jury rendered a verdict, as stated, against the defendants Cozart and Anderson, and the court gave judgment that these defendants convey their interests on payment of their proportion of the purchase price, subject to abatement for their wives' interest in the property, and a similar judgment was entered against the defendant Smith, who had failed to answer or in any way resist the recovery sought.

[1-3] From a perusal of the agreement it appears that this was an option conferred upon the plaintiff requiring an offer to perform within the time, and in this instance to include a tender of the purchase money at or before the execution of the deed (Timber Co.

v. Wells, 171 N. C. 262, 88 S. E. 327; Ward v. Albertson, 165 N. C. 218, 81 S. E. 168; Winders v. Kenan, 161 N. C. 628, 77 S. E. 687; Hardy v. Ward, 150 N. C. 885, 64 S. E. 171; Trogden v. Williams, 144 N. C. 192, 56 S. E. 865, 10 L. R. A. [N. S.] 867; and plaintiff was also, if requested thereto, to give satisfactory assurance as to a redrying plant which he was to build upon the property as a part of the consideration. Ordinarily tenants in common, merely from that relationship, are not authorized to make agreements or receive notices substantially affecting the estate or interest of each other in the common property, but where, as in this instance, such tenants have entered into a joint and binding agreement conferring a purchase option on a third person, such an instrument will constitute one the agent for the other for the purposes of a tender which will turn the agreement into a bilateral contract, and, in our opinion, this is assuredly true in regard to an agreement of the kind presented here, which, from its language and purport, clearly contemplates an indivisible contract to be performed in its entirety. Not only does this appear from the joint covenant to make title on the part of defendants, but also from the consideration promised by the plaintiff, to wit, that he will pay \$5,000 for the property and erect thereon a redrying plant in time for the tobacco season of 1916, a stipulation which necessitated his holding a title to the entire property in order to its valid performance. Wright v. Kaynor, 150 Mich. 7, 113 N. W. 779; In re Jeremiah P. Robinson, 40 App. Div. 23, 57 N. Y. Supp. 502; Flanigan v. Seelye, 53 Minn. 23, 55 N. W. 115; Baker & Brun, Adm'rs, v. Kellogg et al., 29 Ohio St. 663; Detlor et al. v. Holland, 57 Ohio St. 492, 49 N. E. 890, 40 L. R. A. 266; Carman v. Pultz, 21 N. Y. 547; Dyckman v. Mayor, 5 N. Y. 434; Blood v. Goodrich, 9 Wend. (N. Y.) 68, 24 Am. Dec. 121; Dawson and Springer v. Ewing, 16 Serg. & R. (Pa.) 371; 38 Cyc. p. 106; 17 A. & E. Enc. (2d Ed.) p. 672. In the Michigan case supra there was a lease by husband and wife, tenants in common, with an option to renew on notice. The wife having died leaving heirs at law, notice as to renewal was served only on the husband, and the principal question was whether the heirs of the wife were bound. In the original opinion it was held that they were not bound, applying the general principles that one tenant in common could not ordinarily bind the others, but on reargument the decision was modified or changed in this respect, and it was held that notice to the husband was sufficient by reason of the joint agreement on the part of lessors. In delivering the prevailing opinion, Carpenter, Judge, said:

The lessors "were joint contractors in this lease. Jointly they agreed to renew it and to

insert in said renewal an option whereby" the lessee "might purchase not their several, but their joint, interests. \* \* \* Between the lessors there was therefore the relationship of joint contractors as well as the relationship of tenants in common. Allen [the lessee] under these circumstances could pay the rent to either, and either of them could discharge his obligation. 'Among joint obligees any one may receive satisfaction for the entire obligation and execute a valid discharge therefor. The remedy of other joint obligees is against him, and not against the one who has made payment to him.' 7 Am. & Eng. Enc. Law (2d Ed.) p. 102.

"In support of this text numerous authorities are cited which fully sustain it. Though only one of these two joint contractors refused to convey, both would be liable for damages for they have jointly agreed to convey the entire title. *Blood v. Goodrich*, 9 Wend. (N. Y.) 68 [24 Am. Dec. 121]. The principle underlying these decisions is, in my judgment, applicable to this case and compels us to say that the notice given to defendant Ansel of Allen's election to renew the lease was binding upon Augusta and her estate, not because she was a cotenant, but because she was a cocontractor."

[4] The plaintiff, then, having established a tender of the purchase price within the time as to two of these co-owners, has matured his claim under the option as to all, and the question recurs on his right to specific performance of the contract as a bilateral agreement. It is the recognized principle that, in order to relief in actions of this character, it is required that plaintiff shall aver and prove performance or offer to perform or a readiness and ability to carry out the contract on his own part. In *Pomeroy's Eq. Jurisprudence* (3d Ed.) § 1407, the position is stated as follows:

"The doctrine is fundamental that either of the parties seeking a specific performance against the other must show, as a condition precedent to his obtaining the remedy, that he has done or offered to do, or is then ready and willing to do, all the essential and material acts required of him by the agreement at the time of commencing the suit, and also that he is ready and willing to do all such acts as shall be required of him in the specific execution of the contract according to its terms."

A similar statement on the subject appears in *Pomeroy on Contracts* (Specific Performance) 2d Ed., § 323, and, speaking further to the subject, this author, in section 330, says:

"The party seeking aid of the court, as actor, must not only show that he has complied with the terms so far as they can and ought to be complied with at the commencement of the suit, he must also show that he is able, ready, and willing to do those other acts which the contract stipulates for as a part of its specific performance."

Numerous cases here and elsewhere show this to be a correct statement of the doctrine

(*Bird v. Bradburn*, 127 N. C. 411, 37 S. E. 456; *Mincey v. Foster*, 125 N. C. 541, 34 S. E. 644; *Bank of Columbia v. Hagner*, 26 U. S. [1 Pet.] 455, 7 L. Ed. 219); and, in our opinion, its proper application to the facts presented is against plaintiff's right to relief by specific performance. This, as we have seen, is a contract by which defendants agree to sell and convey to plaintiff the lot in question, and plaintiff on his part is to pay \$5,000 at or before the execution of the deed and to build upon the lot a redrying plant. This, while it is to be done after the execution of the deed, is a part of the consideration that plaintiff is to pay for the lot, and, under the principle referred to he is required to aver and show that he is ready and willing to carry out this part of the contract also. Not only is there no averment or proof to this effect, but a perusal of the complaint will disclose that plaintiff does not intend to comply with this feature of the agreement and does not consider that he is any longer under obligation in this respect. Both in his allegations and proof, therefore, he has failed to show that he is ready and willing to perform the stipulations of the agreement.

[5] Again, so far as the title is concerned, this is a contract indivisible in its nature and to be performed in its entirety, and specific performance may not be enforced partially nor as to its separate provisions. This position was adverted to with approval by Associate Justice Conner in *Tillery v. Land Co.*, 136 N. C. 537-543, 48 S. E. 824, and is in accord with the authoritative decisions on the subject. *Tillery v. Land Co.*; *Telfener v. Russ*, 162 U. S. 170, 16 Sup. Ct. 695, 40 L. Ed. 930; *Welty v. Jacobs*, 171 Ill. 624, 49 N. E. 723, 40 L. R. A. 98; *Baldwin, Adm'r., v. Fletcher*, 48 Mich. 604, 12 N. W. 873; *Combs v. Little*, 4 N. J. Eq. 310, 40 Am. Dec. 207. In the Michigan case supra the principle is stated as follows:

"A bill will not lie for the specific performance of particular stipulations, to be separated and dealt with apart from the rest of the contract, if they do not \* \* \* appear by the contract to stand by themselves wholly unaffected by any others. A party to a contract who insists upon parts of it must abide by it in its entirety."

Under the terms of this instrument, as a bilateral agreement, plaintiff is not to acquire title to this property on the payment of \$5,000, but he is to pay this amount and also build on the lot a redrying plant. This last is as much a part of the consideration as the other, and, in order to its proper performance, it is necessary for plaintiff to have the entire ownership of the lot or to establish a binding agreement by which such ownership may be acquired. On perusal of the record, it appears that the court below, on motion, has dismissed the action as to two of the defendants, Eagles and Carr. This

may have been an erroneous ruling on the part of his honor, but it stands until it is in some way modified or reversed, and plaintiff has neither appealed nor excepted. He is therefore no longer in a position to carry out his part of the contract nor pay the consideration promised by him.

[6] We are not inadvertent to the fact that the redrying plant was to have been built in time for the tobacco market of 1916. This requirement as to time, however, was inserted for the benefit of defendants, which could be waived by them and has been waived by their failure to execute the conveyance, but the construction of the redrying plant has not been waived as a part of the consideration to be paid for the property, and plaintiff, who seeks to enforce specific performance of the contract, must, as stated, allege and prove that he is ready and willing to comply with its terms. This he has failed to do, and, in our opinion, the action must be dismissed also as to appellants Cozart and Anderson. The defendant Smith, having failed to answer or except, is bound by the judgment and must comply with its terms.

Reversed.

(113 S. C. 227)

BURTON et al. v. BURTON et al.  
(No. 10881.)

(Supreme Court of South Carolina. Feb. 23, 1920.)

**1. CONVERSION §15(2) — TESTAMENTARY DIRECTION TO SELL CONSTITUTES CONVERSION PRECLUDING PARTITION BY BENEFICIARIES.**

Beneficiaries of a will entitled to share in proceeds of lands directed by the testatrix to be sold cannot maintain an action for the partition of such land, for the direction to sell the lands and divide the proceeds amounted to a conversion, and the beneficiaries can only compel the executors to sell the lands and those in possession to account for the rents and profits.

**2. WILLS §450, 470, 471—INSTRUMENT MUST BE CONSTRUED AS A WHOLE; EFFECT GIVEN TO ALL PARTS; . CONFLICTING PROVISIONS RECONCILED.**

In construing a will, it should be considered as a whole, and, if practicable, effect given to every word and clause of it, so apparently conflicting provisions should be reconciled, if that can be done by any reasonable construction.

**3. WILLS §534—GRANDCHILDREN GIVEN BEQUEST AS FULL SHARE OF ESTATE HELD NOT ENTITLED TO SHARE IN PROCEEDS OF LANDS.**

Where testatrix by item 9 of the will bequeathed to the children of her deceased son \$25 each "as their full share of my estate," and by codicil directed that a son, to whom by item 2 of the will she had bequeathed a parcel of land, should be paid \$50 cash "as his full share," and directed that such land be sold and the proceeds divided equally among the testatrix's other heirs named or their bodily heirs, the chil-

dren named in item 9 were not entitled to share in the division of the proceeds of the land.

**4. WILLS §472—CODICIL CONFIRMING WILL EXCEPT AS TO NAMED ITEM MAKES SUBSEQUENT ITEM THE LAST EXPRESSION OF TESTATOR.**

Where a codicil confirms the will and all its provisions except as to item 2 therein, the codicil is to be treated as written into the will, and hence item 9 of the original will is to be considered as a later provision in point of position, and therefore governs the codicil.

Appeal from Common Pleas Circuit Court of Saluda County; S. W. G. Shipp, Judge.

Action for partition by Mary L. Burton and another against Claude W. Burton and others and Nanme A. Burton and another. From a judgment for plaintiffs, defendants first named appeal. Reversed.

E. L. Asbill, of Leesville, for appellants.

C. J. Ramage and B. W. Crouch, both of Saluda, for respondents.

HYDRICK, J. Plaintiffs brought this action for partition of a tract of land, alleging that they are seized thereof in fee as tenants in common with defendants, under the will of their grandmother, Mary S. Burton, and demanded an accounting of the rents and profits and sale of the tract for division. Defendants denied that plaintiffs have any interest in the land, and alleged that, according to the will, they are only entitled to a legacy of \$25 each.

The issues arise out of the construction of the will and a codicil thereto. The will was executed in 1907 and the codicil in 1911. Testatrix declared in the preamble of her will that she made it to prevent "confusion hereafter in the division of my real estate of about 500 acres," which appears previously to have been divided into eight tracts of "about" 60 acres each. She devised these eight tracts—each by number and description—in eight consecutive items of her will, giving one tract to each of seven children and one to her husband, Joseph Burton, "during his lifetime and at his death to be sold, and proceeds to be equally divided among my children."

Item 2, which is typical in form of all the other devises to her children, reads:

"I hereby give and devise at my death to my son, Lecky M. Burton, his heirs and assigns, tract No. 2 of about 60 acres, bounded north by branch, east by lands of Mrs. Florence Padgett, south by Columbia road, west by lands of T. D. Villard."

Item 9 reads:

"I hereby give and bequeath to Mary I. Burton, Chloe Burton, Nannie A. Burton and Benjamin Burton, children of my deceased son, Benjamin B. Burton, twenty-five dollars each, as their full share of my estate, to be paid to each when 21 years old by my executor."

The codicil reads:

"I, Mary S. Burton, freeholder of the county and state aforesaid, do hereby make and declare this to be my first codicil in which I hereby confirm this my last will herein contained, excepting Item 2, in place of which I now substitute the following: In lieu of the aforesaid tract No. 2, I hereby give and devise to my son Lecky M. Burton, or his bodily heirs, the sum of fifty dollars, to be paid in cash to him or to his heirs at my death, as his full and just proportional part of my estate. And I further will that the said tract No. 2 shall then be sold at public outcry to the highest bidder and that the proceeds of said sale shall be divided equally among my other heirs herein named, or their bodily heirs."

The circuit court held that the grandchildren mentioned in item 9 (two of whom are the plaintiffs and the other two are defendants) were let into the division of the proceeds of tract No. 2 by the last sentence of the codicil, that is, that they are members of the class there described as "my other heirs herein named," and hence that they should share per capita with the other heirs named in the will. Accordingly the court referred the other issues, presumably the accounting for the rents and profits, as that was the only other issue made by the pleadings, to the master. The defendants (except the two grandchildren) appealed.

[1] Even if that construction could be sustained, the plaintiffs would have no cause of action for partition and account for rents and profits. No interest in the land was devised to them, or any of the parties, but testatrix directed that it be sold and the proceeds divided, which was tantamount to a conversion of the land into money; and, therefore, if plaintiffs had any cause of action at all, it was against the executors of the will (who are not parties to this action) to require them to sell the land and divide the proceeds according to the will. *Mattison v. Stone*, 90 S. C. 146, 72 S. E. 991. In such an action, the executors, or other parties who have received the rents and profits, may be required to account for them.

[2, 3] But we think the construction of the will was erroneous, chiefly because it gives no effect whatever to the words found in item 9, wherein testatrix gives these grandchildren \$25 each, "as their full share of my estate." By the express language of the codicil, the will, as previously written, was confirmed, except only as to item 2, and testatrix says that the subsequent provisions of the codicil are to be substituted in lieu of item 2.

Now, let us do as directed, strike out item 2 and substitute in place of it the provisions of the codicil, and we have a gift of \$50 to the son Lecky, "as his full and just proportional part of my estate," and the provision that tract No. 2 which she had previously intended to give him, be sold and the proceeds divided equally among "my other heirs herein

named"; and also we have item 9 remaining just as it was before, with the gift of \$25 to each of the grandchildren named "as their full share of my estate."

In construing any instrument, it must be considered as a whole, and, if practicable, effect must be given to every word and clause in it. *Shaw v. Robinson*, 42 S. C. 345, 20 S. E. 161. Hence, where there are apparently conflicting provisions, they should be reconciled, if it can be done by any reasonable construction, so that each may have effect.

[4] But if they cannot be reconciled, then the latest of such provisions found in a will must be given effect upon the supposition that it is the last expression of intention. This, however, is a rule of last resort. Nevertheless, it is invoked by respondents on the supposition that the codicil contains the last expression of intention. Ordinarily that is true of a codicil. But here the codicil confirms the will in every respect, except item 2. Therefore the provision of item 9 is expressly confirmed as a part of the will, as republished by the execution of the codicil. Now, if we do as testatrix directed, and write the codicil into the will in lieu of item 2, we shall have the provision of item 9 as the last expression of intention, and so the rule invoked by respondents would militate against the construction for which they contend.

However, if we consider the scheme of disposition of her lands which testatrix had in mind, as disclosed by the will as a whole, the conflict between the provisions of item 2, as revised by the codicil, and item 9 becomes only apparent, and a reasonable construction may be found, under which both provisions may stand.

Reading the will as a whole, it is apparent that the primary intention of testatrix was to give her land and the proceeds thereof to her children. This appears from the form of the devise to each of them, and also from the devise of tract No. 6 to her husband which she gives to him for life, and after his death it is to be sold and the proceeds evenly divided equally amongst her children. Now when she changed item 2, and gave her son, Lecky, \$50 as his full share of her estate, and provided for the sale of tract No. 2, and division of the proceeds "equally among my other heirs herein named," she had in mind that child (Lecky) and the division of her estate among her other children. She thought of him as one of her "heirs," not in the technical, but in the popular, sense in which the word is so often used to mean "children"; hence she naturally used the words "other heirs" to refer to her other children. This construction harmonizes and gives effect to all parts of the will, and we think, also, to the intention of the testatrix.

Judgment reversed.

GARY, C. J., and WATTS, FRASER, and GAGE, JJ., concur.

(113 S. C. 154)

**STATE v. GEORGE. (No. 10385.)**

(Supreme Court of South Carolina. Feb. 23, 1920.)

**1. HOMICIDE §=800(3)—INSTRUCTION ON THE DUTY OF ONE ASSAULTED TO RETREAT INCORRECT.**

In prosecution for homicide by defendant, who relied on self-defense, an instruction that where two men meet upon common grounds, where each have equal rights on the premises, it is the duty of one who is assaulted before he takes life to use all possible means of escape and to resort to all possible means of escape, unless he would thereby enhance his own danger, held erroneous, being too broad.

**2. CRIMINAL LAW §=823—PRESUMPTION THAT WITNESS TELLS TRUTH.**

An instruction that there was no presumption that a witness tells the truth is erroneous, for witnesses *prima facie* are presumed to tell the truth.

**3. CRIMINAL LAW §=742(1), 757(1)—AN INSTRUCTION ON PRESUMPTION THAT WITNESSES TELL TRUTH NOT ONE ON THE FACTS.**

While under the Constitution it is for the jury to determine the degree of credit that they will give to the testimony of witnesses, uninfluenced by any expression of the trial judge, the jury cannot act capriciously, and should find their verdict in accordance with the law and evidence; therefore an instruction by the trial judge as to the presumption that witnesses tell the truth, etc., is not objectionable as being on facts.

Appeal from General Sessions, Circuit Court of Edgefield County; T. J. Mauldin, Judge.

John L. George was convicted of manslaughter, and he appeals. Reversed.

Claude N. Sapp, of Columbia, for appellant.  
Geo. Bell Timmerman, Sol., of Lexington, for the State.

**HYDRICK, J.** On indictment for murder, defendant pleaded self-defense. He was convicted of manslaughter, and appealed on two grounds.

**[1] The court charged the jury:**

"Where men meet upon common grounds, where one has as much right to be upon the premises as the other, and if one is assaulted, it is the duty of the one who is assaulted, before he takes life, to use all possible means of escape, or to avoid the necessity of taking human life and resort to all possible means of escape, unless by so doing he would enhance or increase his own danger."

In *State v. Turner*, 29 S. C. 34, 44, 6 S. E. 891, 13 Am. St. Rep. 706, this court approved Greenleaf's definition of self-defense, in which it is said there must be "no other probable means of escape"; and in *State v. Jones*, 29 S. C. 201, 236, 7 S. E. 296, an instruction similar to that given in this case

was disapproved; the court saying the word "possible," was too strong.

In *State v. Ariel*, 38 S. C. 221, 16 S. E. 779, the court sustained an instruction that there must be "no other way of saving himself," on the ground that it should be construed as meaning "no other possible way"; and in *State v. Foster*, 66 S. C. 469, 472, 45 S. E. 1, 2, it was held that a charge that "he must have no means of escape, \* \* \* if he has any possible means of escape," would have been reversible error but for the fact that the error was cured in other parts of the charge, so that the jury was not misled.

But in *State v. Thomas*, 103 S. C. 316, 88 S. E. 20, the majority of the court disapproved an instruction that defendant must have "no other means of escape." As there was other reversible error, the writer of this opinion concurred in the result only, being of the opinion that, under the authority of *State v. Ariel* and *State v. Foster*, the charge should have been sustained as meaning "no other probable means of escape." The instruction here complained of was quite as misleading as that condemned in *Jones' Case*, and less so than that held to be erroneous in *Thomas' Case*; and there was nothing in the other parts of the charge to counteract its harmful effect.

[2] The court erred also in charging, "There is no presumption that a witness tells the truth." We think there is such a presumption, not a presumption of law, but merely a *prima facie* presumption of fact, the strength of weakness of which depends upon the circumstances—such, for example, as the character of the witness, his opportunity of knowing the facts, his interest in the event or the parties, his bias or prejudice for or against the parties, and other facts and circumstances well known to the profession which may, in the judgment of the triers of the facts, be deemed sufficient to strengthen, weaken, or entirely rebut the presumption. The weight of authority and reason sustains the view that, *prima facie*, witnesses are presumed to tell the truth. 8 Enc. of Ev. 755; 10 R. C. L. 883; 1 *Jones* on Ev. §§ 12, 13.

If there is no presumption that witnesses tell the truth, why examine them? The law presumes innocence rather than wrong; hence the presumption that one charged with crime or other wrong is innocent. A witness who willfully testifies falsely is guilty of perjury. There is no logical reason why the presumption of his innocence of perjury should not be indulged, at least *prima facie*, in favor of the truth of his testimony.

Indeed, there is a presumption that people generally tell the truth, even when not under oath, and the social and business affairs of life are conducted in great part upon that presumption; for greater reasons, those who



speak under the sanction of an oath are presumed to speak the truth. Of course, every one knows that a witness may be perfectly honest and intend to tell the truth, but may fail to do so, on account of defective memory, imperfect observation, and other causes; also, that all witnesses are not honest, and that the testimony of some witnesses is colored by bias or prejudice. But all that is implied in the word "presumption," and the statement is generally so understood.

[3] In *State v. Taylor*, 57 S. C. 483, 35 S. E. 729, 76 Am. St. Rep. 575, and *State v. Riley*, 98 S. C. 386, 82 S. E. 621, there are some expressions which sustain the view that there is no presumption that a witness tells the truth, or at least that the court may not so instruct the jury. But they were unnecessary to the decision, for in both those cases, as in this, the question arose on assignment of error in the charge as being upon the facts, and in both the opinion of the trial judge as to the weight which the jury should give to the presumption was clearly inferable from the language used, which made the charge obnoxious to the constitutional inhibition against judges charging upon the facts. Besides, in neither case was the legal nature and effect of the presumption properly explained to the jury.

But if it is a charge on the facts to tell the jury that there is such a presumption, it is equally so to tell them there is no such presumption, for the twofold reason that the latter statement is contrary to the general experience of mankind, upon which the contrary presumption is based, and because it suggests to the jury that they may discredit the testimony of the witnesses, without reason, or at least without sufficient reason.

Under the Constitution, it is for the jury to determine the degree of credit which they will give to the testimony of witnesses, uninfluenced by any expression or intimation of opinion on the part of the trial judge. But that does not mean that the jury will be allowed to act capriciously. It is their duty to find their verdict in accordance with the law and evidence. Therefore they are entitled to have the law and rules of evidence declared and explained to them, in order that they may intelligently perform that duty; and since, as we have seen, there is a presumption that witnesses generally tell the truth, the jury and the litigants are entitled, in a proper case, to the benefit of the court's instruction as to the legal nature and limitations of that presumption. And it is entirely practicable for the court to give them such instructions, without expressing or intimating any opinion as to the weight or credit which they should give to the testimony, or any part of it, and when it is so done, there is no invasion of the province of the jury.

If we hold that such an instruction can-

not be given for the reason stated, then, to be logical and consistent, we shall have to say, for the same reason, that the court cannot tell the jury that a defendant charged with a crime is presumed to be innocent; that malice may be presumed from the intentional killing of another with a deadly weapon; that proof of certain facts raises a presumption of fraud or of negligence, and so on in many like cases. So, too, if conflicting presumptions arise out of the evidence (as in *Chapman v. Cooper*, 5 Rich. 453) the court would be powerless to explain their nature and comparative legal value, and the jury would be left to find its way in darkness, without chart or compass. That view restricts too narrowly the power of the trial judge. The constitutional inhibition was not intended to be so far-reaching.

Judgment reversed.

GARY, C. J., and WATTS, FRASER, and GAGE, JJ., concur.

(113 S. C. 270)

MEIER v. KORNAHRENS et al. (No. 10386.)

(Supreme Court of South Carolina. Feb. 23, 1920.)

1. JURY  $\S$  25(6)—DEMAND FOR JURY TRIAL ON APPEAL FROM DECREE REJECTING WILL SHOULD BE MADE WITHIN TIME FIXED BY EQUITY RULES.

Where the proponent of a will which was rejected by the probate court appealed from the decree filing the transcript as required by Code Civ. Proc. 1912,  $\S$  66, the issues are made by the exception or grounds of appeal, and where respondents, the contestants, desire a jury trial of such issues, which trial is provided for by section 66, they should, in analogy to rule 28 of the circuit courts applicable to equity cases, give notice of desire for jury trial within 10 days after serving of the exceptions.

2. JURY  $\S$  25(6)—WHERE DEMAND FOR JURY TRIAL IS NOT MADE WITHIN TIME FIXED, COURT MAY REJECT SAME.

Where a party to an appeal from decree of the probate court fails to serve notice of request for order framing issues for jury trial within the time required by rule 28 of the circuit court, the court may hold that he has waived his right to move for issues and refuse on that ground to entertain motion.

3. WILLS  $\S$  318(1) — JURY TRIAL MAY BE GRANTED ON APPEAL FROM DECREE OF PROBATE COURT THOUGH REQUEST WAS NOT SEASONABLY MADE.

While the court may deny request for jury trial on an appeal from a decree of the probate court rejecting a will, on the ground that the motion to frame issues for jury was not made within the time prescribed by circuit court rule 28, applicable by analogy, the circuit court may, in the exercise of the discretion vested in it

by Code Civ. Proc. 1912, § 225, allow framing of issues for the jury, or it may on its own motion without suggestion submit the issues to a jury.

**4. JURY ⇐17(3)—JURY TRIAL IN PROCEEDING FOR ADMISSION OF INSTRUMENT TO PROBATE; "SPECIAL PROCEEDING."**

A proceeding to prove a paper purporting to be a will is not a case of equitable nature, but is rather a special proceeding under Civ. Code 1912, § 3581, in which case either party desiring it has the right on appeal from decree of the probate court to trial de novo by jury in the circuit court on any issue of fact raised on such appeal when the question is will or no will.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Special Proceeding.]

**5. WILLS ⇐384—PRESUMPTION OF CORRECTNESS OF TRIAL COURT'S RULING AS TO SUBMISSION OF ISSUES.**

Where the proponent of an alleged will appealed from a decree of the probate court rejecting the instrument, and, though the contestant failed to move within apt time for the submission of issues to the jury, the court granted the motion without stating any reason for doing so, it will be presumed in the appellate court that the circuit court predicated its action upon legal grounds.

Appeal from Common Pleas Circuit Court of Dorchester County; John S. Wilson, Judge.

Proceeding by Henry Meier, executor, to prove a paper purporting to be the will of Mrs. Meta H. C. S. Rodenberg, deceased, opposed by J. N. Kornahrens, and others. From a decree of the probate court rejecting the alleged will, the executor appeals. From an order framing issues to be submitted to jury on hearing of the appeal, the executor appeals. Affirmed.

Logan & Grace, of Charleston, for appellant.

Legare Walker, of Summerville, and Whaley, Barnwell & Grimbail, of Charleston, for respondents.

**HYDRICK, J.** The appellant, Meier, as executor thereof, sought to prove a paper purporting to be the will of Mrs. Meta H. C. S. Rodenberg, deceased, in the probate court for Dorchester. By decree, filed August 23, 1918, the court rejected the alleged will. Meier gave due notice of appeal to the circuit court, and on September 6, 1918, filed therein a certified copy of the record from the probate court, as required by section 64 of the Code of Civil Procedure. On January 3, 1919, respondents served notice on Meier of their intention to apply to the court for an order, framing issues to be submitted to a jury on the hearing of the appeal. Against Meier's objection that the notice was not given within the time allowed by law, the court granted the order prayed for by respondents, and that

is the basis of the sole ground of appeal to this court.

[1] Section 66 of the Code of Civil Procedure provides:

"When such certified copy [that required by section 64] shall have been filed in the circuit court, such court shall proceed to the trial and determination of the question, according to the rules of law; and if there shall be any question of fact or title to land to be decided, issues may be joined thereon under the direction of the court, and a trial thereof had by jury."

By the terms of that section, trial by jury on appeal of issues of fact is not demandable as of right, but may be allowed in the discretion of the court, and, when allowed, the issue is to be joined under the direction of the court; hence, the practice has prevailed, ever since the adoption of the Code, for the party (appellant or respondent) who may desire a trial by jury of any issues of fact on such appeals, to move the court, on due notice to the opposite party, for an order framing such issues. Ex parte Apeler, 35 S. C. 417, 14 S. E. 931, and cases cited by the court. The Code of Procedure does not prescribe the time within which such motion shall be made. But, as most of the issues of fact arising on such appeals are issues in causes of an equitable nature, by common consensus of the bench and bar, rule 28 of the circuit court has been applied to the framing of issues on such appeals.

That rule provides that—

"In equity cases, where a trial by jury of issues of fact may be desired, the party desiring a jury trial shall, within ten days after issue joined, give notice in writing of his intention to move the court" for an order framing such issues, and if the adverse party desires any other issues to be submitted, he shall, within four days after service of the notice upon him, serve notice that he will move the court at the same time for the submission of such additional issues as he may desire, and the court may settle the issues, if any are deemed necessary.

It appears from a glance at that part of the rule which is above quoted that it was originally intended to apply to equity causes pending in the original jurisdiction of the circuit court, in which the issue is joined, when the answer is served, and therefore the time is specified in the rule within which the notice of the several motions for issues must be served. And while that rule was not originally intended to apply to the framing of issues on appeals from the probate court, nevertheless, in the absence of any statutory provision, or other applicable rule, it has been applied in such cases ever since the adoption of the Code, and has served the purpose fairly well.

But, as far as we have been able to discover, this is the first case in which this court has

been called upon to decide the question: When is the "issue joined" within the meaning of the words of the rule, as applied to such appeals? Clearly, they do not mean when the answer is served in the probate court, for, at that time, it cannot be known whether there will be an appeal, nor by which side; hence they must be construed to mean when the issue on appeal is joined.

Now, the issues on appeal are made by the exceptions, or grounds of appeal, and they determine whether the issues will be of law or of fact. Therefore the practice has been for the appellant, who desires a trial by jury, to give notice thereof under rule 28 at the time of serving his exceptions, or at any time within ten days thereafter, and for the respondent, if he desires such a trial, to serve his notice of motion therefor within ten days after service of the exceptions upon him, and, of course, as provided in the rule, either party may, within four days after the service of his opponent's notice upon him, give notice that he will ask for additional issues; and we hold that to be the proper practice.

[2, 3] It follows that, if either party fails to serve the notice within the time required by the rule, the court may hold that he has waived his right to move for issues, and refuse, on that ground, to entertain his motion. But it does not follow that the court may not entertain such motions from either side after the lapse of the time specified in the rule, in the exercise of the discretion vested in it by section 225 of the Code of Civil Procedure, or that the court may not, thereafter, of its own motion, or at the suggestion of either side, submit issues to a jury for its own enlightenment. Such has ever been the practice in equity cases.

[4] But this is not an equity case, nor does the appeal involve issues of fact arising out of a case of an equitable nature. In *re Solomon's estate*, 74 S. C. 189, 54 S. E. 207; *Thames v. Rouse*, 82 S. C. 40, 62 S. E. 254; *Mordecai v. Canty*, 86 S. C. 470, 68 S. E. 1049. It is rather in the nature of a special proceeding under a statute (section 3581, Civil Code 1912), which, as uniformly construed by this court (with the single exception of *Apeler's Case*, supra, of which more hereafter), gives to either party desiring it the right to a trial de novo by a jury in the circuit court of any issue of fact raised on such appeal, when the question is "will or no will." See the cases next above cited; also, *Ex parte Jackson*, 67 S. E. 55, 45 S. E. 132, and *Briggs v. Caldwell*, 93 S. C. 268, 76 S. E. 616. And it is not within the discretion of the court to refuse either party that mode of trial, where the appeal involves issues of fact as to the validity of a will, provided, of course, that it be demanded by the service of notice of motion for such issues, as required by rule 28; for the right of trial by jury, as any other civil right, may be waived by the failure to

claim it within the time or in the manner provided by law.

We say this to prevent any erroneous impression or misapprehension from what has been said hereinbefore with reference to the discretionary power of the court to grant or refuse motions for the reference of issues to a jury in equity cases pending in the original jurisdiction thereof and on appeals thereto from the probate court which involve issues of fact arising in cases of an equitable nature.

In *Apeler's Case*, no legal notice of the application to the court for the framing of issues was given, as required by the rule, and there were other errors and irregularities pointed out in the opinion which prejudicially affected the rights of the appellant; therefore, the judgment was right. But the court went further than was necessary to the decision, and held that neither party had the right to a trial de novo by jury in the circuit court, because the action was not one "for the recovery of money only, or specific real or personal property," according to the provisions of section 274 (now 312) of the Code of Procedure. In so holding, the court evidently overlooked the fact that, while that section does provide that actions of the kind specified must be tried by jury, unless that mode of trial is waived, it does not declare that they are the only actions which must be so tried; or, else, it overlooked the fact that the case in hand was not technically an action, but a special proceeding under a statute which gave the parties the right to a trial by jury in the circuit court, if properly claimed. There are other cases than these specified in section 312, whether we call them actions or special proceedings, in which trial by jury is demandable as of right, as, for instance, proceedings in ejectment of tenants, and for the ascertainment of the compensation for rights of way, and others that need not be mentioned.

[5] What we have said would be conclusive of the issue made by the appeal in favor of the appellant's contention but for the fact that the court had the power, as above stated, to be exercised in its discretion, to relieve the respondents of the consequences of their failure to make their motion within the time prescribed by rule 28, as herein construed, and also the power of its own motion, or at the suggestion of either party, after the lapse of the time prescribed by the rule, to refer the issues of fact to a jury. Having granted the order, without stating any reason for doing so, we must assume that the court predicated its action upon legal grounds (*Stanford v. Cudd*, 93 S. C. 367, 76 S. E. 986), and affirm the order.

Affirmed.

GARY, C. J., and WATTS, FRASER, and GAGE, JJ., concur.

(113 S. C. 254)

**STATE v. MURPHY.** (No. 10374.)

(Supreme Court of South Carolina. Feb. 23, 1920.)

**CRIMINAL LAW §940—NEWLY DISCOVERED EVIDENCE, SHOWING NO MITIGATING CIRCUMSTANCES, NOT GROUND FOR NEW TRIAL.**

Where defendant, who was charged with murder, testified in his own behalf and narrated in detail how he killed deceased, alleged newly discovered evidence, which threw no light on the circumstances which led to or resulted in the homicide, and did not tend to mitigate the commission of the crime, but merely tended to show that the homicide was not committed on the night stated by witnesses, is no ground for new trial.

Appeal from General Sessions Circuit Court of Richland County; W. H. Townsend, Judge.

Jess Murphy was convicted of murder, and from an order denying new trial for after-discovered evidence, he appeals. Order affirmed.

Hugh R. Clinkscapes and Charles T. Smith, Jr., both of Columbia, for appellant.

A. F. Spigner, Sol., of Columbia, for the State.

**HYDRICK, J.** This appeal is from an order refusing a new trial for after-discovered evidence.

Appellant was convicted of the murder of the woman with whom he was living in the city of Columbia. She was last seen alive on Monday, July 31, 1916. On Wednesday following her dead body was found in a trunk in the house which had been occupied by them. In the meantime appellant had evaded arrest and fled the state. He was captured

in Pennsylvania in March, 1919, and brought back for trial.

The state rested its case on proof of the circumstances, which included the testimony of two witnesses that, on Monday night, July 31st, they heard screams coming from the direction of the house in which appellant and the woman lived, and the confession of appellant to the officer who brought him from Pennsylvania. Appellant testified in his own behalf, and narrated in detail the circumstances of the difficulty which resulted in his choking the woman to death, the concealment of her body, and his flight. He said that he killed her and concealed her body about 1 o'clock Monday afternoon. There was no other eyewitness to the homicide.

After conviction, he moved for a new trial on the affidavits of two women, which tended to show that he spent Monday night at the house of one of them, and, inferentially, that the homicide was not committed that night, and that the screams heard by the state's witnesses did not come from the house in which appellant and deceased were living.

The motion was properly refused on the ground that the new testimony was immaterial. The most that is claimed for it is that, if it had been before the jury, it might have had the effect of inducing them to recommend appellant to mercy, and thereby save him from the extreme penalty of death. There is nothing in the new testimony which throws light on the circumstances which led to or resulted in the homicide, or which tends to mitigate the commission of the crime, and therefore nothing which properly could have had the effect claimed.

Order affirmed.

**GARY, C. J., and WATTS, FRASER, and GAGE, JJ., concur.**

§940 For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(35 W. Va. 338)

**WEHRLE v. WHEELING TRACTION CO.**  
(No. 3901.)(Supreme Court of Appeals of West Virginia.  
Jan. 27, 1920. Rehearing Denied  
March 24, 1920.)*(Syllabus by the Court.)***1. NEGLIGENCE**  $\S$ 118(6), 141(9)—**PROOF AND CHARGE ON SUPERVENING NEGLIGENCE PROPER.**

When in an action for damages for personal injuries the averments of the only count in the declaration, properly interpreted, amount to a general charge of negligence, and specific acts of negligence are also averred, the plaintiff can not be limited in his proof to the specific acts averred; and when the defendant by evidence introduces the defense of contributory negligence, the plaintiff may under such declaration offer evidence, and the jury may be instructed, if the evidence justifies it, on the theory of the supervening negligence of the defendant as the proximate cause of plaintiff's injuries. *Hawker v. B. & O. R. R. Co.*, 15 W. Va. 628, 36 Am. Rep. 825, distinguished.

**2. STREET RAILROADS**  $\S$ 118(12)—**"IMMEDIATELY" IN INSTRUCTION ON CONTRIBUTORY NEGLIGENCE IN STARTING ACROSS TRACK CONSTRUED AS FAIRLY DESCRIPTIVE OF ACTS.**

The use of the word "immediately" in an instruction to the jury, intended to describe the conduct of the plaintiff in starting across the track of a street railway after seeing the approach of the car which did him the injury, there being no evidence of delay therein, is fairly descriptive of his acts, and the instruction being otherwise good in law is not thereby rendered erroneous.

**3. DAMAGES**  $\S$ 132(8)—**\$5,000 FOR PERMANENT INJURY FROM BREAKING COLLAR BONE AND SHOULDER BLADE AND INJURY TO RIGHT SIDE AND ARM NOT EXCESSIVE.**

The verdict for the plaintiff in this case for \$5,000.00, cannot, within the rules of law binding us, be said to be excessive.

**4. INTEREST**  $\S$ 21—**JUDGMENT FOR TORT SHOULD BE FOR AMOUNT FOUND BY JURY WITH INTEREST FROM DATE OF VERDICT.**

In actions of tort the judgment should be for the amount found by the jury with interest thereon from the date of the verdict, as provided by section 16, chapter 131, of the Code (sec. 4925). Overruling and correcting the error in *Easter v. Virginian Railway Co.*, 76 W. Va. 383, 86 S. E. 37.

Williams, P., dissenting in part.

Error to Circuit Court, Ohio County.

Action by Lawrence Wehrle against the Wheeling Traction Company. Verdict and judgment for plaintiff, and defendant brings error. Affirmed.

Erskine, Palmer & Curl, of Wheeling, for plaintiff in error.

Carl G. Bachman and Charles J. Schuck, both of Wheeling, for defendant in error.

**MILLER, J.** Error to the circuit court of Ohio County in an action by plaintiff for personal injuries alleged to have been sustained by him at the intersection of Forty-First and Wood Streets, in the City of Wheeling, on June 26, 1917, the result of the alleged negligence of defendant, its servants and employes in operating a certain coal car at a high, excessive and dangerous rate of speed, whereby plaintiff when passing over defendant's track at that intersection, with due care, with his horse and wagon, was struck by said car with great force and violence, his collar bone and shoulder blade broken, his right side and arm injured, and whereby thereafter and up to the time of the suit, he had been and was still unable to use his arm and hand as before said injury. The verdict and judgment complained of was for \$5,000.00.

On the trial, by stipulation of counsel and rulings of the court, all issues not presented by the first count of the declaration were withdrawn from consideration of the jury.

[1] Relying on this state of the pleadings and the evidence relevant thereto, the first point of error urged upon us is that the count below by plaintiff's instruction number five, given, allowed him to introduce the issue of supervening negligence imputed to defendant. This point is based on the assumption that the first count, to which the issues were so limited, did not allege any fact or circumstance putting in issue the fact of such supervening negligence of the defendant. This proposition is sought to be sustained mainly on our cases of *Hawker v. B. & O. R. Co.*, 15 W. Va. 628, 36 Am. Rep. 825, and *Snyder v. Wheeling Electrical Co.*, 43 W. Va. 661, 28 S. E. 733, 39 L. R. A. 499, 64 Am. St. Rep. 922, presently to be considered. Of course the universal rule affirmed and applied in *Wilhelm v. Parkersburg, Marietta & Interurban Railway Co.*, 74 W. Va. 678, 82 S. E. 1089, and other cases cited, is that instructions to the jury should be limited to the issues presented by the pleadings and proofs in the case. The negligence averred in the first count is "that the servants or employes of said defendant company at the time and place indicated negligently and carelessly ran said car over and upon the said intersection of the said Forty-First and Wood Streets at a high, excessive and dangerous rate of speed," where the plaintiff was then crossing with due care, and where the motorman of said car had a clear and unobstructed view of plaintiff and his wagon on the crossing for a distance of over eight hundred feet, but that through the negligence and carelessness of defendant through its agents and servants "operating and controlling said car, at a highly dangerous and excessive rate of speed as aforesaid, the plaintiff's wagon was struck by the said car

before he was able to drive off said intersection and the tracks of said defendant company, with such great force and violence that he sustained the injuries of which he complains." So the contention is that in this count plaintiff was limited to the sole issue whether defendant, at the time of said injury, was operating said car "at a high, excessive and dangerous rate of speed," and that under these averments the issue of last clear chance and supervening negligence as excusing plaintiff's alleged contributory negligence introduced by defendant in its evidence and also submitted to the jury by instructions given on its behalf, were not covered by the pleadings. But in our opinion said first count, fairly interpreted, must be regarded as charging negligence generally on the part of the defendant and its servants in the operation of the car, not limited solely to the high, excessive and dangerous rate of speed averred. Other facts and circumstances of an evidential nature are set out in this count; as for instance the distance at which the motorman could have seen plaintiff when he started across the track, the fact that the injuries were incurred at a public crossing where plaintiff was within plain view of the motorman for a long distance and for a sufficient time to have enabled him to stop his car in time to avoid the injury. These averments sufficiently charge and impute general negligence to the motorman in charge of the car, as to admit of proof of supervening negligence on his part, assuming contributing negligence on the part of plaintiff, of which however the jury acquitted him by their answer to defendant's special interrogatories. The declaration in the case of *Hawker v. B. & O. R. R. Co.*, supra, after averring negligence generally, proceeded to aver that the negligence relied on consisted solely in the acts of the defendant after seeing plaintiff's cattle upon the track in carelessly and negligently driving the locomotive upon them. The declaration in this case, properly interpreted, does not so limit plaintiff in his proof. A familiar rule of pleading referred to and applied in *Snyder v. Wheeling Electrical Co.*, supra, is that a declaration will be treated as alleging by implication every fact which can be implied from its averments by the most liberal intentment. *Hogg's Pl. & Forms*, § 140. The theory of last clear chance and supervening negligence is never resorted to unless the defendant interposes the defense of contributory negligence. In *Bralley v. Railway Co.*, 66 W. Va. 462, 66 S. E. 653, we decided that a declaration charging defendant with a specific act, injurious to plaintiff, and averring general negligence in the performance of the act, is sufficient, and that it is not necessary to set out in detail all the specific acts constituting the negligence complained of. The leaning of the courts now is to a more lib-

eral rather than a strict rule of pleading in this regard. Evidences of such liberality are shown in some of the cases from other states cited and relied on by plaintiff's counsel. *Louisville & N. R. Co. v. Jones*, 45 Fla. 407, 34 South. 246; *Rockford, etc., R. R. Co. v. Phillips*, 66 Ill. 548; *Bush v. St. Jos. & Benton Harbor Street Ry. Co.*, 113 Mich. 513, 71 N. W. 851. In the first case the declaration alleged a high and excessive rate of speed, under which evidence of failure to blow a whistle when approaching a crossing was admitted. When street railways use the public streets of a populous city, their rights at street crossings are not superior to the rights of other travelers. *Ashley v. Traction Co.*, 60 W. Va. 306, 55 S. E. 1016, 9 Ann. Cas. 836; *Riedel v. Wheeling Tract. Co.*, 69 W. Va. 18, 71 S. E. 174. The case of *Bassford v. Pittsburg, etc., Ry. Co.*, 70 W. Va. 280, 73 S. E. 926, involved a steam railroad alleged to have been operated at a dangerous rate of speed, where the rule is different. Our conclusion, therefore, is that the first point of error must be overruled.

[2] The next point involves the criticism of plaintiff's instruction number six. This instruction on the question of contributory negligence, intended to meet the theory of defendant manifested by the character of its evidence offered and the instructions propounded and given on its behalf, simply told the jury that it was not negligence for one to attempt to cross a street railway track in front of an approaching car if in doing so he exercised that judgment and care which a reasonably prudent and careful person would do under the circumstances, and that if the plaintiff exercised such judgment and care in driving over said track at the time of his injury, and looked immediately before crossing the track and saw the car three hundred feet away, he was not guilty of negligence. It is conceded that this is substantially the law of *Ashley v. Traction Co.*, supra, except the assumption therein that plaintiff looked immediately before crossing the track, a fact it is contended not supported by the evidence. We think this word fairly descriptive of what plaintiff says he did, for as he describes his conduct he looked before starting across defendant's track, and apparently nothing intervened between his act of looking and starting. We do not appreciate the objection. We see no virtue in this point, and it also must be overruled.

The third point urged for reversal is that plaintiff's instruction number five was inconsistent with defendant's instruction "No. N." This point is founded on the theory already disposed of, that the pleadings did not admit of any issue on the theory of the supervening negligence of the defendant, covered by plaintiff's instruction number five. As that contention has been overruled, defendant cannot complain of its supposed con-

(102 S.E.)

dict with its instruction "No. N." In so holding we are not called upon to consider the question of waiver of error by defendant by the submission of its instruction on the same subject. We think if defendant on the meager evidence of contributory negligence was entitled to present its instruction to the jury on that theory, plaintiff was on the pleadings and proof entitled to present the theory of the supervening negligence of the defendant as the proximate cause of his injuries.

The point that defendant's instruction "No. I," defining contributory negligence, was erroneously rejected, we think is without merit. The jury were sufficiently instructed on this subject by other instructions given at the instance of both parties.

Two propositions are urged in support of defendant's motion, overruled, to set aside the verdict: (1) That plaintiff's own negligence was the proximate cause of his injuries; (2) that the verdict was excessive. The special verdict of the jury responded specifically to the first proposition, and we think found correctly.

[3] But was the verdict excessive? It was large, considering the nature of the injuries; but can we say it was so excessive as to evince fraud, partiality or prejudice, justifying us in setting it aside? There was some evidence tending to show permanent injury, supported by symptoms existing at the time of the trial. The record shows that defendant's physician and surgeon was permitted to examine plaintiff during the trial, presumably with the view of determining the nature and extent of the injuries. He was not afterwards called by either party to testify on the subject.

[4] Lastly, it is urged that the judgment must be reversed on the ground that it erroneously gives interest from the date of the verdict, contrary to the holding of the court in *Easter v. Virginian Railway Co.*, 76 W. Va. 383, 86 S. E. 37. In the recent case of *Long v. Pocahontas Consolidated Collieries Co.*, 98 S. E. 289, Judge Williams dissenting, we ignored the ruling in the *Easter* Case on this question of interest, and in reversing the judgment below in a tort action rendered judgment for the plaintiff with interest from the date of the verdict. In the *Easter* Case we seem to have been misled by *Talbott v. W. Va. C. & P. Ry. Co.*, 42 W. Va. 560, 26 S. E. 311, opinion by Judge Holt, decided subsequently to the amendments of sections 14, 16 and 18 of chapter 131 of the Code, by chapter 120, Acts of the Legislature, 1882 (secs. 4923, 4925, 4927), and to have overlooked our decision in *Campbell v. City of Elkins*, 58 W. Va. 308, 52 S. E. 220, 2 L. R. A. (N. S.) 159. As Judge Holt in *Talbott v. W. Va. C. & P. Ry. Co.* refers only to *Hawker v. B. & O. R. R. Co.*, *supra*, and *Murdock v.*

*Insurance Co.*, 33 W. Va. 407, 10 S. E. 777, 7 L. R. A. 572, the latter case involving a judgment rendered after, but a verdict rendered before said amendments, he seems to have overlooked the effect of the amendments of 1882. In *Campbell v. City of Elkins*, due regard seems to have been had to the amendments of 1882, and the conclusion there reached that in tort actions like the present the judgment should bear interest from the date of the verdict, as provided in section 16 of chapter 131, the only provision of the law applicable in such cases. After a full review of these decisions, we are fully satisfied that in actions of tort the judgment should bear interest from the date of the verdict, and that the point of error on the question of interest must be overruled.

Seeing no reversible error, our conclusion is to affirm the judgment.

WILLIAMS, P. (dissenting in part). I dissent from so much only of the foregoing opinion as holds that interest on the judgment should run from the date of the verdict, for the same reason expressed in my dissenting opinion in the *Long v. Pocahontas Consolidated Collieries Case*, 98 S. E. 289. Properly construed, I do not think the statute cited in the opinion applies to judgments recovered in tort actions.

(85 W. Va. 459)

CHAFIN v. MAIN ISLAND CREEK COAL CO. (No. 3951.)

(Supreme Court of Appeals of West Virginia.  
Feb. 3, 1920. Rehearing Denied  
March 24, 1920.)

(Syllabus by the Court.)

1. BROKERS ⇨71—AGREEMENT TO PAY "FIFTY-FIFTY" OF WHAT IS SAVED IF PROPERTY CAN BE PURCHASED AT LESS PRICE THAN ONE NAMED CONSTRUED.

Where one who is desirous of purchasing certain property expresses a willingness to pay a certain price therefor, and agrees with another to give him "fifty-fifty" on what is saved if he can purchase the property at a less price, and through the efforts of such other party it is purchased at a less price than that named, such second party will be entitled to receive one-half of the difference between the price at which the purchaser was willing to purchase and the price at which the property was actually secured.

2. CORPORATIONS ⇨426(10) — CORPORATION RECEIVING BENEFITS UNDER CONTRACT IN EXCESS OF POWERS IS ESTOPPED TO SET UP DEFENSE OF ULTRA VIRES.

Where the rights of the public are not involved, a purely private corporation entering into a contract in excess of its powers, and receiving benefits thereunder, is estopped from setting up the defense that it was without pow-

er to make it, so far as such estoppel is necessary to do justice between the parties, unless such contract is in violation of some positive law or well-settled rule of public policy.

**3. CORPORATIONS  $\S$  425(6)—ACCEPTANCE OF BENEFITS OF CONTRACT MADE BY UNAUTHORIZED AGENT CONSTITUTES RATIFICATION.**

Where a private corporation accepts the benefits of a contract made on its behalf by an unauthorized agent, it thereby ratifies the contract in its entirety and will be bound to perform the obligations provided by the contract to be performed on its part.

Error to Circuit Court, Logan County.

Action by J. L. Chafin against the Main Island Creek Coal Company. Judgment for plaintiff, and defendant brings error. Affirmed.

E. T. England and Chafin & Bland, all of Logan, for plaintiff in error.

E. L. Hogsett, of Logan, for defendant in error.

**RITZ, J.** The plaintiff brought this suit to recover upon a contract for services which he claims he performed for the defendant. At the conclusion of the plaintiff's evidence a motion was made to exclude the same and direct a verdict for the defendant, which motion being overruled, and the defendant electing to stand thereon, the case was submitted to the jury upon the plaintiff's evidence alone, resulting in a verdict in his favor, upon which the judgment complained of was rendered.

The plaintiff testified in his own behalf, and his testimony was all that was introduced. In so far as his evidence is material, it establishes the following state of facts: The defendant is a corporation engaged in the mining business in Logan county, and at the time of the transaction involved in this litigation John Laing was its president, and a man by the name of Carson its general manager. The Browning Land Company, controlled by Sidney and Thomas Browning, owned a tract of land which the defendant's president and general manager informed plaintiff it desired to secure by purchase, as well also as another tract owned by Claude and Ray Browning. Plaintiff remarked that the latter tract ought to be acquired for \$20,000 to \$25,000, and plaintiff's general manager replied, "If you will buy it for that, we will give you \$500." On the next morning the defendant's president sent for plaintiff to come to his office. Upon his arrival he was informed by the president that he wanted plaintiff to see the Brownings with a view to purchasing both pieces of land. Plaintiff stated that he had no information as to what the land could be purchased for; that he did not want it understood that his remarks of the previous day were authorized

by the Brownings. Pursuant to his request, plaintiff saw the owners of the Browning Land Company land and got a price of \$4,700 on it. He also saw Claude and Ray Browning, and they made him a price of \$25,000 on their land. He reported this to the defendant's president and general manager, and was informed by the president that the price of \$4,700 for the Browning Land Company land was all right, but the president desired him to see Claude and Ray Browning again and make them an offer of \$20,000 for their land. This the plaintiff did, but the offer was declined. A counter offer was, however, made to sell at \$22,500. The result of this conference was given to the defendant's president and general manager, and the president advised the plaintiff to close for both pieces of land on that basis, that is \$4,700 for the Browning Land Company tract and \$22,500 for the Claude and Ray Browning land, or \$27,200 for both tracts. Plaintiff advised against this, and stated that he believed he could secure both tracts for \$25,000. The general manager of the defendant in the presence of the president thereupon advised the plaintiff that, if he secured the land at that price, he would give him fifty-fifty on what was thereby saved from the price of \$27,200 which the defendant's president was willing to pay. Acting upon this, the plaintiff went back to Logan and got all four of the Brownings together and informed them that the defendant desired to purchase both tracts of land and would give \$25,000 therefor. The Brownings did not accept this, but stated that they believed that, if they could see Mr. Laing, the defendant's president, he would give them the price they asked. Plaintiff says he knew from Mr. Laing that he would be in Logan that evening, and he so informed the Brownings and advised them to see him personally. In the meantime he got into communication with Laing and informed him what had been done, and also advised him that, if he would "stand pat" on the \$25,000 offer, he was sure the Brownings would accept it. Laing came to Logan that evening, and was approached by the Brownings in regard to purchasing the land. He informed them that he would give \$25,000 for both tracts, and if they accepted he would draw a draft for the purchase money and leave it for delivery to them upon the title being passed to the defendant. The Brownings retired, and, after conferring over this proposition, returned and accepted the same. Whereupon Laing, who was going away, drew a draft for the purchase money and arranged for its delivery to the Brownings. The land was taken over under this arrangement at the price of \$25,000. Plaintiff claimed one-half of the difference between \$25,000, the price at which the land was purchased, and \$27,200, the price Laing had



expressed a willingness to pay, because of the proposition of the general manager to give him fifty-fifty on the amount he saved the company. The judgment was for the amount thus claimed.

The defendant says the judgment should be reversed:

(1) Because the compensation to be paid is so indefinitely expressed, the term "fifty-fifty" not having any certain meaning, that no recovery could be had except on the quantum meruit, and there is no evidence upon which to base such a recovery.

(2) Because it does not appear that the defendant had authority under its charter to make such a contract.

(3) Because the president and general manager of the company are not shown to have been authorized to make such a contract on behalf of the defendant, and they have no such implied power.

(4) Because it does not appear that the plaintiff was the efficient agent in securing the property at the price at which it was purchased.

[1] We will take these propositions up in their order. The defendant's contention is that the promise of the general manager to give plaintiff "fifty-fifty" on what was saved does not mean anything. That this expression has a well-defined meaning cannot be doubted. It conveys to the mind immediately the division of the subject of discussion into halves, and we are not willing to admit that we are so ignorant of terms in common usage as not to know the meaning of this phrase. The object of construction of contracts is to give effect to the agreement of the parties so far as it can be ascertained from the language used, and it matters not that the agreement may be expressed in the vernacular of the street. It is clear that the court below gave the proper construction to the agreement of the parties; that is, that each side would get the benefit of one-half of the difference between \$27,200 at which Mr. Laing was willing to close and such less sum as they might succeed in purchasing the property for.

[2] Can the defendant be allowed to say that this act is ultra vires? It is a purely private corporation so far as the record shows, and it does not appear that this contract would violate any principle of public policy nor does it violate any law. It is true there is no showing as to what corporate powers are possessed by the defendant, but, if it relies upon the contract being ultra vires to defeat recovery, it must show that it is not within its corporate powers. But, even if it were ultra vires, the defendant could not set up that defense here. It has taken the benefit of the contract, and that estops it from saying that it did not have power to make it. Where the rights of the public are not involved, a private corporation

entering into a contract in excess of its powers, but which is not in violation of law or any settled rule of public policy, and receiving benefits thereunder, is estopped from setting up the defense that it was without power to make it, so far as such estoppel is necessary to do justice between the parties. *News-Register Co. v. Rockingham Publishing Co.*, 118 Va. 140, 86 S. E. 874; *Linkauf v. Lombard*, 137 N. Y. 417, 33 N. E. 472, 20 L. R. A. 48, 33 Am. St. Rep. 743; *Nims v. Mt. Hermon Boys' School*, 160 Mass. 177, 35 N. E. 778, 22 L. R. A. 364, 39 Am. St. Rep. 467.

[3] There is no evidence in this case as to the authority possessed by the defendant's president or its general manager with which officers the plaintiff's contract was made. The president of a corporation has no implied power to make such a contract as this (*Varney & Evans v. Lumber & Mfg. Co.*, 70 W. Va. 169, 73 S. E. 321), nor has the general manager any such implied power in the absence of a showing that such a contract comes within the scope of its ordinary business (*Carroll-Cross Coal Co. v. Abrams Creek Coal & Coke Co.*, 98 S. E. 148). But the plaintiff contends that, regardless of whether these officers had authority to make the contract or not, the defendant subsequently accepted the benefit of it, and, having done so, it is bound to perform its obligations. It is quite true that the evidence shows that the defendant took over the land under the contract procured for it by the plaintiff, and it cannot, after taking the benefit of the plaintiff's efforts in its behalf, deny his right to recover the compensation agreed upon. 21 R. O. L. title "Principal and Agent," § 111; *Mechem on Agency*, §§ 464 and 501; *Wheeler v. McGuire*, 86 Ala. 398, 5 South. 190, 2 L. R. A. 808; *Mayer v. Dean*, 115 N. Y. 556, 22 N. E. 261, 5 L. R. A. 540; *Eastman v. Provident Mutual Relief Association*, 65 N. H. 176, 18 Atl. 745, 5 L. R. A. 712, 23 Am. St. Rep. 29; *Great Lakes Towing Co. v. Mills Transportation Co.*, 155 Fed. 11, 83 C. O. A. 607, 22 L. R. A. (N. S.) 769; *Matzger v. Arcade Building & Realty Co.*, 80 Wash. 401, 141 Pac. 900, L. R. A. 1915A, 288; *Despatch Line v. Bellamy Mfg. Co.*, 12 N. H. 205, 37 Am. Dec. 203; *Gulick v. Grover*, 33 N. J. Law, 463, 97 Am. Dec. 728; *Meyer v. Morgan*, 51 Miss. 21, 24 Am. Rep. 617; *Sherrod v. Duffy*, 160 Mich. 488, 125 N. W. 866, 136 Am. St. Rep. 451.

The only question remaining is: Did the plaintiff secure the property for a less sum than \$27,200? The defendant says that it was through the efforts of its president, Laing, that this result was obtained. From what we have heretofore said it sufficiently appears that the plaintiff's efforts resulted in securing the property for \$25,000. It is true that Laing co-operated with him, but surely it was contemplated that he would have the

assistance of the defendant's officers in his efforts to secure the land for it at the most favorable price.

We find no error in the judgment, and the same is affirmed.

(85 W. Va. 267)

FEATHER v. BAIRD. (No. 3373.)

(Supreme Court of Appeals of West Virginia.  
Dec. 5, 1919. Rehearing Denied March  
24, 1920.)

(Syllabus by the Court.)

1. QUIETING TITLE §10(1)—RIGHT TO CANCEL DEED PURPORTING TO CONVEY MINERALS.

To entitle one to maintain a bill for the cancellation of a deed purporting to convey the minerals in his land, he must show himself to be the owner of such minerals.

2. MINES AND MINERALS §55(3)—DEED CONSTRUED AS A CONVEYANCE AND NOT A LEASE.

A deed, although styled an "indenture," containing appropriate terms of a grant in present of all the grantor's "right, title and interest in and to" all the minerals in a certain tract of land, reciting present payment of a substantial consideration and containing a covenant by the grantee binding himself, his heirs, personal representatives, and assigns, to pay the grantor one cent per ton royalty for all coal mined, "payable as soon as the coal is mined and shipped," is a deed of conveyance and not a mining lease, and vests in the grantee title to the minerals in place.

(Additional Syllabus by Editorial Staff.)

3. MINES AND MINERALS §55(2)—CONDITIONS SUBSEQUENT IN CONVEYANCE OF MINERALS IN PLACE.

Where a deed granted in present all grantor's "rights, title and interest in and to" minerals in a certain tract, and recited payment of a substantial consideration, a covenant by the grantee, for himself, his heirs and assigns, to pay one cent per ton royalty for all coal mined, "payable as soon as the coal is mined and shipped," was not a condition subsequent, but only an additional consideration for the grant, which covenants were bound to pay.

Appeal from the Circuit Court, Preston County.

Suit in equity by Annie S. Feather against Melvin S. Baird for cancellation of a deed. Demurrer to bill sustained and bill dismissed, and plaintiff appeals. Affirmed.

Vester B. Dunn, of Kingwood, F. E. Par-rack, of Tunnelton, and Wm. S. John, of Morgantown, for appellant.

Joe V. Gibson, of Kingwood, and Conley & Johnson, of Charleston, for appellee.

WILLIAMS, J. Claiming to be the owner of the minerals in, as well as the surface of, a tract of 100 acres of land in Preston county,

plaintiff brought this suit in equity to have canceled, as a cloud upon her title, a deed made by C. M. Hill and wife to the defendant Melvin S. Baird on the 2d of January, 1911, purporting to convey all the minerals underlying a number of tracts of land in said county, among which is the George H. Trembly 500-acre tract, of which plaintiff's 100 acres is a part, in so far as the same includes the mineral underlying her 100 acres. A demurrer to the bill was sustained, and, declining to amend, her bill was dismissed on August 21, 1916, and she has appealed.

Numerous grounds of demurrer were assigned, any one of three of which is especially urged in brief as showing good cause for sustaining the demurrer. These three are: (1) The absence of necessary parties; (2) that the bill and exhibits show plaintiff has no title to the mineral in question; and (3) because she had no possession of the minerals. The second of these is the most vital and fundamental and will be first considered, and, if we find the point raised is sustained by the record, then the other grounds may be passed over without consideration.

Both parties apparently claim title under George H. Trembly, plaintiff, mediately, by deed from said Trembly's widow and heirs, dated January 28, 1913, granting to her, with covenants of general warranty, "the following real estate situate in Preston county, W. Va., on the waters of Roaring creek and bounded as follows." Then follows the metes and bounds of the 100 acres. The consideration named is \$1,730, payable in installments differing in amounts, extending over a number of years, evidenced by eleven notes bearing interest from the date of the deed, and the last falling due eleven years from that date, all secured by vendor's lien, and interest on all the notes payable annually. That deed contains also this provision:

"It is understood and agreed between the parties hereto that this deed is subject to a certain indenture made by G. H. Trembly and wife to Chas. M. Hill and Geo. W. L. Marsden, for coal, minerals and mining rights, dated January 11th, 1895, and recorded in the office of the clerk of the county court, in Book No. 75, page 338, and the grantee herein shall not hold the grantors liable for any damages that might arise by reason of litigation, should the said grantee attempt to remove the said indenture from said land."

A copy of the deed, subject to which plaintiff's deed was made as disclosed by the foregoing quotation from her deed, is exhibited with the bill, and shows that on the date referred to, to wit, January 11, 1895, George H. Trembly and Eva C., his wife, executed a deed granting to Chas. M. Hill and Geo. W. L. Marsden all the minerals underlying the whole of the aforesaid 500-acre tract in the following terms:

"The said party of the first part" (referring to said Trembly and wife), "for and in consideration of the premises and the sum of five hundred dollars, the receipt whereof is hereby acknowledged, hath granted, assigned, conveyed, and by these presents doth grant, assign and convey unto the party of the second part" (meaning Hill and Marsden), "his heirs, executors, administrators and assigns, all right, title and interest of, in and to all coal, iron or any other mineral contained in a certain tract or parcel of land, situate in the county of Preston."

The grantor then mentions the source of his title, the quantity of land as 500 acres more or less, and describes its boundary by reference to the lines and corners of adjacent owners, and specifies particularly the mining rights and privileges granted for excavating, and right of ingress and egress over the land for removing the minerals therefrom. Then follows this covenant:

"And the said party of the second part for himself, his heirs, executors, administrators and assigns, doth covenant and agree to pay to said party of the first part the sum of one cent per ton of 2,240 pounds royalty for all coal mined and removed from said tract of land, said royalty payable as soon as the coal is mined and shipped. And for the faithful performance of all and singular the above covenants, understandings and agreements, the said parties hereto do bind themselves, their heirs and assigns, each to the other, his heirs, executors, administrators and assigns."

Said Hill and wife, Marsden and wife, and a number of other parties, joined in executing a deed dated August 28, 1897, granting "all their right, title and interest in and to" all the minerals in a large number of tracts of land in Preston county, including the aforesaid Trembly tract of 500 acres, to the Blue Ridge Oil & Development Company, a West Virginia corporation. This deed, as well as all others herein mentioned, was duly recorded in Preston county shortly after its execution. What disposition, if any, the Blue Ridge Oil & Development Company ever made of its title, is not alleged. It is alleged, however, that C. M. Hill and wife, by deed dated January 2, 1911, attempted to convey the mineral underlying the aforesaid 500 acres to the defendant Melvin S. Baird, and this is the deed which plaintiff avers is the cloud which she prays to have removed.

[1] Counsel for appellant claims that Baird acquired no title to the mineral by the deed last mentioned and that plaintiff has a right to have it canceled as a cloud upon her title to the minerals in her 100 acres. They further contend that the indenture or deed made by George H. Trembly and wife to Hill and Marsden in 1896 was not a grant to them of the minerals in place, but was in effect only a mining lease, which is forfeited for failure to begin mining operations. On the other hand, counsel for defendant insist that appellant

has shown no title to the mineral in herself, and therefore no right to maintain a suit to remove a cloud therefrom. It is unnecessary to cite authority for the fundamental proposition that, if plaintiff is not the owner of the minerals underlying her 100-acre tract of land, she cannot maintain this suit.

[2] Plaintiff's deed was expressly made subject to the previous deed from George H. Trembly and wife to Hill and Marsden, and, if that deed operated to vest in them title to the minerals in place, then there has been no forfeiture or reversion of that title, and consequently no title in plaintiff to the minerals. The deed recites a substantial, if not an adequate, consideration paid and contains appropriate terms of a grant in present of the minerals, and does vest title to all the minerals in place in and under the land in the grantees therein. *Hardman v. Brown*, 77 W. Va. 478, 88 S. E. 1016, and *Morrison v. American Ass'n*, 110 Va. 91, 65 S. E. 469.

[3] The covenant by the grantees to pay the grantor one cent royalty per ton for all coal mined, "payable as soon as the coal is mined and shipped," is not a condition subsequent, but only an additional consideration for the grant, which the covenantors and their assigns are bound to pay as stipulated. This deed effected a severance of the estate in the surface from the estate in the minerals, and divested the grantor of the latter estate; hence no estate in the minerals passed to his heirs, and their deed passed none therein to the plaintiff. There is no condition subsequent and no provision for a forfeiture or reversion of the title, and nothing in the character of the conveyance from which any limitations upon the estate can be implied.

The decree is affirmed.

(85 W. Va. 145)

RARDIN v. RARDIN et al. (No. 3781.)

(Supreme Court of Appeals of West Virginia.  
Nov. 18, 1919. Rehearing Denied  
March 24, 1920.)

(Syllabus by the Court.)

1. *LIS PENDENS* §24(1)—RIGHTS OF PURCHASERS PENDENTE LITE; EFFECT OF DECREE.

According to the common-law doctrine of *lis pendens*, one who purchases from a party to a pending suit a part or the whole of the subject-matter involved in the litigation takes it subject to the final disposition of the cause, and is bound by the decree that may be entered against the party from whom he derived title.

2. *LIS PENDENS* §8—RELATION BACK TO SERVICE OF PROCESS.

Where process in the suit has been issued and regularly served, and a bill has been filed disclosing the nature and purpose of the suit and its relation to the property involved with sufficient certainty to put an intending pur-

chaser upon inquiry as to whether it is actually involved in the suit, the lis pendens dates at least from the filing of the bill.

### 3. LIS PENDENS ⇐2—STATUTORY PROVISIONS.

Statutes requiring recordation of formal notice of the pendency of a suit, before a pendente lite purchaser for valuable consideration without notice can be bound by the decree rendered therein, do not themselves create the law of lis pendens in the particular jurisdictions in which they are operative, but rather may be regarded as imposing limitations upon the common law otherwise existing upon the subject. Actions or proceedings of a class not embraced within the terms of the statute remain subject to the common-law rule regarding lis pendens.

### 4. LIS PENDENS ⇐13—RECORDATION OF FORMAL NOTICE.

Section 13, c. 139, Code (sec. 5105), limiting the scope of the common-law rule of lis pendens in this state, requires recordation of formal notice of the pendency of the suit only where the proceeding is one to subject real estate to the payment of any debt or liability, and where no previous lien shall have been acquired thereon in some one or more of the methods prescribed by law. In the absence of either or both of these requirements, the statute does not apply, and the common-law rule, requiring no formal notice, governs.

### 5. LIS PENDENS ⇐13—APPLICATION OF STATUTE REQUIRING FORMAL NOTICE; "PREVIOUS LIEN."

In a suit to enforce a prior unrecorded judgment against real estate owned by the judgment debtor, but later conveyed by him, such judgment constitutes a "previous lien" against the real estate within the meaning of section 13, c. 139, Code (sec. 5105), thereby rendering inapplicable the provisions of that statute.

### 6. LIS PENDENS ⇐24(2)—RIGHTS OF BONA FIDE PURCHASERS; NECESSITY OF RECORDING JUDGMENT.

A pendente lite purchaser of the property involved in such suit, therefore, is subject to the common-law rule of lis pendens, and bound by the decree entered in the cause, and is not protected by the provisions of section 6, c. 139, Code (sec. 5098), requiring a judgment for money to be recorded before it can be binding as a lien on real estate against a purchaser for value without notice.

*(Additional Syllabus by Editorial Staff.)*

### 7. LIS PENDENS ⇐15—ACTIONS IN WHICH AUTHORIZED.

The doctrine of lis pendens applies only where the legal proceeding relates directly to the thing or property in question, and has no application to actions to recover personal judgments.

Appeal from Circuit Court, Cabell County.

Suit by Belle Rardin against R. B. Rardin and others in which L. A. Brewer by petition became a party defendant. Decree for plaintiff, and defendant L. A. Brewer appeals. Affirmed.

Meek & Renshaw, of Huntington, for appellant.

W. K. Cowden, of Huntington, for appellee.

LYNCH, J. In a suit brought for the purpose, the plaintiff on the first day of November, 1910, obtained a divorce from her husband, Robert B. Rardin, from bed and board, and an allowance of \$2 per week as alimony; and on the 17th day of October, 1912, a divorce a vinculo matrimonii, and also a decree requiring her husband to pay her \$184, that being the aggregate of the weekly payments first decreed but no part of which he had theretofore paid, and the costs of the suit. The last decree she obtained in the manner authorized by section 13, c. 64, Code (sec. 3648). On or about August 29, 1912, R. B. Rardin inherited from his mother, Sarah E. Rardin, an undivided one-fourth interest in a lot situated in the city of Huntington, which interest he conveyed to his brother, Will T. Rardin, October 26, 1912, or nine days after his wife obtained the decree of absolute divorce last referred to. The plaintiff instituted this suit February 27, 1913, process being served the day following, for the purpose of enforcing against the property of her husband the judgment rendered against him in the decree of October 17, 1912; the bill alleging that the conveyance made by him to his brother was fraudulent and without consideration. It is this deed that the decree complained of canceled and held for naught, so far as her debt and demand is concerned.

As originally instituted, the only parties defendant to the suit were R. B. Rardin and W. T. Rardin and the latter's wife. Later, however, the appellant, L. A. Brewer, became a party defendant by petition filed June 13, 1917, in which he set up a purchase by him from W. T. Rardin and others, the heirs at law of Sarah E. Rardin, of all their interests in the Huntington lot owned by the latter at her death, including the undivided one-fourth interest conveyed by R. B. Rardin to his brother, pursuant to which he alleges he paid to his grantors the entire consideration agreed upon between them, and they conveyed to him the lot July 1, 1913, four months after the institution of this suit. In his petition Brewer claimed to be a purchaser for value without notice of the pendency of this suit and of the decrees entered in the divorce proceedings requiring the defendant therein to pay to plaintiff the money therein decreed to her; and that he was not aware, when he purchased the lot and obtained a deed therefor, that plaintiff had any claim against R. B. Rardin's interest therein or right to subject it to sale to satisfy such claim; and further that at that time he had no notice or knowledge of any fraud committed or intended by R. B. Rardin or W. T. Rardin.

din in the execution and procurement of the deed of October 26, 1912; and that at the time of such purchase and the payment of the consideration therefor and the procurement of the deed of July 1, 1913, plaintiff and no one for her had caused the decree in the divorce suit or notice of the pendency of this suit to be docketed or filed in the office of the clerk of the county court of Cabell county, as required by sections 4, 6, and 13, c. 139, Code (secs. 5096, 5098, 5105); that pursuant to such purchase and conveyance he entered upon the lot, took and since has retained possession of it, and made valuable and permanent improvements thereon; wherefore and by reason thereof and all of which he challenges the legal right of the plaintiff to enforce the decree against said lot or any part of it, and asserts that his right thereto is superior and paramount to any right claimed by her against the same. But the decree complained of accorded to plaintiff a judgment of \$294.62 upon the former money decree and the costs of the suit, dismissed the petition of appellant, set aside the deed of October 26, 1912, from R. B. Rardin to W. T. Rardin, and directed the sale of the one-fourth interest to satisfy the judgment in case of default in the payment thereof.

For the purposes of this discussion, the allegations of appellant's petition will be taken as true, for there is no dispute concerning them, thus presenting the single question whether one who purchases real estate involved in a pending suit brought to charge it with the amount of a decree theretofore rendered in a former suit, but not recorded, takes it subject to the final disposition thereof in such pending suit.

[1, 7] The common-law doctrine of *lis pendens* is a rule of ancient origin. According to its terms, one who purchases from a party to a pending suit a part or the whole of the subject-matter involved in the litigation takes it subject to the final disposition of the cause and is bound by the decree that may be entered against the party from whom he derived title. The litigating parties need take no notice of the title so acquired, nor is it necessary to make such purchaser a party. The basis for the rule, which frequently works hardship upon innocent purchasers for value without notice, rests upon considerations of public policy; the ground being that it is necessary to the administration of justice that the decision of the court in a suit relating to specific property should be binding, not only on the litigant parties, but on those who derive title from them *pendente lite*, whether with notice of the suit or not. Otherwise all such suits might be rendered abortive by successive alienations of the property involved therein. At the end of one suit another would have to be commenced, and after that another, if the property should again be aliened; so that it would be almost impossible for a

plaintiff ever to enforce his rights by resort to legal proceedings. *Newman v. Chapman*, 2 Rand. (Va.) 93, 14 Am. Dec. 766; *Wilfong v. Johnson*, 41 W. Va. 283, 23 S. E. 730; *Wingfield v. Neall*, 60 W. Va. 106, 54 S. E. 47, 10 L. R. A. (N. S.) 443, 116 Am. St. Rep. 882, 9 Ann. Cas. 982; 17 R. C. L. 1012. The doctrine of *lis pendens*, however, applies only where, as here, the legal proceeding relates directly to the thing or property in question, and has no application to actions to recover personal judgments. *White v. Perry*, 14 W. Va. 66.

[2] Where process in the suit has been issued and regularly served, and a bill has been filed disclosing the nature and purpose of the suit and its relation to the property involved with sufficient certainty to put an intending purchaser upon inquiry as to whether it is actually involved in the suit, the *lis pendens* dates at least from the filing of the bill. *Bennett, Lis Pendens*, pp. 95-97; 17 R. C. L. p. 1033; 25 Cyc. 1463. There is authority in this state holding that in such a case the *lis pendens* relates back to the date of the service of process, where that antedates the filing of the bill (*Newman v. Chapman*, supra; *Harmon v. Byram's Adm'r*, 11 W. Va. 511; *Stone v. Tyree*, 30 W. Va. 687, 5 S. E. 878; *O'Connor v. O'Connor*, 45 W. Va. 354, 32 S. E. 276) and some intimating that perhaps it should date from the issuance of the writ (*United States Blowpipe Co. v. Spencer*, 46 W. Va. 590, 33 S. E. 342; *Geiser Manufacturing Co. v. Chewning*, 52 W. Va. 523, 534, 44 S. E. 193). It is not necessary at this time to determine the correctness of these earlier authorities on this point. That question is not material here, for the issuance and service of process and filing of the bill all antedate appellant's purchase by approximately four months.

[3] Because of the severity and harshness of the doctrine of *lis pendens*, in many states statutes have been enacted requiring recodation of formal notice of the pendency of the suit before a purchaser for value without notice can be bound. These statutes do not themselves create the law of *lis pendens* in the particular jurisdictions in which they are operative, but rather may be regarded as imposing limitations upon the common-law doctrine otherwise existing upon the subject. Actions or proceedings of a class not embraced within the terms of the statute must remain subject to the common-law rule regarding *lis pendens*. Note, 56 Am. St. Rep. 855; 17 R. C. L. 1016.

[4] The statute limiting the scope of the common-law rule in this state is section 13, c. 139 (sec. 5105), Code:

"The pendency of an action, suit, attachment or proceedings to subject real estate to the payment of any debt or liability, upon which a previous lien shall not have been acquired in some one or more of the methods prescribed

by law, shall not bind or affect a purchaser of such real estate, for a valuable consideration, without notice, unless and until a memorandum, setting forth the title of the cause; the court in which it is pending; the general object of the suit, attachment, or other proceeding, the location and quantity of the land, as near as may be, and the name of the person whose estate therein is intended to be affected by the action, suit, attachment or proceeding, shall be filed with the clerk of the county court of the county in which the land is situated. The clerk of every such county court shall without delay record the said memorandum in the deed book, and index the same in the name of both the parties."

From a consideration of this section it is seen that two specific requirements must be met before a plaintiff in a suit is required to file for recordation the formal notice mentioned above, in order to bind a pendente lite purchaser for value without notice: First, the proceeding must be one "to subject real estate to the payment of any debt or liability"; second, "upon which a previous lien shall not have been acquired in some one or more of the methods prescribed by law." Hence if the proceeding is not one to charge real estate with a debt or liability, or if a previous lien shall have been acquired thereon, the statute does not apply, and the common-law rule of *lis pendens* governs, which requires no such notice.

The effect of section 13 has been discussed in several cases. In *Osborn v. Glasscock*, 39 W. Va. 749, 20 S. E. 702, it was held to have no application where the subject-matter of the suit was personal property, not real estate. In *Wiffong v. Johnson*, 41 W. Va. 283, 23 S. E. 730, and *O'Connor v. O'Connor*, 45 W. Va. 354, 32 S. E. 276, the purpose of the suits was merely to cancel and set aside deeds as fraudulently obtained, and in each case the court held that the pendente lite purchaser was not protected by section 13, since the suits were for the recovery of real estate, and not to subject it to the payment of a debt or liability.

Similarly, in *Harmon v. Byram's Adm'r*, 11 W. Va. 511, and *Shumate's Ex'rs v. Crockett*, 43 W. Va. 491, 27 S. E. 240, the second requirement was missing. In both cases previous liens existed on the real estate involved, in one, a judgment lien, in the other, judgment and deed of trust liens, all recorded. Because of the existence of these previous liens, the statute was held not to apply, and the pendente lite purchaser took subject to the decree.

The only case which we have discovered where the statute was held to apply to the relief of a purchaser pendente lite where no formal *lis pendens* notice had been filed, is *De Camp v. Carnahan*, 26 W. Va. 839, an attachment suit against the property of one Campbell. There both requirements of section 13 were complied with. An attempt was

made, however, to except the case from the statute on the ground that the lien acquired by instituting the attachment suit was of itself such a lien as the statute specified. But in denying that contention the court said (26 W. Va. 843):

"The fallacy of this argument is that the statute declares that the lien excepted from the operation of the statute must be a '*previous lien*' acquired in some one or more of the methods prescribed by law.' It must have been a lien acquired upon the real estate sought to be affected in that suit *prior* to the commencement of the suit. This was certainly not such a lien. This was acquired after the institution of the suit, or at the time of the institution of the suit in which it is sought to be enforced. It follows therefore that, unless such *lis pendens* was recorded as prescribed by the statute, the lien could not bind or affect a purchaser of such real estate." (Italics not ours.)

In the present case the fundamental purpose of the suit was to subject real estate to the payment of a debt or liability. It is only as incidental to the sale of the undivided one-fourth interest conveyed from R. B. Rardin to W. T. Rardin by deed of October 26, 1912, and by the latter to the appellant, that the plaintiff seeks to set aside that instrument. She is not seeking to recover title or possession of such interest, but merely to remove all bars which might hinder or prevent recourse to that interest in the satisfaction of her claim. That the prime object of the suit was the subjection of real estate to a debt or liability is conclusively shown, not only by the bill praying relief but by the final decree ordering the sale of such interest, which sets aside the conveyance aforesaid, "but so far only as the said debt and demand of said plaintiff, Belle Rardin, is concerned."

[5] But it is the second requirement of section 13, c. 139 (sec. 5105), that is absent. The decree for money rendered in the divorce suit on October 17, 1912, though unrecorded, created a lien upon the real estate of R. B. Rardin within the meaning of that section. According to the terms of sections 1 and 5 of that chapter (secs. 5093, 5097), "every judgment for money rendered in this state heretofore or hereafter, against any person, shall be a lien on all real estate of or to which such person shall be possessed or entitled at or after the date of such judgment," subject only to the qualification contained in section 6 (sec. 5098) that it shall not be operative against a purchaser for valuable consideration without notice unless recorded in the county wherein such real estate is. This qualification or exception, however, does not affect the existence of the lien, but merely renders it inoperative under certain conditions. Hence, there being a previous lien upon the real estate at the time of the institution of the suit, the provisions of section 13 requiring filing and recordation of

formal notice of *lis pendens* have no application here. The only difference between the facts of this case and those of *Harmon v. Byram's Adm'r*, *supra*, and *Shumate's Ex'rs v. Crockett*, *supra*, where the statute was held not to apply, is that in the latter cases the judgments were recorded, while here that was not done. That difference, however, is not material. Section 13 does not require that the liens be recorded, but only that they be "previous liens," such as we have shown to exist here.

[8] Since the statute does not apply to the relief of appellant, the case is to be governed by the common-law rules of *lis pendens*, which are that one who purchases from a party to a pending suit a part or the whole of the subject-matter involved in the litigation takes it subject to the final disposition of the cause, and is bound by the decree that may be entered against the party from whom he derived title. Accordingly, appellant is bound by the decree complained of which subjects to sale the undivided one-fourth interest in the lot purchased by him *pendente lite*, unless protected by the provisions of section 6, c. 139, Code, which requires a judgment for money to be recorded before it can be binding as a lien upon real estate against a purchaser for value without notice. If the purchase had been made prior to the institution of this suit, that section clearly would have protected him. But after its institution he was subject to the common-law doctrine of *lis pendens*, which is inexorable, except in so far as modified by section 13 of chapter 139. Though the rule works harshly against purchasers such as appellant, yet it rests with the Legislature, not with this court, to effect a modification of its terms.

Though apparently the conclusion we have announced is not in accord with the principles enunciated in *Newman v. Chapman*, *supra*, 2 Rand. (Va.) 93, 14 Am. Dec. 766, yet, when they are interpreted and understood in view of the facts of that case, the conclusion does not contravene them. The facts of the two cases put them upon an entirely different basis. The fundamental distinguishing feature is that which differentiates a mortgage from a judgment or decree. By the provisions of section 5, c. 74, Code (sec. 3835), every mortgage of real estate is void as to creditors or purchasers for valuable consideration without notice, until and except from the time it is duly admitted to record in the county wherein the property

embraced in the deed may be. Such was the character of the instrument with which the decision of the *Newman Case* dealt, and it was not admitted to record at the time the sale involved became effective by the execution and recordation of the deed and full compliance of the purchaser with the terms of the sale to him. There was then no lien binding on the land purchased by him that could or did affect the title acquired by him. As to him the mortgage lacked an element essential to its validity. It was not merely voidable as to him, it was void, and, though valid as between the parties immediately concerned in its execution, recordation was an essential prerequisite to affect him.

No such provision obtains respecting the lien of the decree rendered in favor of the plaintiff in the divorce suit, and which she seeks to enforce in this suit. If, as we have said, Brewer had bought the land at any time when no suit was pending to subject it to sale to satisfy the lien and for that purpose to set aside the two deeds, he would have been protected because of the lack of recordation required by section 6, c. 139, Code. Sections 6 and 13 are to be construed as expressive of the legislative intent touching the same class of persons or things, liens, and purchasers for value without notice. In this respect the sections are *in pari materia*. They refer to the same subject, and their plain intent is the creation of a system respecting the enforceability of liens against lands purchased when no suit is pending to enforce them, as in section 6, and when there is such suit, as in section 13; and, if it be true, as argued by counsel, that, unless recorded, the decree for the satisfaction of which plaintiff brought this suit does not bind the land owned by the husband on the date of the decree, then the clause of section 13, "upon which a previous lien shall not have been acquired in some one or more of the methods prescribed by law," is a nullity, and therefore without force or effect. The decree became such a lien before the sale and conveyance to his brother, and it then bound and still continues to bind it because of the pendency of this suit.

Since the facts set up in the petition are shown not to constitute a defense, it becomes unnecessary to discuss the right of appellant to intervene in the suit as he did. The decree of the circuit court, therefore, will be affirmed.

(85 W. Va. 451)

**QUINN v. FLESHER et al. (No. 3932.)**(Supreme Court of Appeals of West Virginia.  
Feb. 8, 1920. Rehearing Denied March  
24, 1920.)*(Syllabus by the Court.)*

1. **EVIDENCE**  $\S$ 380—**RADIOGRAPH NOT ADMISSIBLE UNTIL SHOWN TO HAVE BEEN TAKEN SO AS TO REPRESENT INJURIES CORRECTLY.**

Before a radiograph, purporting to show the nature and extent of an injury suffered by a party to a suit, can be received properly in evidence, it must appear that it was so taken as to represent correctly the injured member. This may be shown by the statement of the expert taking the radiograph that he operated the machine so as to produce a correct result, or it may sufficiently appear from other circumstances, such as that treatment was administered for the relief of the injury disclosed by the X-ray with favorable results.

2. **EVIDENCE**  $\S$ 178(14)—**EXPERTS MAY TESTIFY AS TO INJURIES SHOWN BY RADIOGRAPH WHERE IT HAS BEEN LOST AND INJURED CONDITION HAS CHANGED.**

Experts who have examined a radiograph which it is shown correctly represented an injured condition being inquired about in the trial of a cause may be permitted to testify as to what the radiograph showed the injured condition to be, without its introduction in evidence, where it appears that the same has been lost, and the original injured condition has been changed by medical and surgical treatment as well as the healing processes of nature during the intervening time.

3. **DAMAGES**  $\S$ 206(1)—**DENIAL OF APPLICATION FOR LEAVE TO TAKE RADIOGRAPH OF INJURY DURING TRIAL NOT AN ABUSE OF DISCRETION.**

Where, after the trial of an action to recover damages for injuries sustained from a broken bone has been entered upon, the defendant requests that a radiograph be made of the injured member, and the plaintiff is willing that it may be done, it is not error for the court to refuse such request where no reason is given for not having made the same before the trial, and it does not appear how long the trial will be delayed by granting such request.

4. **FERRIES**  $\S$ 32—**PROPRIETOR'S DUTY AS TO SAFE ACCOMMODATIONS FOR PASSENGERS STATED.**

It is the duty of the proprietor of a ferry to provide adequate accommodations where it usually takes on and discharges passengers and to keep the same in a reasonably safe condition.

5. **FERRIES**  $\S$ 32—**PROPRIETOR LIABLE FOR INJURIES FROM DEFECT IN FLOAT USED IN REACHING FERRYBOAT, THOUGH OUTSIDE GANGWAY.**

The proprietor of a ferry is liable in damages to one intending to take passage on such ferry who is injured by falling into a hole in the floor of a barge or float provided by the operator of the ferry by means of which in-

tending passengers reach his ferryboat from the bank of a stream, where it appears that such hole was at a point over which passengers would reasonably be expected to travel in reaching one of the points upon the float at which the boat used for the conveyance of passengers across the stream frequently took on and discharged passengers, and where it was actually taking on passengers at the time of the injury to such intending passenger.

Error to Circuit Court, Cabell County.

Action by Cora Quinn against B. T. Flesher and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Holt, Duncan & Holt, of Huntington, for plaintiffs in error.

W. W. Smith and Williams, Scott & Lovett, all of Huntington, for defendant in error.

**RITZ, J.** The defendants are the owners and operators of a ferry across the Ohio river between the city of Huntington, W. Va., and the town of Chesapeake, in the state of Ohio. The plaintiff is now, and was at the time of the occurrence giving rise to this litigation, a resident of the town of Chesapeake. She, however, worked in the city of Huntington, and in going to and returning from her work crossed upon the ferry of the defendants each morning and evening, and had been doing so for about 7 years before the accident which is the occasion of this suit. During the summer months and in the daytime during the winter months defendants used a steam ferryboat in conveying passengers and freight across the river, but after dark during the winter months passengers were conveyed across the river in a rowboat or skiff. On the West Virginia side of the river the defendants provided a barge or float at which the boat landed and took on and discharged passengers. This barge is some 40 to 50 feet in length, and access is had to it from the land side over an apron, one end of which rests upon the bank, and the other upon the side of the barge. The end of the apron resting upon the bank is not fastened so that it moves up and down the bank as the barge is raised or lowered with the change in the volume of water in the river. This apron is supported by iron rods extending from the end thereof farthest from the barge to the top of posts erected on the barge at either side of the apron, and these posts are in turn supported by rods extending from their tops to a fastening in the floor of the barge near the side farthest from the apron. Between these posts what is called a gangway, about 10 or 12 feet in width, extends across the barge so that vehicles or passengers intending to cross the river go upon the barge by way of the apron and across the same to the ferryboat moored upon the



opposite side. This gangway is floored over and all of that part of the barge on the lower side of the gangway is likewise floored at the same level as the gangway, and there is erected on this part a small waiting room for the use of passengers. That part of the barge above the gangway for a little space next thereto is likewise floored over on the same level as the gangway, but there is a space at the upper end of the barge which is open. The edge of the barge all the way round except at each end of the gangway is raised a few inches above the level of the floor by a piece of timber attached thereto. At either end of the gangway the timber is cut away to the level of the barge floor to enable vehicles to enter or leave the ferryboat by way of the gangway across the barge without encountering any obstruction. On either side of this gangway at the end from which the ferryboat is entered is a post used for the purpose of making the ferryboat stationary when discharging or receiving freight or passengers. There is a similar post on the same side of the barge about 10 or 12 feet above the upper side of the gangway and just at the upper end of the floored space. As before stated, plaintiff crossed the river on this ferry twice a day practically every day, using the steam ferryboat for the purpose, except on Saturday evenings during the winter months, when her work kept her until after the steam ferryboat ceased running, making it necessary for her to cross the ferry on these occasions by means of the skiff or rowboat.

On Saturday, March 22, 1919, after plaintiff was relieved from her work, she, accompanied by her father, went to the ferry of the defendants for the purpose of crossing the river to her home. She says, and in this she is corroborated by her father and other witnesses, that when she approached the barge coming down the river bank she noticed the skiff taking on passengers. She called to give notice to the man operating the skiff of her approach, and accelerated her pace so as to reach the skiff before it started across the river. When she got upon the barge she noticed that the skiff was not moored at the opposite end of the gangway, but was taking on passengers from the side of the barge above the gangway. In order to reach it she stepped under the iron rod extending from the post which is erected for the support of the apron above referred to, and just as she changed her course and made the first step her right leg went into a hole in the floor which it appears was about 4 inches wide and 10 inches long, and was caused by a piece being broken out of one of the boards constituting the floor. It appears that the iron rod extending from the top of the post above referred to to the floor was higher than the plaintiff's head at the point where the hole is in the floor. Plain-

tiff says that the floored space on the barge above the gangway upon which she was entering when she fell into the hole was habitually used by those waiting to cross the river, and that the skiff used at night during the winter months was frequently made fast to this upper end of the barge, and there discharged and took on passengers, and in this she is corroborated by many witnesses, and little, if any, effort is made to contradict this evidence. It is not contended that the skiff was not taking on passengers from the barge at a point above the gangway at the time plaintiff was injured while attempting to reach it, but it is shown that when the skiff reached the barge on this trip it landed at the gangway, and the operator of the skiff tried to hold it there by catching the post with his hand, but his hold was broken because of the hurry of the passengers in getting in, and because of an eddy at this point, when the skiff was again brought in contact with the barge, it was at a point above the gangway, and here the balance of the load was taken on, and this was the point at which it was stationed at the time the plaintiff entered upon the barge.

The plaintiff, being unable to extricate her leg from the hole in the floor by reason of the fact that it was wedged therein very tight, was assisted by her father and another man who was also desiring to cross the river. They then went into the little waiting room to wait for the next trip; the skiff having become fully loaded so that there was not room for them on that trip. They crossed the river on the next trip, and plaintiff was assisted from the skiff to the top of the bank by her father and another man, one of them supporting her on either side, from which point she was taken to her home in an automobile. She says that when she fell into the hole her leg became numb and of little use to her, but after reaching home the pain became more acute, and was relieved to some extent by hot applications. The next day she went to Sunday school in the morning and to church in the evening, but she says she was unable to walk on either occasion, being supported by her father and uncle, one on each side of her. The pain becoming more intense on Monday morning she sent for a doctor, who, after making an examination, advised that the hip had been injured, and directed her to go to bed and stay there until the condition was improved. This she did, but this doctor, finding no improvement in her condition on the second day after he was first called, advised her to go over to Huntington and have an X-ray examination made with a view of determining the nature and extent of the injury. She was taken in an automobile to the hospital of Dr. J. A. Guthrie, who made an examination of the injured hip and found some kind of disability to exist. He took

her from his hospital to the office of Dr. Pepper, an X-ray expert, where a plate was made of the injured member after which she was sent to her home. When the X-ray plate was developed Drs. Guthrie and Pepper examined it and determined from the information received from the plate and from the examination made of the injured leg that there was a fracture of the hip bone. Dr. Guthrie thereupon advised Dr. Martindall, who lived near the plaintiff, of the conclusions reached by Dr. Pepper and himself, and directed the treatment to be administered. This treatment required plaintiff to remain in bed on her back for five weeks with a ten-pound weight suspended from her right leg. At the expiration of this time it was found that she had made a reasonably good recovery, although the right leg is half an inch too short and the joint somewhat stiff, as a result of which she limps to some extent in walking. She thereupon brought this suit to recover damages upon the theory that defendants were negligent in permitting the hole into which she had fallen to remain in the floor of the barge. A trial resulted in a verdict and judgment in her favor for \$4,750, to review which this writ of error is prosecuted.

[1] The first reason assigned for reversing the judgment and setting aside the verdict is that the court below erred in permitting Drs. Pepper and Guthrie to testify as to what the X-ray picture disclosed to them; the picture itself having been lost. It appears that after the picture was taken by Dr. Pepper and examined by him and Dr. Guthrie it was mislaid, and at the time of the trial, although thorough search was made for it, it could not be found. Notwithstanding this loss of the picture, these doctors were permitted to testify that it disclosed a fractured hip bone. The defendants insist that this was error: First, because it was not shown that the picture was so taken as to represent correctly the object sought to be photographed; and, second, because the picture itself being secondary evidence and it being lost, no testimony could be offered based upon a view of it. It is quite true that before a radiograph can be used as evidence it must appear that it was so taken as to represent correctly the object reproduced. Of course, it is not meant by this that some one must testify that it is in fact a correct representation. Manifestly this would be impossible for the reason that the object thus photographed is not visible except with the aid of the X-ray machine. What is meant is that it must appear that the machine was so placed and operated as to reproduce correctly the object brought within the radius of its activity. Nor need this necessarily appear by a direct statement of the operator to this effect, although it may be, and ordinarily is, shown in that way. It may, how-

ever, as well be shown from a detail of the circumstances. In this case Dr. Pepper, who took the radiograph, is shown to be an expert with large experience in this work. The picture was taken with a view of determining the nature and extent of the plaintiff's injury with a view to treating the same, and treatment was administered for the relief of the injury which the X-ray disclosed, with favorable results. This may not prove absolutely that the plaintiff was injured as disclosed by the radiograph, but the fact that the injury sustained by her responded to the treatment ordinarily administered for the relief of an injury such as that shown by the X-ray is, to say the least, very strong evidence that her injury was actually of that character, and sufficiently authenticates the picture to justify its admission in evidence.

[2] Could the doctors who examined this radiograph testify as to what it indicated? It is contended that the bones themselves are the primary evidence, that the picture, if in existence, is secondary evidence, and that the statements of the doctors in regard to it are tertiary evidence or knowledge derived only from a view of secondary evidence. The object sought to be reproduced was the condition of the bone in plaintiff's hip. This condition no longer exists, and of course it cannot be exhibited. It was shown by the radiograph, which is likewise lost, and the question is: Was it proper for these two doctors to testify as to what the picture indicated. It seems to be very generally held that, where the original of a document is lost, a copy made from a copy may be introduced in evidence upon a showing of the correctness of the first copy and the loss thereof. 17 Cyc. 517. It is the best evidence obtainable. In this case, if we treat the radiograph as but a copy of the then existing condition, we have the original, which was the condition of the bone at the time, lost by a change in the conditions due to lapse of time and the treatment administered, the only reproduction of that condition is lost, and the best evidence obtainable as to what condition actually existed at that time is the impression made upon the minds of the two doctors from their examination of plaintiff's hip and the radiograph thereof. It was not error to admit this evidence.

[3] After the trial of the case had been entered upon the defendants requested the court to permit an expert of their selection to take an X-ray picture of plaintiff's hip joint, in the presence of plaintiff's expert, or to permit them to have such radiograph taken by plaintiff's expert in the presence of an expert to be selected by them. The plaintiff at first declined to permit this to be done, but subsequently, and before the taking of evidence was concluded, she expressed her willingness to comply with the

request of the defendants. The court, however, refused to suspend the trial and declined the request. This is assigned as error. In the case of *Perkins v. Traction Co.*, 81 W. Va. 781, 95 S. E. 797, we reviewed some of the authorities upon the question of the defendant's right to have a physical examination of the plaintiff in a personal injury case, and there concluded that, even were the right conceded, it may be granted or withheld by the trial court in the exercise of a sound judicial discretion. The defendants here do not give any reason for not having made this request before the trial, nor does it appear how long it would have been necessary to suspend the proceedings to permit the picture to be taken. In the absence of a showing that would indicate that the granting of the request would probably result in obtaining evidence of some value and of a satisfactory reason for not having seasonably made the request, as well as a showing that the trial would not be unduly delayed, the court did not abuse its discretion in refusing this request.

[4, 5] The remaining grounds urged for reversal are all comprehended within the one assignment that the evidence does not justify the verdict. The defendants contend that, when the plaintiff went off of the gangway as marked by the posts and the iron rods above referred to, and by the cutting away at each end of the gangway of the timber which projected above the floor of the barge, they were under no duty to provide for her safety. It cannot be doubted that a passenger has a right to assume that the platform over which the carrier invites him to pass is reasonably safe for the purpose. The passenger is under no obligation to look for defects before proceeding to use the means provided by the carrier for his convenience. This duty of the carrier extends to other parts of the platform than that lying directly between the entrance thereto and the place intended for passengers to board the vehicle. 3 *Hutchinson on Carriers*, § 1207; *Barker v. Ohio River R. Co.*, 51 W. Va. 423, 41 S. E. 148, 90 Am. St. Rep. 808; 4 R. O. L. title "Carriers," § 641. The evidence in this case abundantly shows that persons waiting to cross the ferry habitually used the part of the barge where plaintiff was hurt; it is further shown that the defendants frequently, when using the skiff, discharged and received passengers at this point, and this was being done at the very time at which plaintiff was injured. This was a direct invitation to her to use this part of the barge to reach the boat which was then taking on passengers, and she had a right to believe that the same was in reasonably safe condition. The authorities cited and relied upon by counsel for defendants are without application to the facts here shown. They

simply hold that, where there are two ways or methods by which a servant may perform his duty to the master, one of which he knows to be safe and the other dangerous, and he selects the latter, he will be guilty of contributory negligence. It does not appear that the plaintiff in this case had any knowledge that the way she was going was unsafe. The way used by her was the one most convenient to reach the point at which the defendants' boat was receiving passengers, and, this being so, she had a right to believe that the defendants had performed their duty, and that it was in a reasonably safe condition.

There is no error in the judgment of the circuit court, and the same is affirmed.

Affirmed.

(85 W. Va. 326)

STATE v. MILLER. (No. 3549.)

(Supreme Court of Appeals of West Virginia.  
Dec. 5, 1919. Rehearing Denied  
March 24, 1920.)

(Syllabus by the Court.)

1. ASSAULT AND BATTERY §67—RIGHT OF SELF-DEFENSE TO AGGRESSOR.

One assaulted by another is not bound to retreat, but if he is the aggressor, or unnecessarily pursues his assailant after the latter has declined the combat and inflicts upon him bodily injury, he is guilty of assault and battery. The rules of self-defense are the same in their application to felony, misdemeanor and in civil cases.

2. CRIMINAL LAW §1169(1), 1170(1), 1172(1), 1173(1)—HARMLESS ERROR.

Error in the admission or rejection of evidence, or in the giving or refusing of instructions to the jury, will not be good ground for reversal when it appears upon the whole case as presented and the admissions of the defendant the verdict ought to be confirmed.

3. CRIMINAL LAW §1213—CRUEL AND UNUSUAL PUNISHMENT.

A fine of two hundred dollars and imprisonment for sixty days imposed by the court on a verdict of guilty of assault and battery is not excessive or cruel and unusual punishment inhibited by the Constitution.

Error from Circuit Court, Monongalia County.

Otis W. Miller was convicted of assault and battery, and he brings error. Affirmed.

Charles Powell, of Fairmont, and C. Wm. Cramer and L. V. Keck, both of Morgantown, for plaintiff in error.

E. T. England, Atty. Gen., Charles Ritchie, Asst. Atty. Gen., and Stanley R. Cox, Pros. Atty., of Morgantown, for the State.

**MILLER, P.** Upon an indictment in two counts, the first charging defendant with having feloniously and maliciously stabbed, cut and wounded one Samuel E. Snider, with intent to maim, disfigure, disable and kill him; the second with unlawfully and feloniously beating, wounding and ill-treating him with intent and malice aforethought to kill and murder him, the jury found him guilty of assault and battery upon said Snider, as charged in the indictment, the lowest offense of which he could have been convicted thereunder; and the judgment now under review was that he pay to the State a fine of two hundred dollars and be also confined in the jail of the county for the period of sixty days.

Numerous points of error relating to the admission of evidence and to the giving and refusing of instructions, are urged and relied on to reverse the judgment, and a number of them are well founded; but on the defendant's own testimony the jury could not rightfully have acquitted him or rendered a verdict for a lesser offense. He says he met Snider in the public road, Snider on a wagon loaded with coal going in one direction, he afoot and going in the opposite direction. He contradicts Snider as to which of the two cast the first stone. He says Snider laughed at him and first threw a piece of coal about the size of his fist, hitting him on the breast. Snider's evidence was that when the two met on the road, Miller with an oath said: "I will bring you off there;" that defendant had a package under his arm which he threw down, and gathered up a stone and took after him, and when he got close enough threw the stone and struck him under his right shoulder blade; that he never stopped his horses, but went right on, doing nothing until he saw he would have to defend himself, when he got upon his feet on the load and picked up a lump of coal weighing probably four or five pounds, and that when Miller got up to where he might throw again, he drew back as if he would throw the coal, and when he dropped the coal Miller took after him again and followed him some twelve hundred yards, continued throwing stones, throwing from twelve to twenty of them, two or three of which would have hit him also, if he had not dodged. Miller admits having pursued Snider in this way, but contends it was not over five hundred feet. He admits he tried to hit Snider with these stones. Miller was thirty-eight years of age and weighed one hundred and ninety pounds; Snider was sixty-one years of age and weighed about one hundred and forty-five pounds.

[1] The assault here complained of was committed in October, 1916. The record of an indictment against defendant for a previous assault upon Snider in April of the same

year, and his confession of guilt thereon, was admitted in evidence over his objection. We think the evidence showing such a recent assault was properly admitted. But if we exclude that record, still the evidence of defendant shows beyond question that he was also guilty of this more recent assault and battery upon Snider. Admitting that Snider may have first hit Miller with a piece of coal, he did not stop but went right on, all the time going away from Miller. Miller was in no danger, and it was wholly unnecessary for him, as a means of self-defense, to have pursued Snider with rocks, as he admits he did. He was not bound to retreat, but he could not lawfully pursue Snider. When he did so, he undoubtedly became the assailant, and liable for the consequences of his acts and conduct; and of course if he threw the first stone, he was the assailant from the very inception of the affray. Defendant can not justify his assault on the basis of self-defense. The rules of self-defense are the same in their application to felony, misdemeanor and in civil cases. *Teel v. Coal & Coke Railway Co.*, 66 W. Va. 315, 66 S. E. 470, point 4 of the syllabus. The law of self-defense is so well understood and has been so many times laid down by prior decisions as to need no additional affirmation in this case.

[2] The rule of law applicable to the facts is that an appellate court will not reverse the action of the trial court because of the admission or rejection of evidence or because of erroneous instructions, where it appears to the court upon the whole case as presented and the admissions of the defendant the verdict ought to be confirmed. *Tucker v. The Colonial Fire Insurance Co.*, 58 W. Va. 30, 43, 51 S. E. 86, and cases cited; *State v. Hull*, 45 W. Va. 767, 32 S. E. 240; *White v. L. Hoster Brewing Co.*, 51 W. Va. 259, 41 S. E. 180; 1 Enc. Dig. Va. & W. Va. Rep. 592, and cases there digested. In such a case what good would come of a reversal for error when on a new trial the lowest possible verdict which could be rightly found on the defendant's own admissions would be the one found by the jury on the first trial? We can not and ought not assume that on another trial the jury would go counter to defendant's admissions, and acquit him or guilt, when he confesses the facts establishing his guilt beyond any peradventure.

[3] The point most strenuously urged is that the fine imposed is excessive, and that the judgment of imprisonment amounts to cruel and unusual punishment, prohibited by the Constitution. Assault and battery is a common-law offense, of which our courts have jurisdiction, and no statute limits the punishment. The amount of the fine and the term of imprisonment are discretionary with the court, and limited only by the Constitution, that it shall not be excessive,

nor cruel and unusual. *State v. McKain*, 56 W. Va. 128, 49 S. E. 20; *Ex parte Garrison*, 36 W. Va. 686, 15 S. E. 417; *Ex parte Wait W. Richards*, 53 W. Va. 555, 556, 45 S. E. 341.

The fine of two hundred dollars and imprisonment for sixty days no doubt seems harsh to the defendant, considering the result of the assault on Snider, but he pursued Snider viciously, and says he tried to hit him with rocks. If in doing so he had killed Snider, as was possible, his crime would have been murder. By his own confession he had been guilty of a recent assault on Snider, and had paid a small fine then assessed against him. This was a second offense, and the purpose of the court in assessing the larger fine and also imprisonment was to make the judgment effective to prevent further assaults of the same kind. Prevention of crime is the purpose of all punishment. The judgment does not fall within any of the cruel and unusual punishments inveighed against by the Constitution. *State v. Woodward*, 68 W. Va. 66, 69 S. E. 385, 30 L. R. A. (N. S.) 1004, and cases cited.

For these reasons the judgment will be affirmed.

(179 N. C. 280)

#### FIELDS v. BRINSON. (No. 183.)

(Supreme Court of North Carolina. March 3, 1920.)

#### SEDUCTION — ACTION MAY BE MAINTAINED THOUGH INTERCOURSE ACCOMPLISHED BY FORCE.

Issue whether defendant unlawfully and forcibly assaulted and carnally knew and abused plaintiff and issue whether defendant wrongfully seduced and carnally knew her were both embraced in allegation "did seduce, debauch, and violently force the plaintiff, and had sexual intercourse with her against her will," and there was no error in submitting both issues.

Appeal from Superior Court, Craven County; Kerr, Judge.

Action by N. B. Fields, as father, and also as next friend, of his daughter, Carrie Fields, against Walter T. Brinson. Judgment for plaintiff, and defendant appeals. No error.

D. L. Ward, E. M. Green, and Gulon & Gulon, all of Newbern, for appellant.

Moore & Dunn and A. D. Ward, all of Newbern, for appellee.

CLARK, C. J. The complaint avers that the defendant "did seduce, debauch, and violently force the plaintiff, and had sexual intercourse with her against her will," alleging injury, etc. The defendant tendered as the sole issue:

"Did the defendant assault the plaintiff, Carrie Fields, and have intercourse with her forcibly and against her will, as alleged in the complaint?"

The judge submitted two issues:

"(1) Did the defendant unlawfully and forcibly assault and carnally know and abuse the plaintiff as alleged?"

"(2) Did the defendant wrongfully seduce and carnally know the plaintiff as alleged?"

—besides the third issue as to damages. The defendant excepted to the submission of the second issue. The jury responded "No" to the first issue and "Yes" to the second, and assessed damages.

If this had been a criminal action, the issue requested by the defendant would have made him liable to capital punishment if found in the affirmative, though the jury could have convicted of the lesser offense, as in this case.

There was no error in submitting the two issues, as they are both embraced in the allegation in the complaint, and the defendant cannot complain that under the issues submitted he was acquitted of civil liability for the capital charge.

Even if the charge and proof had been of the greater offense and only the first issue had been submitted, the verdict as rendered would have been legal.

The whole matter has been so very fully and thoroughly discussed by Allen, J., in *Tillotson v. Currin*, 176 N. C. 479, 97 S. E. 395, as to every phase of the action, that he has left nothing to be added. After quoting from 35 Cyc. 1296, to the above effect, and numerous cases there cited, Judge Allen said:

"The Court says in the case from California [*Marshall v. Taylor*, 98 Cal. 55, 32 Pac. 867, 35 Am. St. Rep. 144]: 'Where a parent sued for the seduction of his daughter and consequent loss of services, and it appears that the intercourse was accomplished by force, such a showing will not defeat the action, but will aggravate the injury.'

"In the case from Massachusetts [*Kennedy v. Shea*, 110 Mass. 147, 14 Am. Rep. 534]: 'As the gist of the action is the debauching of the daughter, and the consequent supposed or actual loss of her services, it is immaterial to the plaintiff's claim under what special circumstances the injury was wrought, or whether it was accompanied with force and violence or not. The action will lie although trespass vi et armis might have been sustained. It would be no defense that the crime was rape and not seduction.'

"And in the Illinois case [*Leucker v. Stelleu*, 89 Ill. 545, 2 A. C. Am. Rep. 104, it is said]: 'We do not think there is any legal foundation for the claim that defendant could be held to less responsibility for forcible wrong than for seduction without force. The outrage is quite as great and the mischief quite as offensive.'

"We are therefore of opinion, on reason and authority, that the evidence of force would not justify the denial of the right to maintain the

action, and that the motion for judgment of nonsuit was properly overruled."

Judge Allen also cites to support the above *Velthouse v. Alderink*, 153 Mich. 217, 117 N. W. 76, 18 L. R. A. (N. S.) 587, 15 Ann. Cas. 1111; *Furman v. Applegate*, 23 N. J. Law, 28; *White v. Murtland*, 71 Ill. 250, 22 Am. Rep. 100; *Damon v. Moore*, 5 Lans. (N. Y.) 454; *Wooten v. Geisser*, 9 La. Ann. 523. To the same general principle are *State v. Cody*, 60 N. C. 197; *State v. Halford*, 104 N. C. 877, 10 S. E. 524.

The other exceptions in this appeal need no discussion. Indeed, the case was almost entirely one of fact, and as to the law it is completely covered by the very able opinion in *Tillotson v. Currin*, supra. The defendant cites no authority whatever in his brief.

No error.

(179 N. C. 285)

### STOCKS v. STOCKS. (No. 186.)

(Supreme Court of North Carolina. March 3, 1920.)

1. JUDGMENT  $\S$ 138(3), 497(2) — JUDGMENT RENDERED WITHOUT SERVICE MAY BE SET ASIDE ON MOTION; IF RECORD SHOWS WANT OF SERVICE, JUDGMENT MAY BE COLLATERALLY ATTACKED.

Where it appears on the record that summons has been served, when in fact it has not been, the remedy is by motion in the cause to set aside the judgment, and not by an independent civil action; but when it appears that it has not been served, the judgment is open to collateral attack.

2. JUDGMENT  $\S$ 443(1) — MAY BE ATTACKED IN EQUITY IN INDEPENDENT ACTION FOR FRAUD.

The equity of a mother to have set aside a default judgment against her procured by her son who fraudulently assured her that the action had been withdrawn and that she need pay no attention to it may be set up in an independent action.

3. QUIETING TITLE  $\S$ 7(4) — FRAUDULENTLY PROCURED DEFAULT JUDGMENT MAY BE SET ASIDE IN INDEPENDENT ACTION AS CLOUD ON TITLE.

Where judgment fraudulently procured by son against his mother was a cloud on her title to her dower, her equity or right to have it removed and the true right or title determined and adjudicated could be asserted in a separate and independent action, in view of Revisal 1905,  $\S$  1589.

4. JUDGMENT  $\S$ 441, 470 — IF REGULAR ON ITS FACE, CANNOT BE ATTACKED COLLATERALLY, BUT ONLY BY INDEPENDENT ACTION.

A decree of a court having jurisdiction in a proceeding in all respects regular on its face as to parties cannot be attacked collaterally, but it may be successfully impeached for fraud in an independent action brought for the purpose, when sufficient allegations of fraud are made,

and issues framed upon such allegations are submitted to a jury, and the fraud is established by the verdict.

5. QUIETING TITLE  $\S$ 19 — STATUTES TO BE LIBERALLY CONSTRUED.

Revisal 1905,  $\S$  1589, as to actions to determine adverse claims, being remedial in their nature, should have a liberal construction to effect the legislative intent.

6. DOWER  $\S$ 112 — JUDGMENT IN DOWER ACTION CONCLUSIVE UPON SON CLAIMING DECEASED FATHER HAD ONLY LIFE ESTATE.

Judgment in a widow's suit to have dower assigned her in certain lands which she claimed her deceased husband owned in fee estopped her son by such husband to question her title to the dower land assigned on the ground that his father had only a life estate in the lands, and that on the father's death the land vested absolutely in the son, who was the only child.

Appeal from Superior Court, Pitt County; Connor, Judge.

Action by Ada Stocks against Joseph Lee Stocks. From order overruling demurrer to the complaint, defendant appeals. Affirmed.

This action was brought to set aside a judgment entered at August term, 1914, of the superior court of Pitt county, in a case entitled "*Joseph Lee Stocks v. Ada Stocks*," which judgment was taken by default, and purports to vacate and set aside a certain proceeding in which dower was allotted to Ada Stocks, the plaintiff therein.

On the 21st day of January, 1887, one Jesse A. Stocks executed to Redding S. Stocks, his son, a deed for 25 acres of land in Pitt county, N. C.; the portion of said deed necessary to present the question of construction raised in this case being as follows:

"To have and to hold the same to him, the said Redding S. Stocks, during his natural life, and then to his bodily heirs, if there be any at his decease, and, if there be none, then to the lawful heirs of the said Jesse A. Stocks. I, the said Jesse A. Stocks, do by these presents agree to warrant and defend the right and title of the aforesaid land to the said Redding S. Stocks and his heirs forever, against the lawful claims of any person whatsoever."

Redding S. Stocks died and left him surviving one child, Jos. L. Stocks, the defendant in this action, and a widow, Ada Stocks, the plaintiff herein.

Shortly after the death of Redding S. Stocks to wit, on the 4th day of July, 1907, his widow, Ada Stocks, commenced a proceeding before the clerk of the superior court of Pitt county (which is referred to in the complaint filed in this cause) in which she asked that dower be assigned to her in the lands conveyed by Jesse A. Stocks to her husband Redding S. Stocks, and covered by the deed above referred to; and in that proceeding it appears that the defendant, Joseph

L. Stocks, who was at that time a minor, was regularly made a party defendant.

It further appears from the complaint that Jos. L. Stocks was represented in the dower proceeding by a guardian ad litem, and that the guardian ad litem filed an answer on behalf of the said Jos. L. Stocks, his ward, in which he admitted that Ada Stocks, widow of Redding S. Stocks, was entitled to dower in the 25 acres of land conveyed to Redding S. Stocks in the deed referred to and made a part of the complaint in this cause.

It also appears that dower was assigned to Ada Stocks, the widow, in said proceedings by commissioners appointed for that purpose, that a report was filed by them allotting the dower, which was confirmed, and no exception was taken to the report by Jos. L. Stocks through his guardian ad litem, or in any other way, and that the judgment therein still is unreversed.

Plaintiff alleges in her complaint, among other things, that after dower had been allotted to plaintiff as above set out, and after plaintiff had taken possession and the use and benefit of it, the defendant, Joseph L. Stocks, on the 7th day of August, 1914, brought an action in the superior court of Pitt county for the unlawful and wicked purpose of defrauding plaintiff of her right of dower and her dower in the land above described; that the summons purports to be returnable to the 24th day of August, 1914, but that no summons was ever served upon plaintiff in this case and the defendant in that case; that, notwithstanding the fact the summons was never served upon the plaintiff in this action, who was the defendant in that action, there was a judgment entered at August term of court purporting to deprive plaintiff of her dower in the tract of land herein described and adjudging Joseph Lee Stocks to be the owner in fee of the same and entitled to the immediate possession of the same, which judgment was recorded in the clerk's office of Pitt county.

The plaintiff further alleges that she was never served with process of any kind in the second suit, which was just described, and that she was informed that some sort of proceeding had been brought against her, when she spoke to Joseph Lee Stocks about it, and he falsely, and with intent to deceive and defraud her, stated to her that there was nothing in it, that she could not be hurt, as there was a proceeding commenced, but it had been withdrawn, but nothing had been done or nothing would be done to prejudice her right, and finally that "she need not bother herself any more about it"; that, as Joseph Lee Stocks was her son, she relied upon what he had said, as it was natural for her to do, and did not therefore give it any other thought or concern, until a few months ago, when her son, Joseph Lee Stocks, took unlawful possession of the dower land against

her will, and asserted title to it under what purports to be a judgment in the proceeding, which he told her did not exist, and had actually caused it to be adjudged that her husband, Redding S. Stocks, had only a life estate in the tract of land from which her dower was set off, when in fact he had a fee simple; that in the alleged proceeding under which the defendant claimed his right to the possession of the land it was not alleged that the former proceeding for dower was fraudulent, and no ground, either legal or equitable, was stated for setting aside the judgment therein.

The plaintiff prayed that the pretended judgment in Joseph Lee Stocks v. Ada Stocks be declared void and of no effect, and that the first proceeding, allotting her dower, be declared valid and in full force, and that she have immediate possession of her dower, which she acquired by and under the same. The defendant demurred because the complaint does not state a cause of action for these reasons:

First. The deed executed by Jesse A. Stocks to Redding S. Stocks attached to the complaint herein filed, and under which the plaintiff claims dower interest, when properly construed, conveys to Redding S. Stocks, husband of plaintiff, a life estate only in said land.

Second. That, Redding S. Stocks owning under said deed a life estate only at the death of the said Redding S. Stocks, the land described in the complaint vested absolutely in the defendant, the only child of the said Redding S. Stocks.

Wherefore defendant demands that this action be dismissed, and that he recover his cost.

The court overruled the demurrer, and defendant appealed.

F. C. Harding and L. W. Gaylord, both of Greenville, for appellant.

P. R. Hines, of Ayden, and Julius Brown, of Greenville, for appellee.

WALKER, J. (after stating the facts as above). This case naturally divides itself into three propositions:

[1] First. It does not distinctly appear from the complaint in this action whether the fact which is alleged herein—that no summons or other process was served on the defendant in the second of the three actions, it being the one which was brought to set aside the judgment in the dower suit—is shown on the face of the record in that case. Where it appears that summons has been served, when in fact it has not been, the remedy is by motion in the cause to set aside the judgment, and not by an independent civil action; but, when it appears on the record that it has not been served, the judgment is open to collateral attack. *Doyle v. Brown*, 72 N. C. 393; *Whitehurst v. Transportation Co.*

109 N. C. 342, 13 S. E. 937; *Carter v. Rountree*, 109 N. C. 29, 13 S. E. 716; *Rutherford v. Ray*, 147 N. C. 253, 61 S. E. 57; *Rackley v. Roberts*, 147 N. C. 201, 60 S. E. 975; *Bailley v. Hopkins*, 152 N. C. 748, 67 S. E. 569; *Hargrove v. Wilson*, 148 N. C. 439, 62 S. E. 520; *Glisson v. Glisson*, 153 N. C. 185, 69 S. E. 55; *Barefoot v. Musselwhite*, 153 N. C. 208, 69 S. E. 71. There is an inadvertent expression in *Doyle v. Brown*, supra, 72 N. C. at page 396, where it is said:

"But the defendant's error is in misunderstanding the scope of this action. It is an action in the nature of a bill in equity to vacate the said decree."

The mistake is in calling it "an action," when in fact it was but a motion in the cause, as will appear from the record, and the statement of the case, which begins with these words "Motion to set aside a decree," etc. With this correction, the case is in perfect harmony with all the other decisions of this court upon the subject. But this point is not so material, as there are other allegations in this complaint which confer jurisdiction of the case, and, too, it may hereafter appear that the record of the other does show that there was no service on or appearance or pleading by the defendant in that case, who is plaintiff in this.

[2] Second. The plaintiff alleges that the judgment in the second action, which was brought to set aside the dower proceedings, was procured by fraud, which is set out in the complaint, the gist of it being that the defendant in this suit deceived her by a false statement to the effect that, while the action had been started, it had been wholly abandoned and withdrawn; that she need pay no attention to it, or give herself any anxiety concerning it, as she could not be harmed by it in the least, and thereby lulled her into a sense of security; that, believing she was ignorant of what he was doing, or unconscious of what was going on at his instigation, he proceeded further in the action, and finally obtained what purported to be a judgment which he procured to be docketed, and afterwards entered upon the dower land and claimed the possession and ownership of it under and by virtue of this false and fraudulent judgment. So that the judgment in the second action and the proceedings leading up to it are attacked and asked to be set aside for the fraud practiced upon her. This equity can be set up in an independent action, as is done here. *Hargrove v. Wilson* and cases supra.

[3-5] Third. But there also are sufficient allegations to show that the judgment and the proceedings in that second action rest as a cloud upon the plaintiff's title to her dower, and her equity or right to have it removed and the true right or title determined and adjudicated can also be asserted in a sepa-

rate and independent action. *Hargrove v. Wilson*, 148 N. C. 439, 62 S. E. 520; *Bailley v. Hopkins*, 152 N. C. 748, 67 S. E. 569; *Rackley v. Roberts*, supra. It is elementary learning that a decree of a court having jurisdiction in a proceeding in all respects regular on its face as to parties cannot be attacked collaterally. It may be successfully impeached for fraud in an independent action brought for the purpose, when sufficient allegations of fraud are made and issues framed upon such allegations are submitted to a jury, and the fraud is established by the verdict. *Hargrove v. Wilson*, 148 N. C. 439, 440, 62 S. E. 520, and cases cited. A judgment, if invalid, would be such a cloud on the title or such a direct menace to it as to fall within the provisions of Revisal 1905, § 1589, and Pub. Laws 1893, c. 6, as amended by Pub. Laws 1903, c. 763. These acts, being remedial in their nature, should have a liberal construction in order to execute fully the legislative intention and will. *Christman v. Hilliard*, 167 N. C. 4, 82 S. E. 949.

[6] It is not necessary to construe the deed of Jesse A. Stocks to Redding S. Stocks at this time, as defendant is estopped by the judgment in the dower suit to question plaintiff's title to the dower land, if that judgment stands. *Gay v. Stancell*, 76 N. C. 369. We will therefore wait until the validity of the judgment is determined before deciding that question, as it may never again arise.

Our conclusion is that the demurrer was properly overruled. The defendant will be allowed to answer the complaint. When all the facts are disclosed upon the trial of the issues between the parties, the aspect of the case may be changed from what it now is, and other principles may have to be invoked. They do not arise at present, and we restrict ourselves to those before us.

**Affirmed.**

(179 N. C. 279)

**PRICE et al. v. NORFOLK-SOUTHERN R. CO.** (No. 180.)

(Supreme Court of North Carolina. March 3, 1920.)

**1. WATERS AND WATER COURSES ⇨179(4)—EVIDENCE MADE OUT CASE FOR DAMAGES AGAINST DEFENDANT RAILROAD.**

Evidence that drainage was sufficient before defendant's railroad was constructed, but on account of ditches being filled up and there being no culvert the water could not get through, and consequently injured plaintiff's land and crops by backing up on it, makes out a cause of action.

**2. TRIAL ⇨295(6)—INSTRUCTION WHEN TAKEN WITH CHARGE AS A WHOLE NOT MISLEADING.**

Instruction that, if by refusal and failure of defendant railroad to keep its railroad ditches clean the flow of water was impeded and turned



on plaintiff's land and destroyed plaintiff's growing crops, finding should be for plaintiff, held, taking the charge as a whole, not subject to objection that it does not require the jury to find that water had been diverted by defendant from its natural water course and turned on plaintiff's land.

**8. WATERS AND WATER COURSES**  $\S$ 171(1)—  
**DEFENDANT RAILROAD LIABLE FOR DIVERSION OF WATER FROM NATURAL COURSE.**

If the damage to plaintiff's crops and land was due to construction by defendant of railroad, to diversion of water from its natural course or to plaintiff's land, or to defendant's failure to keep its ditches along its right of way open and free from obstruction, defendant is liable.

Appeal from Superior Court, Craven County; Kerr, Judge.

Action by Alexander Price and another against the Norfolk-Southern Railroad Company. Judgment for plaintiffs, and defendant appeals. No error.

Civil action tried upon these issues:

(1) Are plaintiffs the owners of the land described in the complaint? Answer: "Yes."

(2) Were the plaintiffs' lands and crops damaged by the negligence of the defendant as alleged in the complaint? Answer: "Yes."

(3) If so, what damages are plaintiffs entitled to recover? Answer: "\$1,000."

The defendant appealed.

Moore & Dunn, of Newbern, for appellant.  
 D. L. Ward, of Newbern, for appellees.

**BROWN, J.** We have examined the several exceptions to the evidence and find no substantial error in them, certainly none that would justify us in ordering another trial, and we do not deem it necessary to discuss them. The prayer for instruction that upon the whole evidence, if believed, the jury should answer the second issue "No" was properly refused.

[1] The plaintiff offered evidence tending to show that the drainage was sufficient before the railroad was constructed, but on account of the ditches being filled up and there being no culvert the water could not get through, and consequently injured the plaintiff's land and crops by backing up on it. This evidence, if believed, makes out a cause of action and entitles the plaintiff to recover damages for three years preceding the commencement of the action. *Duvall v. Railroad Co.*, 161 N. C. 448, 77 S. E. 811; *Roberts v. Baldwin*, 155 N. C. 276, 71 S. E. 819; *Davenport v. Railroad*, 148 N. C. 287, 62 S. E. 431, 128 Am. St. Rep. 599.

[2] The defendant excepted to the following charge:

"If you find from the evidence, by its greater weight, that the railroad company failed and refused to keep its railroad ditch or ditches along its right of way open and free of ob-

struction, and failed to keep the same clean in such a manner as to allow the water to flow along the same, and by reason of said negligence the flow of water was impeded and the flow was turned upon the plaintiffs' land and stood thereon and sobbed and soured the same and destroyed the plaintiffs' growing crops, and find that this endangered and probably caused the plaintiffs' injury and damage, then you would answer the second issue 'Yes.'"

The learned counsel for the defendant insists that this charge is erroneous because there is nothing in it which requires the jury to find that the water had been diverted by the defendant from its natural course and turned upon the plaintiffs' land.

[3] Taking the charge as a whole, we think it a very clear exposition of the law and that the jury could not have misunderstood the question in controversy. It matters not whether the water was diverted from its natural course onto the plaintiff's land by the construction of the road, or whether injury was caused by the defendant failing to keep its ditches on its right of way open and free of obstruction so as to allow the water to flow along the same, and thereby the flow of water was turned upon the plaintiffs' land by reason of said negligence. Either would constitute, if established, such negligence as would render the defendant liable for the injury incurred within the principle laid down in the above-cited cases. No error.

(179 N. C. 254)

**BRICKELL v. HINES. (No. 104.)**

(Supreme Court of North Carolina. March 3, 1920.)

**1. HABEAS CORPUS**  $\S$ 90(8) — **RIGHT OF ADOPTING PARENTS NO GREATER THAN THAT OF NATURAL PARENTS.**

The right of adopting parents to the care, custody, and control of an infant child is usually no greater than the right of the natural parents.

**2. HABEAS CORPUS**  $\S$ 90(3) — **WELFARE OF CHILD TO BE CONSIDERED IN AWARDED CUSTODY.**

In determining to whose custody infant child will be awarded, the welfare of the child is entitled to full consideration, and on especial facts may become the controlling consideration.

**3. HABEAS CORPUS**  $\S$ 90(3)—**INFANT PROPERLY AWARDED TO NATURAL PARENTS, AS AGAINST ADOPTING PARENTS, WHERE FOR BEST INTEREST OF CHILD.**

In habeas corpus proceedings for custody of 3½ year old child by natural parents against adopting parents, who adopted child when it was only one month old, with the mother, who was then unmarried, joining in the petition for the adoption, where it would be to the interest of the child that she be placed in the custody of her natural parents, and that her future wel-

fare would be thereby materially promoted, court properly awarded custody of child to natural parents.

Appeal from Superior Court, Wayne County; Daniels, Judge.

Habeas corpus proceedings by Mrs. George G. Brickell against Mrs. Wade H. Hines. Judgment for petitioner, and respondent excepts and appeals. Affirmed.

Habeas corpus proceedings to determine as to care and custody of an infant child, now 3½ years of age, heard, on petition of the parents, before his honor, F. A. Daniels, Judge, at Chambers in Goldsboro, N. C., on 20th day of September, 1918. It appeared that the child, in 1916, when one month of age, had been adopted by respondents, on proceedings had in the hustings court of the city of Richmond, in 1916, the feme plaintiff, not then married, joining in the petition for adoption, and had since been cared for by respondents, now domiciled in North Carolina, petitioners being also resident and domiciled here. There was evidence tending to show that, under circumstances now existent, the welfare of the child would be best subserved by awarding the same to the petitioners, its parents. The court, having so found, there was judgment, awarding the child to the care and custody of petitioners, and respondents excepted and appealed.

Hood & Hood, of Goldsboro, for appellants.

J. Faison Thomson, of Goldsboro, for appellees.

HOKE, J. It has been held in several recent decisions, where the question was directly considered, that parents have prima facie the right to the custody and control of their infant children, and that the same, being a natural and substantive right, may not be lightly denied or interfered with by action of the courts. It is further held in these and other cases that this right of the parents is not universal and absolute, but that the same may be modified and disregarded when it is made to appear that the welfare of the child clearly requires it. *Ex parte Warren*, 178 N. C. 43, 100 S. E. 76; *In re Means*, 176 N. C. 307, 97 S. E. 39; *Atkinson v. Downing*, 175 N. C. 244, 95 S. E. 487. The last case citing, among others, *In re Fain*, 172 N. C. 790, 90 S. E. 928; *In re Mary Jane Jones*, 153 N. C. 312, 69 S. E. 217, 138 Am. St. Rep. 670; *Newsome v. Bunch*, 144 N. C. 15, 56 S. E. 509; *In re Alderman*, 157 N. C. 507, 73 S. E. 126, 39 L. R. A. (N. S.) 988; *In re Turner*, 151 N. C. 474, 66 S. E. 431; *In re Samuel Parker*, 144 N. C. 170, 56 S. E. 873.

[1, 2] It is also the accepted position, as pertinent to the facts of this record, that when an infant child has been duly adopted, pursuant to legislative provision, and before

a court having jurisdiction of the cause and the parties, this right of the natural parent, under the regulations usually prevailing in such cases as to care, custody, and control of the child, is thereby transferred to the adopting parents, and the force and effect of the proceedings and decree will follow the parties on a change of domicile, and control the personal relationship existent between them. 1 R. C. L. p. 611; 1 Amer. & Eng. Ency. (2d Ed.) p. 733. This right of the adopting parents, however, is usually no greater than the natural, and, as said in *Downing's Case*:

Here too "the welfare of the child is entitled to full consideration, and on especial facts may become controlling in the disposition of its custody."

Applying these principles, the wise and learned judge, having investigated the case and set forth fully the testimony pertinent to the inquiry, has found and adjudged:

"That it is to the interest of the infant child that she be placed in the custody of her natural parents, and that her future welfare will be thereby materially promoted."

[3] In our opinion, the facts in evidence are in support of his honor's conclusion, and the judgment awarding the child to its natural parents is affirmed.

Affirmed.

(179 N. C. 237)

JERNIGAN v. JERNIGAN. (No. 115.)

(Supreme Court of North Carolina. Feb. 25, 1920.)

1. JUDGMENT  $\S$ 143(2)—PERSONS OF SOUND MIND SERVED WITH PROCESS AND FAILING TO EXERCISE ORDINARY DILIGENCE CANNOT HAVE A DEFAULT VACATED.

Persons served with process should be diligent, and, where they fail to use ordinary prudence in protecting their rights, a default judgment will not be vacated as for excusable neglect.

2. JUDGMENT  $\S$ 143(1)—VACATION OF DEFAULT NOT WARRANTED BECAUSE OF DEFENDANT'S INFIRMITY.

Where the defendant was of sound mind and, though his bodily infirmities confined him, carried on business and defended other suits, a default judgment against such defendant will not be vacated on account of excusable neglect, because of his infirmities.

3. JUDGMENT  $\S$ 143(10)—DEFAULT JUDGMENT WILL NOT BE VACATED FOR EXCUSABLE NEGLIGENCE, WHERE DEFENDANT AFTER SECURING COUNSEL TOOK NO FURTHER STEPS.

Where defendant, on being served with process in an action by his wife, to have a deed set aside, wrote and engaged attorneys located in another county to represent him, but took no further steps to see that an answer was filed, etc., although defendant was diligent in

his defense of other actions, a default judgment in favor of the wife will not be vacated after defendant's death, notwithstanding he was at the time of the action confined to his home, because of physical infirmities, for a party has no right to abandon active prosecution of his action because he has secured counsel to represent him.

Appeal from Superior Court, Harnett County; Connor, Judge.

Action by Rebecca Jernigan against Blackman Jernigan, in which there was a default judgment for plaintiff. Thereafter the heirs and devisees of the defendant, who had died since judgment, moved to set the same aside, and, motion having been denied, they appeal. Affirmed.

See, also, 100 S. E. 184.

The plaintiff alleged, in her complaint, that a certain deed executed by her to her husband was void and asked that it be set aside. The defendant failed to appear or plead, and judgment by default, for want of an answer, was entered accordingly. Defendants moved to set aside this judgment, for excusable neglect of the defendant, who was their father, and now deceased.

The court found the following facts:

"That the summons in the action was issued by the clerk of the superior court of Harnett county on the 6th May, 1916, returnable to the May term of said court, and was personally served on the defendant Blackman Jernigan, then living in Johnson county, by the sheriff of said county, on the 11th day of May, 1916. That a duly verified complaint was filed under authority of a special order made in this action on the 3d day of July, 1916, and, no appearance having been entered and no answer filed, a judgment by default final was rendered in favor of plaintiff and against defendant, pertaining to real estate, at September term, 1916, of this court.

"(2) That defendant Blackman Jernigan died on 7th day of June, 1917, and that the defendants who file this motion are his heirs at law and devisees named in his last will and testament.

"(3) That said heirs at law and devisees, through their attorneys, now move to set aside the judgment by default final entered at September term, 1917, and within one year from rendition of the same as determined by the Supreme Court in an appeal from the judgment rendered at February term, 1919.

"(4) That defendant Blackman Jernigan wrote a letter to attorneys at law, residing at Smithfield, N. C., as soon as the summons was served on him, requesting them to represent him in this action, and soon thereafter received from the attorneys a letter advising him that they would represent him; and said attorneys are and were reputable and reliable and regularly practiced in the courts of Johnson county; but that they do not regularly practice in Harnett county and do not regularly attend the courts of that county. That they did not enter an appearance for Blackman Jernigan, nor did they file an answer to the complaint

herein. That there is no evidence from which the court can find that any other or further communication was had, by letter or otherwise, between the said Blackman Jernigan and the said attorneys, relative to this action, or to any other matter. That from the date of the service of the summons in this action on him to the date of his death, Blackman Jernigan resided in or near the town of Benson, in Johnson county, and his attorneys resided in the town of Smithfield, in said county.

"(5) That Blackman Jernigan was on the date of the service of summons in this action on him, and continuously to the date of his death, confined to his home by sickness, and was physically unable to attend court or to leave his home to attend to any business whatever.

"(6) That Blackman Jernigan, during the months of August and September, 1916, and during the months of January, February, and March, 1917, bought and sold land and conducted business transactions involving large sums of money. He executed and received deeds and directed the management of his business.

"(7) That two actions were pending in the courts of Johnson county against the said Blackman Jernigan during the fall of 1916. That he filed answers in both said actions and by his attorneys contested the same in said courts. That the deposition of Blackman Jernigan was taken in March, 1917, and was used in his behalf in the trial of the case of Lucy E. Hays v. Blackman Jernigan in the Johnson county court.

"(8) That Blackman Jernigan was continuously, between the date of the service of the summons in this action upon him, and the date of his death, mentally capable of attending to business and of communicating by letter and otherwise with persons relative to business matters.

"(9) That the plaintiff, Rebecca Jernigan, was the wife of Blackman Jernigan. That no children were born of their marriage. That the land which is the subject-matter of this action was owned by Rebecca Jernigan, prior to her marriage, and was, after the marriage, and while she was living with her husband, conveyed by her and her husband to M. C. Butler, who, contemporaneously with the conveyance of the land to him, conveyed the same to Blackman Jernigan. That thereafter Blackman Jernigan ceased to live with the said Rebecca Jernigan, and the purpose of this action was to have the two deeds declared void for the reason set out in the complaint. That the affidavits filed herein by the heirs at law and the devisees of the defendant Blackman Jernigan, and the answer tendered to the court, disclose a meritorious defense to the plaintiff's cause of action."

Upon the foregoing facts, the court was of the opinion, and so held, that the failure of Blackman Jernigan to file an answer to the complaint was not due to any mistake, inadvertence, surprise, or excusable neglect on his part, and that the motion to set aside the judgment rendered by default at September term, 1916, ought to be, as a matter of law, denied.

It is therefore ordered and adjudged that

the said motion be and the same is denied, and that the plaintiff recover of the defendants, heirs at law and devisees of Blackman Jernigan, the costs incurred upon this motion.

Defendants excepted and appealed.

C. L. Guy and Clifford & Townsend, all of Dunn, for appellants.

Godwin & Williams and E. F. Young, all of Dunn, and Robert W. Winston, of Raleigh, for appellee.

WALKER, J. (after stating the facts as above). [1] We are of the opinion that the order of Judge Connor refusing to disturb the judgment was plainly correct. It is now almost an axiom to say that persons of sound mind, who are served with process to appear in an action and answer a complaint, should be active and diligent in the protection and preservation of the rights, and the least that can be expected of them is that they will give the case that attention which a man of ordinary prudence usually bestows upon his important business. If he fails in this respect, he can have no relief under the statute in the way of vacating the judgment, which has been entered because of his default in appearing and pleading. *Sluder v. Rollins*, 78 N. C. 271; *Roberts v. Allman*, 106 N. C. 394, 11 S. E. 424; *School v. Peirce*, 163 N. C. 427, 79 S. E. 687; *McLeod v. Gooch*, 162 N. C. 122, 78 S. E. 4; *White v. Rees*, 150 N. C. 678, 64 S. E. 777; *Pierce v. Eller*, 167 N. C. 672, 83 S. E. 758. The law does not favor those who sleep upon their rights, but those who are vigilant, and give them proper attention. This is a very ancient maxim, and it has frequently been applied by us to cases of this kind. *School v. Peirce*, supra.

[2, 3] Applying this principle to our case, we find the facts to be, as stated by the learned judge, that the original defendant against whom the judgment was rendered was at the time of perfectly sound mind; he retained attorneys, who lived in his own county, not far from his home; he had other cases to which he gave the requisite attention; and he was capable of guarding his interest in this case and of consulting with his attorneys in regard to it and filing his answer. The mere fact that he was sick is not, of itself, sufficient to excuse him, for the judge finds that, notwithstanding his illness, he was able to have his answer prepared and filed. It was said in *Pierce v. Eller*, supra, that "the defendants (in that case), it is true, were old and feeble, but there is no finding that they are not of sound mind," and their neglect to answer was not excused. Here, it is affirmatively found that the defendant was of

sound mind, though enfeebled by disease and not able to leave his home, and that he had actually attended to his ordinary affairs efficiently and in the usual way, except as above indicated. The court found, as will appear, by reference to the statement of facts, that he had directed the management of his business and even the other litigation then pending, and especially that he had filed answers in two civil actions during the period of his sickness and confinement at his home. It appears that, notwithstanding the ability of Blackman Jernigan to file his answer, he never wrote but one letter to his attorneys about the business, and that was when he retained them to appear for him, and he took no further steps himself to see that an answer was filed. We have held, as before indicated, that a party has no right to abandon all active prosecution of his case simply because he has secured counsel to represent him in it. *McLeod v. Gooch*, supra. It further appears that he employed attorneys not residing in Harnett county, where the case was pending, and not practicing in its courts. The learned judge could consider this fact upon the question of negligence. *Manning v. Railroad Co.*, 122 N. C. 824, 28 S. E. 963; *Osborn v. Leach*, 133 N. C. 428, 45 S. E. 783; *Williamson v. Cocke*, 124 N. C. 585, 32 S. E. 963; *Hardware Co. v. Buhmann*, 159 N. C. 511, 75 S. E. 731; *McLeod v. Gooch*, supra. As said by this court in *Kerchner v. Baker*, 82 N. C. 169, and affirmed in *White v. Rees*, 150 N. C. 678, 64 S. E. 777:

"The course of the defendant was not the care of an ordinarily prudent man in reference to his own personal interest, nor was it consistent with the proper defence and attention due from the defendant and every suitor to the known and orderly course and practice of the courts in the administration of the law." The defendants have lost their rights, if they had any to protect, by their own inattention and inexcusable neglect."

We added in *White v. Rees*, supra:

"The defendants have lost their rights, if they had any to protect, by their own inattention and inexcusable neglect."

There is no finding that Blackman Jernigan was prevented by illness, or other reasonable cause, from communicating with his counsel and thereby making known to them his defense, but the contrary is stated as the fact, and the cases where that appeared, such as *Mebane v. Mebane*, 80 N. C. 34, do not apply.

The facts present a case of inexcusable neglect within the meaning of the statute, and the decision of the court was correct. Affirmed.

(179 N. C. 231)

BECK v. WILKINS-RICKS CO. (No. 110.)

(Supreme Court of North Carolina. Feb. 25, 1920.)

**1. BAILMENT §14(1)—REQUIRED TO EXERCISE MERELY ORDINARY CARE FOR SAFE-KEEPING OF AUTOMOBILE LEFT FOR REPAIRS.**

Repair man with whom automobile was left for repairs was not liable as an insurer of the automobile, but was required merely to exercise ordinary care for its safe-keeping and return to owner in good condition, and would not have been liable if, notwithstanding the exercise of ordinary care, the machine had been injured or stolen or destroyed by fire while in his custody.

**2. BAILMENT §14(1)—LIABLE FOR DESTRUCTION BY FIRE OR THEFT OF AUTOMOBILE IN ABSENCE OF SHOWING OF EXERCISE OF REASONABLE CARE FOR ITS SAFE-KEEPING.**

The mere fact that automobile left with garage keeper for repairs had been destroyed by fire or stolen did not absolve him from responsibility to owner any more than he would have been absolved if it had been injured in his custody, unless he had shown that he had exercised ordinary care for its safe-keeping.

**3. BAILMENT §31(3) — PROOF OF GARAGE KEEPER'S FAILURE TO RETURN AND ADMISSION OF ITS DESTRUCTION BY FIRE ESTABLISHED PRIMA FACIE CASE OF NEGLIGENCE.**

In automobile owner's action against repair man for loss of automobile in fire, proof of failure to return the automobile, with the admission that it had been burned, made out a prima facie case requiring repair man to produce proof that it discharged its duty of exercising proper care while intrusted with the custody of the automobile.

**4. BAILMENT §31(1)—EVIDENCE §75—BAILEE WHO FAILS TO RETURN PROPERTY REQUIRED TO SHOW EXERCISE OF ORDINARY CARE WHILE PROPERTY WAS IN ITS CUSTODY.**

While the destruction or loss of property in hands of bailee is not conclusive on question of bailee's negligence, the failure to return the property requires bailee to show that it exercised ordinary care while property was in its custody, and since bailee has the best knowledge of the facts it will be presumed, if proof thereof is not forthcoming, that bailee cannot produce such proof.

**5. BAILMENT §83—BAILEE'S NEGLIGENCE QUESTION FOR JURY WHERE PROPERTY WAS DESTROYED, STOLEN, OR INJURED.**

Where bailee claims that the property has been destroyed, stolen, or injured without any fault on his part, the question of bailee's negligence was for the jury; such occurrences being out of the ordinary course of events, and the facts being peculiarly within the knowledge of the bailee.

**6. EVIDENCE §83—PROOF OF BAILEE'S FAILURE TO RETURN BAILMENT IN GOOD CONDITION SHIFTS BURDEN OF PROOF; THE MATTER BEING WITHIN BAILEE'S SPECIAL KNOWLEDGE.**

In bailor's action against bailee for loss or destruction of bailment, the burden of proving

negligence rests upon bailor and does not shift throughout the trial, but the burden of proceeding does shift, and where bailor has shown that bailee received the property in good condition and failed to return it, or returned it injured, bailor has made out a prima facie case of negligence, which the bailee is called upon to explain; the matter being one within his special knowledge.

**7. TRIAL §165—PLAINTIFF'S EVIDENCE TO BE TAKEN AS TRUE.**

On motion for nonsuit plaintiff's evidence must be taken as true, with all just inference that can be drawn therefrom.

Allen, J., dissenting.

Appeal from Superior Court, Lee County; Connor, Judge.

Action by A. C. Beck against the Wilkins-Ricks Company. Judgment of nonsuit, and plaintiff excepts and appeals. Reversed.

Action for damages for the destruction of an automobile while in the defendant's garage for repairs. It was in evidence that the plaintiff carried his car to the garage for certain minor repairs, and was to call for it at noon; it being understood that he would need it at that time. When he called for it at that time he was told that it would take only a short time longer, not more than 30 minutes. The plaintiff then stated that he would call for it when he came back from dinner, but being delayed he went at 5 p. m. and found his automobile torn down and the defendant's employes grinding the valves, which had not been authorized by plaintiff. The answer admits that the machine was not in such condition that it could be removed that afternoon. It is alleged in the complaint and admitted in the answer that during that night the building was destroyed by fire and the car with it. The complaint alleges the liability for negligence and also for departure from the terms of the bailment and also a promise to pay by the company after the destruction of the machine. At close of plaintiff's evidence the court sustained a motion for judgment as of nonsuit, and the plaintiff excepted and appealed.

E. L. Gavin, Williams & Williams and Hoyle & Hoyle, all of Sanford, for appellant. Seawell & Milliken, of Sanford, for appellee.

CLARK, C. J. [1-3] The defendant as bailee assumed liability of ordinary care for the safe-keeping and the return of the machine to the bailor in good condition. The bailee did not assume liability as insurer, and therefore did not become liable for the non-return of the property in good condition if he observed the ordinary care devolved upon him by reason of the bailment. If the machine had been injured or stolen or destroyed by fire while in his custody, the defendant would

not be liable if such care had been observed. On the other hand, the mere fact that the property had been destroyed by fire or stolen did not absolve him from responsibility, any more than he would have been absolved if it had been injured in his custody, unless he had shown that he had used the care required of him by virtue of his bailment. The burden of proving negligence was on the plaintiff, and this burden does not shift; but when it was shown, or admitted, that the machine was not returned by reason of its being destroyed or stolen, or that it was returned in injured condition, it was the duty of the defendant to "go forward" with proof to show that it had used proper care in the bailment. Therefore it was error for the court to withdraw the case from the jury and thus to hold, as a matter of law, that the defendant had exercised proper care.

The law is admirably summed up and stated, upon a review of all the authorities, in 6 Corpus Juris, pp. 1157-1160, as follows:

"Sec. 156. In an action to recover the bailed property the burden of proof is on the bailor to establish the bailment and the failure to return the property in accordance with the contract."

"Sec. 158. The rule is undoubted that in all actions founded upon negligence, or a culpable breach of duty, the burden is on plaintiff to establish negligence by proof. This principle is recognized by all the authorities as applicable between bailor and bailee, and the only conflict is on the question whether the loss of, or damage to, the goods while in the bailee's possession raises such a presumption of negligence on his part as to establish a prima facie case against him.

"Sec. 159. In some of the old decisions it was held that the loss or injury raised no presumption of negligence. The bailee is not an insurer of the goods, and when they are lost or damaged it was said that the law, which never presumes any man negligent, would rather attribute the loss to excusable causes. It was not enough for plaintiff to prove the loss or injury, but it was held that he must go further and must show that the same had occurred by defendant's negligence.

"Sec. 160. *The Modern Rule.* The rule adopted in the more modern decisions is that the proof of loss or injury establishes a sufficient prima facie case against the bailee to put him upon his defense. Where chattels are delivered to a bailee in good condition and are returned in a damaged state, or are lost or not returned at all, the law presumes negligence to be the cause, and casts upon the bailee the burden of showing that the loss is due to other causes consistent with due care on his part. But if the possession of the bailee has not been exclusive of that of the bailor the rule does not apply. In order to throw the burden of evidence upon the bailee it is sufficient that the bailor has shown damage to the bailed article that ordinarily does not happen where the requisite degree of care is exercised."

The above is sustained by the almost uniform authorities cited in the notes to the above and the reasons are thus summed up:

"*Reasons of Rule.*—(1) 'Since the bailor is generally at a disadvantage in obtaining accurate information of the cause of the loss or damage, the law considers he makes out a case for the application of the rule of *res ipsa loquitur* by proof of the bailment and the failure of the bailee to deliver the property on proper demand.' *Corbin v. Cleaning Co.*, 181 Mo. App. 151, 155, 167 S. W. 1145. (2) 'The rule rests upon the consideration that, where the bailee has exclusive possession, the facts attending loss or injury must be peculiarly within his own knowledge. Besides, the failure to return the property, or its return in an injured condition, constitutes the violation of a contract, and it devolves upon the bailee to excuse or justify the breach.' *Nutt v. Davison*, 54 Colo. 586, 588, 131 Pac. 391, 44 L. R. A. (N. S.) 1170. (3) 'The rule is founded in necessity and upon the presumption that a party who, from his situation, has peculiar, if not exclusive, knowledge of facts, if they exist, is best able to prove them. If the bailee, to whose possession, control and care the goods are intrusted, will not account for the failure or refusal to deliver them on demand of the bailor, the presumption is not violent that he has been wanting in diligence, or that he may have wrongfully converted or may wrongfully detain them; or if there be injury to or loss of them during the bailment, it is but just that he be required to show the circumstances, acquitting himself of the want of diligence it was his duty to bestow.' *Davis v. Hurt*, 114 Ala. 146, 150, 21 South. 469, quoted in *Hackney v. Perry*, 152 Ala. 626, 633, 44 South. 1029, 1031."

In 6 Corpus Juris, 1160, the conclusion from the long list of authorities and citations in the notes is thus summed up:

"The burden of proof of showing negligence is on the bailor and remains on him throughout the trial. The presumption arising from the injury to the goods or failure to redeliver is sufficient to satisfy this burden and make out a prima facie case against the bailor; but the bailee may overcome this presumption by showing that the loss occurred through some cause consistent with due care on his part."

This summing up is based, among other citations, upon the very clear statement of this court by Walker, J., in *Hanes v. Shapiro*, 168 N. C. 31, 84 S. E. 37, in which, after stating that some of the old authorities were somewhat different, Walker, J., says:

"But the better opinion, supported by the weight of authority, holds that while the burden of proving negligence rests upon the plaintiff and does not shift throughout the trial, the burden of proceeding does shift; and that where the plaintiff has shown that the bailee receives the property in good condition and failed to return it, or returned it injured, he has made out a prima facie case of negligence."

He further says (168 N. C. 32, 84 S. E. 37):

"Unless the bailee overcomes this prima facie case by satisfying the jury that the loss or damage was consistent with the absence of fault on his part, the plaintiff may prevail."

And he further says (168 N. O. 33, 84 S. E. 37):

"But those rules are, of course, subject to the qualification that the bailee is bound, in all proper instances, when intrusted with the bailor's property, to exercise due care with respect to the subject."

This entitled the plaintiff to have the facts of this case submitted to the jury. The authorities to the above effect are numerous, and the more recent authorities are uniform to that effect.

[4] While the destruction or loss of property is not conclusive of negligence, the failure to return the property does devolve upon the defendant the burden of going forward with proof to show that it discharged its duty of requisite care of the property while in its custody. It would be singular if the mere fact that the property was destroyed or stolen or injured was conclusive that the bailee had exercised proper care. It had the best knowledge of the facts, and if proof thereof was not forthcoming the presumption is that it could not produce it.

To the same effect are the other text-books and authorities. In 3 R. C. L. 151 (Bailment, § 74), where explaining the apparent conflict of the later with the older cases on this point as due to the confusion between "the burden of the proof" and "duty of going forward," it is said:

"The general rule, at least in the United States, seems to be that where a bailor alleges and proves simply the delivery of the property to the bailee and the latter's failure to return it on demand, a prima facie case is made out against the bailee."

In 3 R. C. L. p. 152, § 75, it is said that there are authorities which support the broad doctrine that—

"The burden of proving freedom from negligence by the preponderance of the evidence, where the property is damaged or destroyed, is on the bailee, although it would seem that some of the cases contain language which indicate that it must be taken simply as authority for the proposition that in case of injury to or loss of the property the burden of overcoming a presumption of negligence rests on the bailee."

In 2 R. C. L. 1210 (Automobiles, § 46), it is said:

"It may be accepted as settled that persons operating a garage are required to exercise reasonable care to protect and preserve automobiles placed in their custody for storage or repairs, and if an automobile so placed is injured or destroyed on account of negligence of the garage keeper or his servants while acting within the scope of their authority the garage keeper is liable therefor. \* \* \* On proof of the delivery of a car into a garage, if the garage keeper is unable, by reason of the destruction of a car, to make return thereof, the burden is cast on him to show that the car was not destroyed by his negligence."

In Hale on Bailments, 241, it is said that—

"A failure or refusal by a warehouseman to deliver on demand goods intrusted to him, or the return of the goods in a damaged condition, is prima facie evidence of negligence sufficient to cast upon him the burden of accounting for nondelivery. In other words, the burden of proving negligence rests on plaintiff throughout, but the weight of evidence shifts" (citing authorities).

It is further said that—

"The burden of the proof does not shift, but the failure to return, or the destruction or injury of the property, is such prima facie evidence of negligence that there devolves upon the bailee the duty of going forward with proof that he exercised proper care."

[5] This is simply another way of saying that the failure to return the goods in good condition is a breach of the contract of bailment, which, if unexplained, entitles the bailor to recover, and that when the bailee claims that the property has been destroyed or stolen or injured without any fault on its part, it is called on to put on some proof of the circumstances thereof. These occurrences being out of the ordinary course of events, and the facts being peculiarly in the knowledge of the bailee, are sufficient evidence of negligence to carry the case to the jury.

[6] The whole subject is exhaustively discussed in the text and notes to 6 Corpus Juris and R. C. L. above cited, and we think the present doctrine on the subject and the reason of the thing is nowhere more clearly set out than in the quotation from Hanes v. Shapiro, above set out in Corpus Juris, from the opinion of Mr. Justice Walker, which we think states accurately the correct conclusion.

It would be a singular proposition if the plaintiff, who has intrusted his property to the care of the defendant, should find the latter protected from liability for loss of or injury to the property without any proof of the discharge of his duty as bailee, though such evidence is in his special knowledge, unless the plaintiff (who is often a stranger) shall grope around among the defendant's employes to find evidence of the negligence of their employer or of their coemployes. The destruction or theft of the property, or injury thereof, not being in the ordinary course, calls upon the bailee to explain it, just as a collision or derailment is prima facie negligence which carries the case to the jury. Marcom v. Railroad, 126 N. O. 200, 35 S. E. 423, and citations in Anno. Ed.

[7] In this case there was some additional evidence tending to show negligence, among others the fact that there was, on the day the machine was left in the garage, remains of half-smoked cigarettes lying around, and that after the fire the representative of the defendant promised to pay for the loss of the machine. This evidence must be taken

as true upon a nonsuit, with all just inference that can be drawn therefrom, as, for instance, that the agent of the company had information that negligence caused the fire.

We need not, however, discuss (as the case goes back for a new trial) whether the defendant is bound by such promise, for the authority of the party making such agreement is not fully brought out in the evidence. For the same reason, also, we need not consider the exceptions by the plaintiff to the evidence.

It is sufficient to say, upon the above authorities, that the failure of the bailee to return the property, with the admission that it has been burned, made out a prima facie case, which devolved upon the defendant the duty of going forward with proof that it had discharged its duty of proper care while intrusted with the custody of the plaintiff's automobile. Upon the evidence, this was the proper subject of inquiry which the plaintiff was entitled to have investigated by the jury.

The judgment of nonsuit is reversed.

ALLEN, J. (dissenting). The plaintiff delivered his automobile to the defendant to be repaired in its garage and it was destroyed by fire. There is no evidence as to the origin of the fire or of negligence on the part of the defendant. I think the rule applicable to these facts is correctly stated by Associate Justice Walker in *Hanes v. Shapiro*, 168 N. C. 31, 84 S. E. 37, as follows:

"But the better opinion, supported by the weight of authority, holds that while the burden of proving negligence rests upon the plaintiff, and does not shift throughout the trial, the burden of proceeding does shift; and that where the plaintiff has shown that the bailee received the property in good condition and failed to return it, or returned it injured, he has made out a prima facie case of negligence. 'When he has shown a situation which could not have been produced except by the operation of abnormal causes, the onus rests upon the defendant to prove that the injury was caused without his fault.' *Res ipsa loquitur*. Unless the bailee overcomes this prima facie case by satisfying the jury that the loss or damage was consistent with the absence of fault on his part, the plaintiff may prevail. Where the bailee makes such showing, however, as where it appears that the property was stolen or injured by vis major, the burden of proceeding shifts back to the plaintiff, and he must show that the bailee was negligent in exposing the property to risk of harm, or in failing to avoid the danger after it was known. In other words, the weight of the evidence may be in favor first of one party and then the other, but the burden of establishing the issue in his favor rests on plaintiff throughout. *Hale on Bailments*, pp. 31 and 32."

It is not disputed that the automobile was destroyed by fire, vis major, and, if so, the prima facie case made by showing delivery and failure to return was destroyed, and he

could not recover without furnishing evidence of negligence, which he has failed to do.

As it appears to me, the judgment of nonsuit ought to be sustained.

(179 N. C. 266)

**WILKINS-RICKS CO. v. WELCH.**  
(No. 113.)

(Supreme Court of North Carolina. March 3, 1920.)

**1. CORPORATIONS** ¶428(1)—NOTICE OF DEFENSES TO OFFICERS OF ONE CORPORATION IS NOTICE TO ANOTHER CORPORATION, THE OFFICERS OF WHICH ARE THE SAME.

In an action by a corporation to recover mules under a chattel mortgage securing notes transferred to plaintiff after maturity, wherein the defense was interposed that plaintiff's transferor had notice of a substitution of the mortgaged property and had received part payment with such knowledge, notice to the officers of the transferor corporation was notice to the officer of plaintiff; the officers of both being the same.

**2. BILLS AND NOTES** ¶351—TRANSFEREE AFTER MATURITY HOLDS SUBJECT TO DEFENSES AGAINST TRANSFEROR.

A transferee of notes and mortgages after maturity holds them subject to any defenses existing against the transferor.

**3. CHATTEL MORTGAGES** ¶219—MORTGAGEE HAVING WITH NOTICE ACCEPTED PART OF PURCHASE PRICE OF SALE OF MORTGAGED PROPERTY CANNOT RECOVER IT.

In an action to recover two mules claimed under a chattel mortgage, where it appeared that the mortgagor traded the mules mortgaged for two others and paid the mortgagee the money taken in boot on the trade, neither the mortgagee nor its assignee could recover the mules originally mortgaged; the mortgagee having accepted and appropriated to its own use with knowledge of the facts the check given by defendant as part of the purchase price.

**4. PRINCIPAL AND AGENT** ¶172—RATIFICATION CANNOT BE IN PART.

A transaction entered into by one in reference to the property of another, although without authority, must be ratified or repudiated as a whole, and a benefit cannot be accepted under it without being subject to its burdens.

Appeal from Superior Court, Lee County; Connor, Judge.

Action by the Wilkins-Ricks Company against B. N. Welch. Judgment for plaintiff, and defendant appeals. New trial ordered.

This is an action to recover two mules, which the plaintiff claims under a chattel mortgage executed by A. C. Stout to Wilkins-Lashley Company, and which, with the notes



secured therein, were transferred to the plaintiff after maturity.

The chattel mortgage included the two mules and other personal property.

Before the notes and mortgage were transferred to the plaintiff, Stout traded the mules to the defendant and received in exchange two mules and a check for \$210, agreeing at the time to secure the release of the mules from the Lashley mortgage.

Stout saw L. P. Wilkins, who was secretary and treasurer of Wilkins-Lashley Company and of the Wilkins-Ricks Company, told him of the trade with the defendant, and delivered to him the check for \$210, which he accepted for the company, and which the company indorsed and received the money thereon.

L. P. Wilkins testified:

"That he was the secretary-treasurer of the Wilkins-Ricks Company; that H. O. Stout came to see him some time during the early part of 1915 and gave him a check for \$210, for which he credited him on his notes and mortgages; that Stout told him that he had traded mules and wanted him to change the papers; that he asked Mr. Palmer, president of the plaintiff company, to look at the mules, and Mr. Palmer reported that they were poor security, so he told Stout that he would not make the change; that he saw Stout several times afterwards and had a good deal of correspondence with him about paying the mortgage; that he never agreed to release his original security; that Welch came in to see him several times, but always assured him that Stout was an honest man and would pay his debts, until finally Welch told him that the plaintiff had lost its rights in the case against him altogether by accepting his check; that he knew that the check for \$210 was boot money which Stout had received in a trade of the mules described in his mortgage."

His honor held that there was no ratification of the sale to the defendant, and instructed the jury to answer the issue as to the ownership of the property in favor of the plaintiff, if they believed the evidence, and the defendant excepted.

There was a verdict and judgment in favor of the plaintiff, and the defendant appealed.

Siler & Barber, of Pittsboro, and Hoyle & Hoyle, of Sanford, for appellant.

Seawell & Milliken, of Sanford, for appellee.

ALLEN, J. [1, 2] The plaintiff corporation and the Wilkins-Lashley Company are apparently one corporation; but, however this may be, notice to the officers of one would be notice to the other, as the officers of both are the same, and in any event the plaintiff, having taken the notes and mortgage after maturity, holds them subject to any defenses existing against the Wilkins-Lashley Company.

[3] The real question then is: Could the Wilkins-Lashley Company maintain this action to recover the two mules? Clearly not, because it has accepted and appropriated to its own use, with knowledge of the facts, the check given by the defendant as a part of the purchase price of the mules.

[4] A transaction entered into by one in reference to the property of another, although without authority, must be ratified or repudiated as a whole, and a benefit cannot be accepted under it without being subject to its burdens. *Rudasill v. Falls*, 92 N. C. 226.

"If with a full knowledge of all the facts a person ratify an agreement which another person has improperly made concerning the property of the person ratifying it, he thereby makes himself a party to it. He is in precisely the same position in this respect as if the original agreement had been made with him. And it has been held that one who knowingly accepts the benefits intended as the consideration coming to him under a contract, voluntarily made by another in his behalf, becomes bound by reason of such acceptance to perform his part of the contract." 9 Cyc. 387.

This principle was properly applied in *Norwood v. Lassiter*, 132 N. C. 52, 43 S. E. 509, to facts not so clear as in this case.

In the *Norwood* Case land was sold under a mortgage, and the proceeds of sale were applied to the debt, and the excess paid to the guardian of the plaintiff. The guardian turned over the money to a receiver of the estate, and resigned, and after the plaintiff became of age the receiver settled with him and paid to him the part of the proceeds of sale in his hands. The plaintiff then brought his action to recover the land against the purchasers at the mortgage sale, alleging that the sale was illegal, and upon this phase of the case the court says:

"It is admitted that so much of the proceeds of the sale as was necessary for that purpose was applied to the payment of the debt due to Farmer, and the balance was paid to the guardian of the plaintiff, who was then a minor, and that part of that balance was expended by the guardian for the plaintiff's support and maintenance. The guardian resigned, and a receiver of the estate of the minor was appointed under the statute, and the balance of the proceeds of the sale remaining in the guardian's hands was paid to him. When the plaintiff attained his majority, the receiver settled with him and paid over the balance in his hands. The plaintiff admits the receipt of the money from the receiver, but he says that, upon taking it from him, he asked him if receiving the money would be a ratification of the sale made by W. C. Bowen, and that the receiver referred him to his attorney, a lawyer of high standing, who was familiar with all of the facts, and who advised him that it would not be a ratification of the sale, and that, acting upon the advice of the attorney, and with no actual intention of ratifying the sale, he accepted the money, and

at the time of doing so, he expressed his intention to bring this suit. This, it seems to us, is a fair and full statement of the facts to be gathered from the record in the case.

"It is perfectly clear that, notwithstanding what the plaintiff may have said or what he intended at the time he took the money, which was a part of the proceeds of the sale, his receipt of it was a ratification of the sale to the defendant and a complete waiver in law of all irregularities in the conduct of the sale and of any lack of authority in Bowen there may have been, for the reason assigned, that is, the absence of any request from Farmer to make the sale. When the plaintiff received the money, he did something that was utterly inconsistent with his right to repudiate or disaffirm the sale."

This authority is affirmed as late as *McCullers v. Cheatham*, 163 N. C. 64, 79 S. E. 306, in which appears the statement, pertinent here:

"He could not accept the money derived from the sale and at the same time reserve the right to repudiate the sale."

There must be a new trial because of the erroneous instruction.

New trial.

(179 N. C. 720)

STATE v. GREENVILLE PUB. CO. et al.  
(No. 162.)

(Supreme Court of North Carolina. March 10, 1920.)

1. LIBEL AND SLANDER §148, 154 — STATE MUST SHOW BEYOND REASONABLE DOUBT THAT DEFAMATORY STATEMENT CONCERNING A PUBLIC OFFICIAL WAS BOTH FALSE AND MALICIOUS.

Fair criticism of qualifications and conduct of officials and candidates for public office is qualifiedly privileged, and, in a prosecution of a newspaper and its editor for libel of an official, the burden is upon the state to show that the defamatory charge was both false and malicious.

2. LIBEL AND SLANDER §148, 154—MALICE IN PROSECUTION FOR LIBELING A PUBLIC OFFICIAL, HOW SHOWN.

The falsity of a charge against a public official is not of itself sufficient to establish malice, but malice in such a case is not necessarily that of personal ill will or malevolence, and may be said to exist when it is shown that the publication is made from some ulterior motive, and it may be inferred where a defamatory statement is knowingly false or made without any fair or reasonable grounds to believe its truth, or, at times, from the character and circumstances of the publication itself, but with the exception, probably, that a man's general moral character is presumed to be good until the contrary is shown.

3. LIBEL AND SLANDER §155 — IN PROSECUTION FOR DEFAMATION OF PUBLIC OFFICIAL, EVIDENCE OF GENERAL COMPLAINT IN COUNTY ADMISSIBLE TO SHOW GOOD FAITH.

In a prosecution for publication of a defamatory of an officer, evidence offered by defendant, to the effect that "there was general complaint in the county at the time, of the negligence of the sheriff in the enforcement of the law as to deserters and slackers," was admissible as tending to show good faith in making the publication, although such evidence is not competent to show the truth of the defamatory charge.

4. INDICTMENT AND INFORMATION §3 — COUNTY COURT COULD TRANSFER PROSECUTION FOR LIBEL TO SUPERIOR COURT WITHOUT BILL OF INDICTMENT.

Where one accused of criminal libel was bound over to the county court of Pitt county by a magistrate, the county judge could of his own motion transfer the cause to the superior court for trial without there being a bill of indictment, and the superior court would thereby acquire jurisdiction, in view of Pub. Loc. Laws 1915, c. 681, declaring such offense a petty misdemeanor.

Appeal from Superior Court, Pitt County; Kerr, Judge.

The Greenville Publishing Company and James L. Mayo, editor, were convicted of libel, and appeal. New trial.

"The action was commenced before C. D. Rountree, a justice of the peace, with the issuance of a warrant against the defendants, charging them with libeling Joseph McLawhorn, sheriff of Pitt county. Upon the preliminary hearing, the magistrate found a case of probable cause against the defendants, and they were bound over by him to the county court of Pitt county. When the case was called for trial in the county court, Hon. F. M. Wooten, the county judge, announced from the bench that he would not try the case for the reason that he was a stockholder in defendant company, and thereupon, of his own motion, transferred the cause to the superior court of Pitt county for trial, where it was duly docketed, and for three regular terms of said court was continued by the presiding judge upon motion of defendants. The case came on for trial at the November term, 1919, and without objections from defendants the trial proceeded upon the original warrant. Upon the evidence, the defendants were found guilty by the jury, and adjudged by the court to pay a fine of \$100 each, and the cost, from which judgment defendants appealed."

Ward & Grimes and Small, MacLean, Bragaw & Rodman, all of Washington, N. C., and S. J. Everett and Julius Brown, both of Greenville, for appellants.

The Attorney General and Frank Nash, Asst. Atty. Gen., for the State.

HOKE, J. On the hearing, it was made to appear that in June, 1918, defendants had

(102 S.E.)

published an editorial comment as to the conduct of the prosecutor, Joseph McLawhorn, then sheriff of Pitt county, and a candidate for renomination at the approaching primaries, charging, in effect, that the prosecutor had been unfaithful and criminally negligent in the performance of his official duties in reference to enforcing the statutory provision applicable to deserters and slackers, under the federal draft acts, and containing allegations that the recent killing of one of these deserters in the effort to arrest him was indirectly due to this misconduct on the part of the sheriff and the demoralized condition thereby created. There were also facts in evidence on the part of the state tending to show that these charges were false and permitting the inference that the publication was malicious. For the defendant, there was evidence tending to show that the allegations were true, or that the publication was made under the fair and reasonable belief that they were true and so not malicious.

With this opposing testimony, the court instructed the jury on the issue as follows:

"If you find from the evidence in this case beyond a reasonable doubt that the defendant the Greenville Publishing Company published the alleged article by and with the procurement or consent of its managing editor, James L. Mayo, of and concerning the prosecuting witness, in which it stated words to the effect that he procured and counseled his son to remain out of service of the United States Army after his desertion therefrom, or, by advice, aided and abetted him in doing the same, then this accusation charges him with a crime punishable by indictment, and is libelous per se; and the law presumes malice, and the defendants, both of them, nothing else appearing, would be guilty as charged in the warrant, and you should so find."

And further:

"When malice is shown, or presumed by law, the burden then shifts to the defendant to show to the jury, not beyond a reasonable doubt, but to your satisfaction, if they can, that the publication was not a malicious publication, but that it was founded upon information which they reasonably believed to be true amounting to probable cause for comment, and you are the judges of the reasonableness of the belief of the truth of the information. Mere color of lawful occasion and pretense of justification is not sufficient, but this belief must be founded upon reason, and you are the judges of the reasonableness of the same, or that the said statement of and concerning the prosecuting witness was in fact not false but true, and if the defendants, or either of them, have so satisfied you of both or either of these facts, then they would not be guilty, and your verdict should be not guilty."

To these instructions defendants have duly excepted and assigned the same for error.

[1, 2] Recognizing that it is to the public interest that the conduct and qualifications of officials and candidates for public office

should be subjected to free and fair criticism and discussion on the part of their constituents, it is held for law in this jurisdiction that such criticism presents a case of qualified privilege, and, in order to a conviction of libel by reason of a defamatory publication of this character, it must be shown that it is both false and malicious, and our decisions on the subject are to the effect further that the "falsity of the charge is not of itself sufficient to establish malice, there being a presumption that such a publication is made in good faith." True, the malice referred to is not necessarily that of personal ill will or malevolence; it may be said to exist when it is shown that the publication is made from some ulterior motive, and it may be inferred where a defamatory statement is knowingly false or made without any fair or reasonable grounds to believe in its truth, or, at times, from the character and circumstances of the publication itself, but with the exception, probably, that a man's general moral character is presumed to be good until the contrary is shown; this being, as stated, a case of qualified privilege, the burden is on the state to show, and, in a criminal prosecution, to show beyond a reasonable doubt, that the defamatory charge is both false and malicious. *Lewis v. Carr*, 178 N. C. 578, 101 S. E. 97; *Riley v. Stone*, 174 N. C. 588, 94 S. E. 434; *Osborn v. Leach*, 135 N. C. 628, 47 S. E. 811, 66 L. R. A. 648; *Ramsay v. Cheek*, 109 N. C. 270, 13 S. E. 775; 17 R. C. L. pp. 417, 418, tit. Libel & Slander, §§ 177, 178.

Recurring to the portions of the charge objected to, we do not think the defendants have been given the benefit of the principle to which we have adverted. For, being of opinion that the defamatory article amounted to the accusation of a serious criminal offense, his honor held, in effect, that the law would imply malice, and placed on the defendants the burden of repelling the imputation. In the case of *Lewis v. Carr*, supra, the article undoubtedly contained a charge of crime, and yet, being a case of qualified privilege, the court ruled that the burden of showing malice remained upon the state.

[3] Again, we are of opinion that the evidence offered by defendants to the effect that "there was general complaint in the county, at the time, of the negligence of the sheriff in the enforcement of the law as to deserters and slackers," should have been received. True, evidence of this kind is not ordinarily competent to show the truth of a defamatory charge; but it is relevant as tending to show good faith on the part of defendants, a county newspaper and its editor, in making the publication.

[4] There is no merit in the objection made by defendants to the jurisdiction of the court. The statute establishing the inferior court of Pitt county, after declaring this and various other offenses committed to its jurisdic-

tion petty misdemeanors, provides that the same may be tried on the warrant of the justice of the peace, acting as committing magistrate. In section 3 of the statute (Pub. Loc. Laws 1915, c. 681), authority is conferred on the judge of said inferior court to transfer any and all causes to the superior court of Pitt county for trial. The procedure thus provided has been pursued in the present instance, in such case and it is held that no bill of indictment is required. *State v. Hyman*, 164 N. C. 411, 79 S. E. 284; *State v. Lytle*, 138 N. C. 738, 51 S. E. 66.

For the errors indicated, however, the defendants are entitled to a new trial of the issue, and it is so ordered.

New trial.

(179 N. C. 216)

**GOFF v. ATLANTIC COAST LINE R. CO.**  
(No. 63.)

(Supreme Court of North Carolina. Feb. 25, 1920.)

**1. RAILROADS ⇐350(7) — NEGLIGENCE IN FAILURE TO GIVE SIGNAL QUESTION FOR JURY.**

Evidence held to make a question for the jury as to railroad's failure to give the crossing signal by sounding the whistle or bell.

**2. RAILROADS ⇐312(3)—FAILURE TO SOUND WHISTLE OR BELL AT MUCH-USED CROSSING IS NEGLIGENCE.**

The failure to give notice of a train's approach to a much-used public crossing by sounding the whistle or bell is negligence.

**3. RAILROADS ⇐327(5)—DUTY TO LOOK AND LISTEN DEFINED.**

Before attempting to cross a railroad track a traveler must use his senses of sight and hearing to the best of his ability under the circumstances and look and listen in both directions if not prevented by the fault of the railroad company, and he has time to do so, and must do this before going into a position of danger.

**4. RAILROADS ⇐350(16) — NEGLIGENCE IN FAILING TO LOOK AND LISTEN QUESTION FOR JURY.**

The duty of a traveler to look and listen before crossing a railroad track may be so qualified by attendant circumstances as to require the issue of contributory negligence by not taking proper measures for his safety to be submitted to the jury.

**5. RAILROADS ⇐328(1) — ONE USING FACULTIES AS BEST HE CAN TO ASCERTAIN APPROACH OF TRAINS NOT NEGLIGENCE.**

If a traveler's view is obstructed or his hearing an approaching train prevented, especially if this is done by the railroad's fault, and the company's servants fail to warn him of its approach, and, induced by this failure of duty, he attempts to cross the track and is injured, having used his faculties as best he could to ascertain if there was danger, negligence will not be imputed to him.

**6. RAILROADS ⇐350(22)—AUTOMOBILE DRIVER'S CONTRIBUTORY NEGLIGENCE QUESTION FOR JURY.**

Evidence held to make a question for the jury as to whether automobile driver's view and hearing were so obstructed that he could not see or hear the approaching train in time to avoid the collision by the exercise of ordinary care.

**7. RAILROADS ⇐338—CONTRIBUTORY NEGLIGENCE DID NOT DEFEAT RECOVERY WHERE TRAINMEN NEGLIGENCELY FAILED TO STOP TRAIN AFTER COLLISION.**

That a person whose automobile was struck by a train was negligent in failing to look and listen did not bar a recovery, where the engine picked up the automobile and carried it for some distance, and the trainmen negligently failed to keep a lookout or to make any effort to stop the train until the automobile struck a switch post.

**8. RAILROADS ⇐348(4) — EVIDENCE SUFFICIENT TO SHOW NEGLIGENCE IN CARRYING AUTOMOBILE ON ENGINE WITHOUT STOPPING.**

In an action for the death of a person whose automobile was struck by a train, evidence held to support jury findings that he was not killed at the crossing, and that his car was carried on the front of the engine for 300 yards until it struck a switch post, and that, if the engineer had been keeping a proper lookout, he would have known of the collision in time to stop the train.

**9. RAILROADS ⇐346(6) — BURDEN OF SHOWING CONTRIBUTORY NEGLIGENCE IN FAILING TO LOOK AND LISTEN IS ON DEFENDANT.**

In an action for the death of a person struck by a train at a crossing, the burden is on defendant to plead and prove contributory negligence in failing to look and listen for approaching trains.

Appeal from Superior Court, Edgecombe County; Devin, Judge.

Action by G. E. Goff, administrator, against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

This is an action to recover damages for the negligent killing of plaintiff's intestate, D. C. Goff, at the public crossing in Rocky Mount at Gay's store on Cokey road.

The allegations of negligence are that the defendant allowed trees and bushes to grow on its right of way and failed to give the signals to travelers required at crossings by ringing the bell and blowing the whistle or and plaintiff killed; that the engineer and fireman failed to keep a proper lookout for otherwise, at the proper time, in order to warn the travelers of the approach of the train, and caused plaintiff's intestate to enter on the right of way with his car in motion, and to undertake to cross over said railroad, and negligently caused said train to pass over said crossing at an excessive, rapid, reckless, and unusual rate of speed, to wit, more than 50 miles an hour, and without keeping any lookout on part of its engineer and fireman,

and after plaintiff's automobile was stricken by the engine of said train it was negligently carried, with plaintiff's intestate in same, over 300 yards on front of said engine until it struck a switch post standing close to the track, when said automobile and plaintiff's intestate were hurled violently to the ground the protection of travelers on said road passing over said crossing, and that, if they had kept a proper lookout, they could have seen said automobile as it reached the crossing and was picked up by the engine, and avoided carrying same until it struck a switch post, and violently hurling the auto and plaintiff's intestate to the ground and killing him.

The defendant denied that it was negligent, and pleaded that the death of the plaintiff's intestate was caused by his own contributory negligence.

At the conclusion of the evidence the defendant moved for judgment of nonsuit, which was overruled, and the defendant excepted.

The defendant also excepted to the submission.

The defendant also excepted to the charge of the court upon the third issue upon the ground that there was no evidence that the sion of the third issue to the jury upon the ground that there was neither allegation nor proof to support it.

intestate was not mortally injured by the collision at the crossing.

The defendant also excepted because of refusal to give the following instruction to the jury:

"The burden is on the plaintiff to satisfy you by the greater weight of the evidence that the deceased, before attempting to cross the railroad, listened and looked in both directions to ascertain if a train was approaching; so, if the plaintiff has not satisfied you that the deceased did listen and look in both directions for an approaching train before attempting to cross the track, you are instructed to answer the issue as to contributory negligence 'Yes.'"

The jury returned the following verdict:

"(1) Was plaintiff's intestate killed by negligence of defendant, as alleged in the complaint? Answer: Yes.

"(2) Did plaintiff's intestate by his own negligence contribute to his injury and death, as alleged in the answer? Answer: No.

"(3) Was the death of plaintiff's intestate caused by the negligence of the defendant in failing to stop its train in time to prevent the automobile from being thrown against the switch post, after said automobile had been struck by the engine, as alleged in the complaint? Answer: Yes.

"(4) What damage, if any, is plaintiff entitled to recover of the defendant? Answer: \$18,000."

Judgment was entered upon the verdict for the plaintiff, and the defendant excepted and appealed.

F. S. Spruill, of Rocky Mount, and John L. Bridgers, of Tarboro, for appellant.

J. B. Ramsey, of Rocky Mount, and W. O. Howard, of Tarboro, for appellee.

ALLEN, J. The motion for judgment of nonsuit is upon the ground: (1) That there is no evidence of negligence; (2) that the plaintiff's intestate was guilty of contributory negligence in any view of the evidence.

If the first position can be maintained, the defendant is entitled to a reversal of the judgment, but the same result does not necessarily follow if the plaintiff's intestate was guilty of contributory negligence, because it has been found in answer to the third issue that, whether plaintiff's intestate was negligent or not, the defendant could have avoided killing the deceased but for its negligent failure to stop after the automobile was struck, and caught on the front of the engine.

Is there evidence of negligence? In *Bagwell v. Railroad*, 167 N. C. 615, 83 S. E. 816, the court quotes with approval the following from *Edwards v. Railroad*, 132 N. C. 100, 43 S. E. 585:

"It is undoubtedly true that the engineer must give such a signal as will be reasonably sufficient to warn persons on highways that intersect the track of the coming of the train, and this must be done by ringing the bell or blowing the whistle, as the peculiar circumstances of the case may suggest to be the proper method, and the failure of the engineer to give such signal would be evidence of negligence. *Hinkle v. R. R.*, 109 N. C. 473 [13 S. E. 884] 26 Am. St. Rep. 581. The warning must be reasonable and timely, but what is reasonable and timely warning must depend upon the conditions existing at the time in the particular case, and we are not by any means prepared to say that the law requires in every case that the signal should be given in any special way. We know of no such hard and fast rule as that laid down by the trial judge in this case. The bell and the whistle are the appliances provided for the purpose of giving signals, and one or the other, as the case may seem to require, must be used for that purpose, and, in cases of emergency or when the peculiar situation seems to demand it, there should perhaps be a resort to the use of both; but it must be left to the jury to decide, upon proper instructions of the court as to the law, what is the proper signal in any given case."

It was also held in *Edwards v. Railroad*, 129 N. C. 79, 39 S. E. 730:

"That the testimony of a witness that he did not hear either the whistle or the bell, although in a position where he might reasonably have heard either, is sufficient evidence for the consideration of the jury. It tends to prove that neither the whistle nor the bell was sounded; but whether it does prove it is for them alone to decide."

Applying these principles, the plaintiff was entitled to have his cause of action considered by the jury.

[1] The plaintiff's intestate was driving his automobile at a moderate rate of speed on the Cokey public road, which crosses the railroad of the defendant within the corporate limits of Rocky Mount, and as he attempted to cross the track he was stricken by the train and injured.

One witness testified:

"A man coming up to the crossing and car moving he could not turn to either side; there are ditches on both sides. I have seen cars have wrecks there on both sides to keep out of way of trains. Rocky Mount has about 21,000 people. This crossing is in the town limit; is built up about there. I guess built up about four blocks towards Tarboro. The crossing is used a whole lot. Two main roads cross it; somebody crossing most of the time. All the county south side Norfolk, Carolina, and east of W. & W. Railroad; this is the only crossing in this section."

J. O. Joyner, who was at Gay's store within 100 feet of the crossing, testified:

"Did not hear any whistle; bell was not ringing; didn't see train until after it struck auto."

Jesse Calhoun, also at Gay's store, says:

"Don't remember hearing any signal."

Frank Carter, who was at his home 150 feet from crossing:

"Didn't hear it blow. I can hear train blow at crossing at my house. Has blown heap of times when I didn't hear it."

Mrs. Moore, within 100 yards of crossing:

"I noticed the train coming at extra speed; didn't hear whistle blow."

W. H. Gay:

"I was in store; I guess store is about 10 steps from right of way; did not hear any signal of train; heard the smash and saw auto wheel rolling between spur track and railroad, kinder in direction train was going."

[2] This was sufficient to be submitted to the jury on the question of the failure of the defendant to give any notice of the approach of its train to a much-used public crossing, and, if it failed in the performance of this duty, it was guilty of negligence. There is also evidence that no proper lookout was maintained.

The fireman on the engine testified that he saw the intestate approaching the track, driving about 8 miles an hour, and that he said nothing to the engineer until after the collision, and a witness testified he heard the engineer say "he didn't know he hit any one until car struck switch," which was 300 or 350 yards beyond the crossing.

There is evidence of contributory negligence, in that the intestate, by the exercise of proper care, could have heard the roar of the train or could have seen it in time to stop before entering upon the track, but it is not

so conclusive that it can be declared as matter of law.

[3-5] The principles applicable to this phase of the case are accurately stated in *Johnson v. Railroad*, 163 N. C. 443, 79 S. E. 695, Ann. Cas. 1915B, 598.

"(4) On reaching a railroad crossing, and before attempting to go upon the track, a traveler must use his sense of sight and of hearing to the best of his ability under the existing and surrounding circumstances; he must look and listen in both directions for approaching trains, if not prevented from doing so by the fault of the railroad company, and if he has time to do so; and this should be done before he has taken a position exposing him to peril or has come within the zone of danger, this being required so that his precaution may be effective. *Cooper v. Railroad*, 140 N. C. 209 [52 S. E. 932, 3 L. R. A. (N. S.) 391, 6 Ann. Cas. 71]; *Coleman v. Railroad*, 153 N. C. 322 [69 S. E. 251]; *Wolfe v. Railroad*, 154 N. C. 569 [70 S. E. 993], in the last of which cases the rule was applied to an employé charged with the duty of watching a crossing and warning travelers of the approach of trains, and he was required to exercise due care, under the rule of the prudent man, for his own safety by looking and listening for coming trains.

"(5) The duty of the traveler arising under this rule is not always an absolute one, but may be so qualified by attendant circumstances as to require the issue as to his contributory negligence, by not taking proper measures for his safety, to be submitted to the jury. *Sherrill v. Railroad*, 140 N. C. 255 [52 S. E. 940]; *Wolfe v. Railroad*, supra. \* \* \*

"(7) If his view is obstructed or his hearing an approaching train is prevented, and especially if this is done by the fault of the defendant, and the company's servants fail to warn him of its approach, and, induced by this failure of duty, which has lulled him into security, he attempts to cross the track and is injured, having used his faculties as best he could, under the circumstances, to ascertain if there is any danger ahead, negligence will not be imputed to him, but to the company; its failure to warn him being regarded as the proximate cause of any injury he received. *Mesic v. Railroad*, 120 N. C. 490 [26 S. E. 633]; *Osborne v. Railroad*, supra [160 N. C. 309, 76 S. E. 16]."

[8] One witness described conditions on the day of the accident:

"There is a good scope of woods before you get to the railroad. There is a good lot of buildings at crossing. If a train happened to be close by you could see it when you first got to the buildings. That is a map of the crossing. The road curves a little to the right going into Rocky Mount. Several houses alongside the country road (see map); about six. You could see right here (indicates on the map); if along there, would have to see the train in front, before reaching the right of way; would have to see between the buildings, but the train would be ahead of him; going west, there is a lumber shed, boiler room, stable, warehouse, and Gay's store (indicates on map; explains map to jury); the map does not show bushes, ditches, and trees; unless he could catch the train between there, those narrow spaces; he

could not see it at all; he would be right on the train before he would see it. The sweet gum bushes are right smart higher than my head; they were (as high) as my head then. A traveler coming on the right of way, after he had cleared the bushes and got a clear view of the train coming, could not turn to the right or left; there were ditches along there; there was a ravine on each side of the road."

Another witness:

"Between Cokey road and right of way of railroad, one-quarter of a mile, three dwellings, storage house; lumber and boiler room and stables further down in edge of woods; pointed to houses on map; they obstruct view of railroad. In space between Cokey road and railroad right of way, trees, shrubs, and large trees growing; a ditch runs across the crossing, and it has some growth on it. On the right of way the crossing is narrow, wide enough for two to pass in vehicles; ditches on each side of the crossing. I estimate two or three feet deep."

Another witness:

"Good many buildings between road and right of way; very hard to see train; have to catch glimpses between buildings; traveler could not catch sight of train until he had passed lower building and got on right of way; there are some bushes, some high as the house, between Dozier & Thorne's storage house and the railroad track; there is a ditch there on the right of way; I don't think that they have ever crossed the ditch and cut any trees down; right of way is clear between ditch and railroad."

W. L. Dunn testified:

"There are some buildings and mill along the track, and I think they would cut off from a person going to Rocky Mount the sound of a coming train; don't think you could hear it unless it blowed."

The inference is permissible from this evidence that the view and hearing were so obstructed that the intestate could not see or hear the approaching train in time to avoid the collision by the exercise of ordinary care, and, if so, the question was for the jury.

[7] If, however, the intestate was negligent in entering upon the track without looking and listening, this would not bar a recovery, because of the finding on the third issue, which is supported by allegation and proof.

The plaintiff alleges:

That the defendant "could have seen said automobile as it reached the crossing and was picked up by the engine and avoided carrying said automobile of plaintiff's intestate, with plaintiff's intestate in same, more than 200 yards, and violently hurling said automobile and plaintiff's intestate to the ground, and thereby avoided killing him; that the said engineer and fireman negligently failed and omitted to keep any lookout at all and did not know of the collision until plaintiff's automobile with plaintiff in same, had been carried more than two city blocks, and until the automobile struck a switch post and plaintiff's intestate and his automobile were hurled to one side, and made

no effort whatever to stop said train until said switch post was stricken by said automobile."

[8] Frank Carter testified:

"At the time of accident I was standing on end of front porch next to the railroad. I went out to look at the train. I saw a man sitting in the car on the pilot of the engine, and about that time it threw the car off, and threw the man up as high as the engine. The man's back was towards me like he was holding the steering wheel of the car. If the man had been going towards Rocky Mount and crossing from the south to the north, the position he was sitting was the natural position. When the train got to the switch it threw the car off. One end got on the switch, and it threw the man about as high as the engine. He was laying in the path at the end of the cross-ties when I got there. After the auto struck the switch, the train stopped in less than a car length of the whole train. Speed of train was 35 or 40 miles an hour. I didn't see train at Cokey crossing; don't think it slackened; didn't act like it; didn't hear any brakes applied."

T. J. Bullock says:

"Heard engineer say train was a little late: said he didn't know anything was on cowcatcher until he struck switch post, and then he began to slow up."

There was also evidence that it was a light train, and that the switch post was 300 or 350 yards from the crossing.

This evidence justifies the findings, incorporated in the third issue, that the intestate was not killed at the crossing; that his car was struck and carried on the front of the engine 300 or 350 yards, to the switch post; that during this time the intestate was sitting in his car with his hand on the steering wheel; that the car struck the post and the intestate was then killed; that the engineer did not know anything was on his engine; that he did not slacken speed until he struck the post, and that, if he had been keeping a proper lookout, he would have known of the collision at the crossing and could have stopped the train before it reached the post, and thus have avoided killing the deceased.

There is an exception to a charge upon the third issue upon the ground that there is no evidence the intestate was not killed at the crossing, which is covered by what has already been said.

[9] The prayer for instruction on contributory negligence could not have been given, because it placed the burden on the plaintiff, when the law requires the defendant to plead and prove contributory negligence.

There is no exception to the amount of damages assessed.

No error.

CLARK, O. J., concurs in the opinion of ALLEN, J., and further says: Any collision between a train and a vehicle of any kind at a crossing is *prima facie* negligence on the

part of the company. The public have a right to use their roads, and the right of the railroad to cross is in subordination thereto. The population of the country is increasing steadily, and in addition to the ordinary vehicles there are now more than 100,000 automobiles and motortrucks licensed by this state, besides a large number from other states passing thru this state. It is not reasonable to expect that this immense volume of business can cross and recross the railroad tracks of this state without frequent loss of life or personal injuries. It is therefore negligence on the part of the railroad not to abolish all grade crossings and to make their crossings of public roads in every instance either above or below the surface except when for sufficient cause the Corporation Commission may authorize gates and a tender at exceptional crossings.

Whenever death or personal injuries occur at a crossing, it is prima facie due to the negligence of the railroad company in crossing the public road upon the same grade. The burden should be upon the company to prove that, notwithstanding its negligence in maintaining a grade crossing, the death or injury would not have occurred but for the conduct of the party killed or injured.

Throughout Europe grade crossings are forbidden, and they have been abolished in Massachusetts, Connecticut, New York, New Jersey and some other states. The United States Supreme Court has held that any state can require this to be done at the expense of the corporation. Our own statute (Revisal, § 1007(2)) confers upon the Corporation Commission power "to require the raising or lowering of the track at any crossing when deemed necessary." This was re-enacted and emphasized (Laws 1907, c. 469, § 1(c)).

The laws and the courts are not solely for the protection of property rights, but for the enforcement as well of the constitutional guaranty of the protection of life and limb.

This court accordingly held in *Greenlee v. Railroad*, 122 N. C. 977, 30 S. E. 115, 41 L. R. A. 399, 65 Am. St. Rep. 734, and *Troxler v. Railroad*, 124 N. C. 189, 32 S. E. 550, 44 L. R. A. 313, 70 Am. St. Rep. 580, that the absence of automatic car couplers was negligence per se, and hence an irrebuttable presumption. This negligence has now been made punishable by act of Congress (8 U. S. Compiled Statutes, § 8606).

This court made a similar ruling as to the failure to adopt a "block system" (*Stewart v. Railroad*, 137 N. C. 687, 50 S. E. 312), which was reiterated in the same case (141 N. C. 253, 53 S. E. 877), and such system is now required by statute (Laws 1907, c. 469, § 1(b)). There are other similar decisions of this Court as to other matters involving exposure to unnecessary dangers. The longer retention of grade crossings should be on the same footing as the lack of car couplers and block

systems. As Lord Chancellor Erskine observed, when at the bar:

"Morality comes in the cold abstract from the pulpit, but men smart practically under its lessons when juries and judges are the teachers."

The General Assembly can make the abolition of grade crossings by railroads imperative instead of leaving it, as now, unexercised in the discretion of the Corporation Commission, and can place the cost of doing so upon the corporations, whose duty it is to remove them. *Railroad v. Minn.*, 208 U. S. 583, 28 Sup. Ct. 341, 52 L. Ed. 630, cited *Railroad v. Goldsboro*, 155 N. C. 362, 71 S. E. 514. In the meantime, like any other collision, or a derailment, the act itself is prima facie negligence on the part of the railroad company. *Marcom v. Railroad*, 126 N. C. 200, 35 S. E. 423. This matter has heretofore been called to the public attention in *Cooper v. Railroad*, 140 N. C. 228, 229, 52 S. E. 982, 3 L. R. A. (N. S.) 391, 6 Ann. Cas. 71; *Wilson v. Railroad*, 142 N. C. 348, 349, 55 S. E. 257; *Gerringer v. Railroad*, 146 N. C. 35-37, 59 S. E. 152; *Railroad v. Goldsboro*, 155 N. C. 360-362, 364, 71 S. E. 514, affirmed on writ of error 232 U. S. 548, 34 Sup. Ct. 364, 58 L. Ed. 721; *McMillan v. Railroad*, 172 N. C. 857-860, 90 S. E. 683, where the matter is fully discussed with full citation of authorities; and *Borden v. Railroad*, 175 N. C. 179, 95 S. E. 146.

(113 S. C. 437)

**BLACKMON v. WILLIAMS et al.**  
(No. 10384.)

(Supreme Court of South Carolina. Feb. 23, 1920.)

**WILLS** ¶782(10)—PROVISIONS FOR WIDOW IN WILL HELD TO BE IN LIEU OF DOWER BY NECESSARY IMPLICATION.

Where surviving wife took the land given her by deceased husband's will, and the remaining land, pursuant to will, was sold for payment of debts and legacies, the personal estate being insufficient, the surviving wife, whose bequest was out of the very land of which she was dowable and more than her dower, was not entitled to dower in such land in addition to the provisions made for her in will; such provisions being by necessary implication in lieu of dower.

Appeal from Common Pleas Circuit Court of Lancaster County; Ernest Moore, Judge.

Suit by Sarah F. T. Blackmon against George W. Williams and others. Judgment for defendants, and plaintiff appeals. Affirmed.

J. Harry Foster, of Rock Hill, for appellant.

Williams & Williams & Stewart, and R. E. Wylie, all of Lancaster, for respondents.



HYDRICK, J. Plaintiff sued the present owners for dower in a tract of land which was sold by the executor of her husband's will, according to the directions thereof, to provide a fund for the payment of debts and legacies.

The question is whether she is entitled to dower in the land, in addition to the provisions made for her in the will; or, otherwise stated, it is whether the will, read as a whole in the light of the circumstances and situation of the parties, manifests, by necessary implication, the intention that the provision made for her was to be in lieu of dower, notwithstanding that intention was not expressly declared.

Testator had no children, but a number of nephews and nieces, to whom he gave legacies. He had seven tracts of land, aggregating about 566 acres. He devised six of these aggregating 388 acres to plaintiff, for life or widowhood (remainders over), and gave her all his household goods and half his personal estate, after payment of debts and legacies, and directed that his executors sell the other tract of 200 acres (in which plaintiff claims dower) and add the proceeds to his personal estate. This tract was sold for \$2,850, which has been found to be a full and fair price for it. The personal estate (so augmented, not including the household goods given to plaintiff) amounted to something over \$9,000, and the debts and legacies together amounted to about \$7,500, so that, after deducting the expenses of administration, plaintiff will get between \$600 and \$700 from the personal estate, as augmented by the proceeds of the tract sold. Of this amount, the executor has paid her \$500, and she has also received the other bequest and the lands devised to her.

We agree with the circuit court that from the nature of the estate bequeathed and devised to plaintiff, as compared with testator's entire estate, and the other provisions of the will, the inference is clear beyond doubt—indeed, it is necessary, if effect is to be given to the intention expressed—that testator intended the provision made for plaintiff to be in lieu of her dower. The personal estate which is primarily liable for the payment of debts and legacies would have been insufficient for that purpose, if it had not been increased by the proceeds of the tract in question. In that event, plaintiff would have gotten nothing from the one-half of the residue of the personal estate, as there would have been no residue after payment of debts and legacies. So it can be fairly said that plaintiff has received and will receive from the proceeds of the tract more than the value of her dower interest therein. The case falls within the illustration given in *Hall v. Hall*, 8 Rich. 407, at page 411 (64 Am. Dec. 758),

when Judge O'Neill, speaking for the court, said:

"If a testator owns but one tract of land, and he devises to his wife an estate for life in one half of it, and she claims her dower in the other half, then I apprehend that it might be shown by parol that he owned no other land, and that consequently the estate devised to her, being out of the very land of which she was dowable, and more than her dower, was a satisfaction."

Here the estate bequeathed to plaintiff was out of the very land of which she was dowable, and more than her dower. Her claim is utterly inconsistent with the will. Both cannot be given effect; and, as it is not a case for election whether she will take under the will or under the law, her claim was properly denied.

Judgment affirmed.

GARY, C. J., and WATTS, FRASER, and GAGE, JJ., concur.

SHAW v. FISHER. (No. 10378.)

(113 S. C. 287)

(Supreme Court of South Carolina. Feb. 23, 1920.)

1. CONSTITUTIONAL LAW §83(2) — HOLDING ONE HIRING SERVANT WHO HAS BROKEN CONTRACT OF EMPLOYMENT LIABLE TO THE MASTER WOULD CREATE INVOLUNTARY SERVITUDE.

As Const. U. S. Amends. 13 and 14, abolished all involuntary servitude except for crime, one who hires a servant who has already broken his contract of service with knowledge of the breach is not responsible to the master despite the common-law holding to that effect, for, if any one who engaged a servant breaking his contract of employment would be liable to the master, the servant would practically be compelled to remain in the service until the expiration of his contract and thus reduced to a state of involuntary servitude.

2. MASTER AND SERVANT §339—ENGAGING SERVANT QUITTING SERVICE OF ANOTHER LAWFUL.

The law does not prevent a servant who breaks his contract securing other employment by penalizing those who engage him with notice.

3. CONSTITUTIONAL LAW §87—LAW COMPELLING EMPLOYER TO RETAIN ONE IN SERVICE WOULD DENY RIGHT TO ACQUIRE AND HOLD PROPERTY.

Any law which would undertake to compel an employer to retain in his service an employé whom he desires to dismiss would be a denial of the employer's constitutional right to make contracts and acquire and hold property, even though the contract of service had not expired.

Gage, J., dissenting.

Appeal from Common Pleas Circuit Court of Anderson County; S. W. G. Shipp, Judge.

Action by John L. Shaw against A. D. Fisher. From a judgment for plaintiff, defendant appeals. Reversed.

A. H. Dagnall, of Anderson, for appellant.  
Bonham, Watkins & Allen, of Anderson, for respondent.

HYDRICK, J. Plaintiff sued defendant for damages (1) for enticing away from him one Carver, who was under contract with him as a share cropper for the year 1916, and (2) for harboring his said servant by employing him after notice that he was under contract with plaintiff. The jury found a general verdict for plaintiff for \$300, and from the judgment thereon defendant appealed.

Plaintiff's contract with Carver was in writing, dated March 22, 1916, and provided that Carver should work for plaintiff as a share cropper until the end of the year. Carver left plaintiff in June, and moved into a house on defendant's plantation. His goods were moved by the use of defendant's wagon and team, against plaintiff's protests and notice to defendant that Carver was under contract with him. After he left plaintiff, Carver worked for wages, part of the time for defendant, and part of the time for others in the community.

Defendant denied enticing Carver away from plaintiff, and introduced testimony tending to prove that Carver quit plaintiff's service of his own volition and for cause. Carver so testified, and said that plaintiff was so contentious and hard to get along with that he would "die and go to hell" rather than to have worked for him any longer; and that he quit plaintiff, of his own motion, before he applied to defendant for employment.

Defendant asked the court to instruct the jury that, if Carver quit plaintiff of his own volition, they should find for defendant; and the court gave that instruction, but restricted the application of it to the cause of action for enticement, and charged the jury that, if Carver quit plaintiff for good cause, that is, such cause as would be sufficient in law to justify him in breaking his contract with plaintiff, defendant would not be liable for employing him, but if Carver broke his contract with plaintiff without such cause, and if defendant gave him employment after notice that he was under contract with plaintiff, defendant would be liable on the cause of action for harboring plaintiff's servant.

The court read to the jury as law the following from section 2596, vol. 7, Labatt's *Master & Servant*:

"It must now be considered clear law that a person who wrongfully and maliciously, or which is the same thing, with notice, interrupts the relation subsisting between master and servant by procuring the servant to depart from

the master's service, or by harboring and keeping him as a servant after he has quitted it, and during the time stipulated for as the period of service, whereby the master is injured, commits a wrongful act for which he is responsible at law."

Defendant concedes that the law as to enticing another's servant was correctly laid down, but assigns error in the charge as to liability of one who merely employs a servant after notice that he has quit the service of another, even though the quitting was an unwarranted breach of contract.

The issue is one of grave concern both to employers and employes, and we have given it consideration commensurate with its importance.

[1-3] No doubt the law declared to the jury was at one time the common law of England, and we will assume that it was also the common law in this country prior to the adoption of the thirteenth and fourteenth amendments to the federal Constitution. But those amendments superseded and annulled all law—statutory or common law—which was in conflict with them. And we think the law as declared to the jury in this case as to the liability of one for harboring the servant of another does conflict with the spirit and intent of both those amendments.

The thirteenth amendment prohibits involuntary servitude, except as a punishment for crime.

"It was a charter of universal civil freedom for all persons, of whatever race, color, or estate, under the flag. \* \* \* The plain intention was to abolish slavery of whatever name and form and all its badges and incidents; to render impossible any state of bondage; to make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit which is the essence of involuntary servitude." *Bailey v. Alabama*, 219 U. S. 219, 241, 31 Sup. Ct. 145, 151 (55 L. Ed. 191).

The court further said that—

"While the amendment was self-executing, so far as its terms were applicable to any existing condition, Congress was authorized to secure its complete enforcement by appropriate legislation."

And, in interpreting the act of Congress commonly known as the peonage statute, which was enacted to give effect to the thirteenth amendment, after quoting the provisions of the statute, the court said at page 242 of 219 U. S., at page 152 of 31 Sup. Ct. (55 L. Ed. 191):

"And in this explicit and comprehensive enactment, Congress was not concerned with mere names or manner of description, or with a particular place or section of the country. It was concerned *with a fact*, wherever it might exist; *with a condition*, however named and wherever it might be established, maintained, or enforced [and, we may add, however it might be brought about]. The fact that the debtor con-

tracted to perform the labor which is sought to be compelled does not withdraw the attempted enforcement from the condemnation of the statute. The full intent of the constitutional provision could be defeated with obvious facility if, through the guise of contracts under which advances had been made, debtors could be held to compulsory service. *It is the compulsion of the service that the statute inhibits, for when that occurs the condition of servitude is created, which would be not less involuntary because of the original agreement to work out the indebtedness. The contract exposes the debtor to liability for the loss due to the breach, but not to enforced labor.*" (Italics added.)

In *Clyatt v. United States*, 197 U. S. 207, 215, 25 Sup. Ct. 429, 430 (49 L. Ed. 726), after stating the difference between so-called voluntary and involuntary peonage, the court said: "But peonage, however created, is compulsory service, involuntary servitude." The converse must be true—that involuntary servitude, however created or brought about, is within the inhibition of the statute, if the purpose of it is to enforce the payment of a debt, or the performance of the obligation of a contract. And, again, at page 215 of 197 U. S., at page 430 of 25 Sup. Ct. (49 L. Ed. 726):

"A clear distinction exists between peonage and the voluntary performance of labor or rendering of services in payment of a debt. In the latter case the debtor, though contracting to pay his indebtedness by labor or service, and subject like any other contractor to an action for damages for breach of that contract, *can elect at any time to break it, and no law or force compels performance or a continuance of the service.*" (Italics added.)

Of course, as there said, this statement of the law is not applicable to exceptional cases such as the service of a sailor, the obligations of a child to its parents, and other exceptional relations, which need not be mentioned.

Let us apply the principles above stated to the situation before us. If no one else could have employed Carver during the term of his contract with plaintiff, after he had elected to break that contract, without incurring liability to plaintiff for damages, the result would have been to coerce him to perform the labor required by the contract; for he had to work or starve. The compulsion would have been scarcely less effectual than if it had been induced by the fear of punishment under a criminal statute for breach of his contract, which was condemned, as violative of the thirteenth amendment, in *Ex parte Hollman*, 79 S. C. 9, 60 S. E. 19, 21 L. R. A. (N. S.) 242, 14 Ann. Cas. 1105. The prohibition is as effective against indirect as it is against direct actions and laws—statutes or decisions—which, in operation and effect, produce the condition prohibited. The validity of the law is determined by its operation and effect.

Of course, the sanction of the obligation of the contract, and the liability to pay damages

for breach thereof, inhere in every contract, and these alone do not amount to that compulsion which is prohibited so long as the employé has the liberty at any time to elect to break the contract, subject only to the legal consequences—an action for damages—just like any other contractor. But if the law should penalize all who give him employment, after he has breached his contract, the effect would be to deny to him the same freedom that every other contractor enjoys, to wit, that of electing at any time to break his contract, subject only to his liability for damages. To that extent, liberty of action and freedom of contract is guaranteed by the fourteenth amendment. *Coppage v. Kansas*, 236 U. S. 1, 35 Sup. Ct. 240, 59 L. Ed. 441, L. R. A. 1915C, 960; *Truax v. Raich*, 239 U. S. 33, 36 Sup. Ct. 7, 60 L. Ed. 131, L. R. A. 1916D, 545, Ann. Cas. 1917B, 283.

The law under the federal Constitution, as interpreted by the highest courts, is thus stated in 6 R. O. L. at page 274:

"Liberty of contract involves, as one of its essential attributes, the right to terminate contracts, subject only to civil liability for unwarranted termination. Since an employé cannot be compelled to work against his will, it is generally recognized that he is at liberty to refuse to continue to serve his employer. In this respect the rights of the employer and the employé are equal. Any act of the Legislature that would undertake to impose on an employer the obligation of keeping one in his service whom, for any reason, he does not desire, would be a denial of his constitutional right to make and terminate contracts and to acquire and hold property. Equally so would be an act the provisions of which were intended to require one to remain in the service of another whom he did not desire to serve. Accordingly, it has been held that a statute making it a misdemeanor for one under contract to labor or work on particular land to break his contract and enter into another with a different person, without the consent of his employer, and sufficient excuse, to be adjudged by the court, and without giving notice of his contract to the person with whom he makes the new one, violates the constitutional guaranties of liberty."

See, also, 16 R. O. L. p. 414, and 18 R. O. L. p. 510, and authorities cited in the footnotes.

If Carver, of his own volition and without enticement from defendant, put an end to his contract with plaintiff, as we have seen he had the constitutional right to do, with or without cause, subject only to liability for damages for an unwarranted breach, he had the right thereafter to contract with defendant, or any other person, for his labor, and those who gave him employment are under no legal liability to plaintiff. Their right to hire him is determined by his right to hire to them. *Truax v. Raich*, supra.

In this view of the case, it becomes unnecessary to consider the error assigned in the charge as to the measure of damages

resulting from the harboring of Carver. The other exceptions are overruled.

As the jury may have found that defendant did not entice Carver away from plaintiff, but that he was liable for hiring him after notice that he was under contract with plaintiff and after he had breached that contract of his own volition, there must be a new trial.

Judgment reversed.

WATTS and FRASER, JJ., concur.  
The CHIEF JUSTICE did not sit.

GAGE, J. I dissent. The argument of the leading opinion would be relevant were the procedure against the servant; but it is not.

The effect of the decision will be to deprive the first employer of a laborer of all remedy against the second employer of a laborer, for in every instance the second employer will surely make his contract after the servant has broken his contract.

It will be time enough to announce that the case is controlled by federal law when so much has been decided by federal courts, which I conceive has not yet been done.

(113 S. C. 282)

MIDDLETON et al. v. COCKFIELD et al.  
(No. 10371.)

(Supreme Court of South Carolina. Jan. 27, 1920.)

1. ESTOPPEL ¶72—MORTGAGEE WHO ACCEPTED NEW INDORSED NOTE AND MORTGAGE AND ASSIGNED ORIGINAL NOTE AND MORTGAGE TO INDORSEE ESTOPPED FROM DENYING VALIDITY OF SAME WHEN ASSIGNED BY INDORSEE.

Under the rule that, where one of two innocent persons must suffer loss, it must be borne by the one who by his conduct has made the injury possible, a bank holding a mortgage and note already due which accepted a new mortgage and note on the latter being indorsed by a third person to whom was assigned the original note and mortgage cannot attack the validity of the original note and mortgage in the hands of plaintiff, a bona fide purchaser, even though the transfer was made after maturity; the mode of assignment being such as would naturally lead plaintiff to believe that the original note and mortgage was still enforceable.

2. MORTGAGES ¶253—PRIORITY OF RIGHTS OF ASSIGNEE OF FIRST MORTGAGE OVER ORIGINAL MORTGAGEE WHO ACCEPTED RENEWAL MORTGAGE AND ASSIGNED ORIGINAL NOT AVOIDED ON GROUND MORTGAGOR WOULD PAY TWICE.

Where plaintiff acquired a mortgage and note which original mortgagee assigned when it accepted a new note and mortgage in renewal, held, that plaintiff's right to priority against the original mortgagee will not be denied on the ground that the mortgagor might be compelled to pay the same debt twice.

3. MORTGAGES ¶260—RULE THAT ONE BUYING NONNEGOTIABLE SECURITY TAKES IT SUBJECT TO EQUITIES DOES NOT APPLY WHERE THE ORIGINAL PARTIES HAVE ESTOPPED THEMSELVES TO ASSERT SUCH EQUITIES.

The rule that one buying a nonnegotiable security, such as a mortgage, takes it subject to all equities existing between the original parties, is inapplicable where the original parties have by their conduct, acts, or omissions estopped themselves from asserting existence of such equities.

Appeal from Common Pleas Circuit Court of Williamsburg County; T. S. Sease, Judge.

Action by C. F. Middleton and others, co-partners trading as Middleton & Co., against J. A. Cockfield and the Home Fertilizer & Chemical Company and the Farmers' & Merchants' National Bank of Lake City. From a judgment for plaintiffs, the last-named defendants appeal. Affirmed.

Arrowsmith, Muldrow, Bridges & Hicks, of Florence, for appellants.

Stoll & O'Bryan, of Kingstree, and H. W. Connor, of Charleston, for respondents.

HYDRICK, J. This action was brought to foreclose a mortgage of real estate, dated January 16, 1913, and given by J. A. Cockfield to Farmers' & Merchants' Bank to secure his note for \$1,090.76.

On November 2, 1914, J. A. Cockfield conveyed the land to H. W. Cockfield, subject to the mortgage to the bank, payment of which was assumed by H. W. Cockfield.

On November 3, 1914, H. W. Cockfield mortgaged the land to S. R. Cockfield to secure his note for \$2,500 which was assigned before maturity to Home Fertilizer & Chemical Company.

On February 2, 1915, the defendant, Farmers' & Merchants' National Bank (successor to Farmers' & Merchants' Bank) assigned the J. A. Cockfield note and mortgage to S. R. Cockfield, under the following circumstances: The bank having demanded payment thereof, it was arranged by the payment of \$223.03 in cash and the giving of a new note for \$901.03 which was signed by H. W. Cockfield, and indorsed by S. R. Cockfield and Mrs. F. O. Cockfield. This was done through S. R. Cockfield, who carried the money and new note to the bank and negotiated the business.

Instead of marking the J. A. Cockfield note and mortgage paid, or crediting the cash payment made thereon, the bank assigned them to S. R. Cockfield for the sole purpose, as testified by the cashier, of securing him and Mrs. F. O. Cockfield against loss by reason of their indorsement of H. W. Cockfield's note, which has not been paid, and upon which there is still due about \$800. But no payment was ever made thereon by either of the indorsers.

The assignment, however, did not express

the agreement above stated, but was as follows:

"For and in consideration of the sum named in the within paper we do hereby transfer, set over and assign all our rights, title, and interest in the within note and mortgage to S. R. Cockfield, his heirs and assigns, forever, without recourse to or on us."

On February 26, 1916, S. R. Cockfield assigned said note and mortgage, which were then past due, to plaintiffs as collateral to secure them for advances which were to be made and were made to him during the year 1916. Plaintiffs knew nothing of the agreement above stated under which the note and mortgage had been assigned to S. R. Cockfield by the bank, but took them in good faith, in reliance upon the form of the bank's assignment of them to him, and his statement to them that he was the absolute owner thereof, and that the full amount thereof was due to him, and plaintiffs had no notice of the agreement until after they had made the advances.

In the meantime, on December 31, 1915, H. W. Cockfield mortgaged the land to S. R. Cockfield to secure his note for \$1,831.84, which was assigned before maturity to the bank.

On January 17, 1917, M. B. Joye (presumably the grantee of H. W. Cockfield) mortgaged the land to S. R. Cockfield to secure his note for \$5,000, which was assigned at once to the bank.

[1] Appellants contended that the note and mortgage sued on were paid before their assignment to plaintiffs, and, having been assigned to plaintiffs after maturity, they took them subject to the equities existing between the original parties; and plaintiffs contended that by its unqualified assignment of them to S. R. Cockfield, by which he was allowed to hold himself out as the absolute owner thereof for the full amount due thereon, the bank is estopped from asserting the contrary.

We agree with the circuit court in sustaining the plaintiffs' contention. The rule in equity is that, where one of two innocent persons must suffer a loss, it must be borne by the one who, by his conduct, acts, or omissions, has made the injury possible. This rule as stated by Pomeroy was quoted and approved in *Chambers v. Bookman*, 67 S. C. 432, 451, 46 S. E. 39. By the form of its assignment to S. R. Cockfield the bank made it

possible for him to commit a fraud upon plaintiffs, unless the bank is now held to be estopped to deny that the assignment spoke the truth, and it follows the bank should suffer the loss.

The words "for and in consideration of the sum named in the within paper" were calculated to mislead plaintiffs into the belief that S. R. Cockfield had paid to the bank the full amount due on the note and mortgage, and was entitled to hold the same as securities therefor. By its form the necessary implication of the assignment was that the note and mortgage were valid subsisting securities for the amount due thereon, and that the bank had good title thereto and the right to give its assignee such a title. *Wait v. Williams*, 107 S. C. 32, 91 S. E. 969.

[2] It is contended on behalf of H. W. Cockfield, though he is in default, and admitted to be insolvent, that to sustain the plaintiffs' contention would cause him to have to pay the same debt twice. That does not necessarily follow. But we are not called upon to decide that issue, or any issue that may arise between H. W. Cockfield and the bank, as to his liability to pay the note which the bank holds against him. The issue here is between the plaintiffs and the bank.

[3] The principle relied upon by appellants that one who buys a nonnegotiable security takes it subject to all equities existing between the original parties is sound, but inapplicable where such original parties have, by their conduct, acts, or omissions, estopped themselves from asserting the existence of such equities. There is no conflict between the two rules.

Appellants' argument is predicated upon the assumption that plaintiffs are not entitled to the protection of bona fide purchasers for value without notice within the equity rule, because they took the note and mortgage as security for the payment of a pre-existing debt. But, as hereinbefore stated, the evidence satisfies us, as it did the circuit court, that the note and mortgage were not taken to secure a pre-existing debt, but to secure the payment of advances to be made and actually made during the year 1916, before plaintiffs had any notice of the defect in their assignor's title.

Judgment affirmed.

GARY, C. J., and WATTS, FRASER, and GAGE, JJ., concur.

(113 S. C. 278)

**WILSON et al. v. MOSELEY et al.**  
(No. 10872.)

(Supreme Court of South Carolina. Feb. 23, 1920.)

**1. EVIDENCE ¶336(1), 372(1)—DEED RECORD BOOK ADMISSIBLE ALTHOUGH NOT AS AN ANCIENT DOCUMENT.**

Record book more than 30 years old, in which deeds were copied, is admissible under the principles of common law, independent of Civ. Code 1912, § 4000, although not admissible as an ancient document; its age not affecting its character.

**2. EVIDENCE ¶83(4)—COPY OF DEED FOUND IN RECORD BOOK PRESUMPTIVELY CORRECT.**

As it is proper to copy a deed into a record book, the record book copy is presumed to be correct, being found in a book where it was authorized to be written.

**3. EVIDENCE ¶174(3)—ORIGINAL DEED IS THE BEST EVIDENCE OF ITS CONTENTS.**

Even though a deed is copied into a record book, the original deed, and not the record book, is the best evidence of its contents.

**4. EVIDENCE ¶183(15)—GRANTEES ARE PRESUMED TO HAVE CUSTODY AND LOSS CANNOT BE PROVEN BY TESTIMONY OF HEIRS OF GRANTOR.**

The grantees of a deed are presumed to have custody of the deed, and the loss of the instrument so as to make secondary evidence admissible cannot be proven by the testimony of the heirs of grantor.

**5. EVIDENCE ¶183(15)—SECONDARY EVIDENCE OF CONTENTS OF DEED NOT ADMISSIBLE UNTIL THERE IS TESTIMONY BY SUPPOSED CUSTODIAN AS TO LOSS.**

Secondary evidence as a record book copy of a deed is not admissible until there is some evidence by the supposed custodian of the deed as to its loss.

Appeal from Common Pleas Circuit Court, of Sumter County; F. B. Gary, Judge.

Suit for partition by Magnolia E. Moseley and others against Selina E. Wilson and others. From a judgment of nonsuit plaintiffs appeal. Affirmed.

A. B. Stuckey, of Sumter, for appellants.

L. D. Jennings and A. S. Harby, both of Sumter, for respondents.

GAGE, J. The plaintiffs sued for the partition of a parcel of land at Wedgefield which contains but one-fourth of one acre. Some of the defendants pleaded a paramount title, the cause went to a jury, and a nonsuit was ordered.

The plaintiffs claim under a deed from Elbert T. Moore and Jos. S. Wilson to William W. Moore, Isaac J. Wilson, and James A. Harvin, trustees of Wedgefield Academy, dated in 1880. The deed contains this clause:

"But upon the express condition that if the said property should ever be used for any other purpose, then and in that case all the right, title and interest in and to the same shall forthwith revert to us, the said Elbert T. Moore and Jos. S. Wilson."

The plaintiffs and the Moseley defendant are heirs at law of the grantors, and they claim the land as reversioners under the operation of the above-quoted words.

The plaintiff undertook to prove the existence and contents of the aforementioned deed and by offering in evidence the book from the clerk's office wherein deeds are to be recorded, and wherein the deed in issue purported to have been recorded in January, 1880. For convenience we shall refer to that book as the record book. This appeal arises out of what was done thereabout.

[1-5] The appellants' counsel has argued two questions, and to understand the first a decision of the second is pertinent. The contention of the appellant on the second question is that the record book made in 1880 is an ancient document and as such proved itself. The record book was not admissible as an ancient document for age did not affect its character; but it was admissible independent of section 4000 of the Code of Laws, and according to the rules of evidence existing at the common law. *State v. Crocker*, 49 S. C. 242, 27 S. E. 49. But nevertheless the record book is a copy of the original deed, presumed to be a correct copy because found in a book wherein it was authorized to be written. Therefore, if the original is handy, it is the best evidence of the contents of the deed.

And that brings us to the first question, and that is to have the parties applying to introduce the record book as secondary evidence offered testimony tending to prove that the original deed was not to be had at the trial. The original deed was made to three named trustees of a school now succeeded by three others in the trust. The presumption of fact is that the trustees had in their custody the title deed, and not that the heirs at law of the grantors had it. There was no effort made to inquire if these trustees or either of them, or their heirs if dead, or their successors in office, had the deed; and therefore there was no testimony tending to prove that the original deed was lost or destroyed. Strange enough all the testimony as to loss was elicited from the heirs at law of the grantors, who made and delivered up possession of the deed to the trustees. The record book was not competent until there had been some testimony from the supposed custodians of the deed, tending to prove that the original deed was not to be had. *Duren v. Sinclair*, 22 S. C. 365. There was insistent and repeated exception by the defendants' counsel that

there was no testimony from the trustees about the whereabouts of the deed, and for that reason secondary evidence of its contents was not competent.

The appellants' counsel has complained that the circuit court first admitted the record book, and then excluded it. The case shows that the court went further than it was bound to go to escape what seemed like the application of a technical rule of procedure to cut off the plaintiff. The court said:

"I hate for a case to go off on a technicality, but clearly there is not enough evidence here to admit these books. Now if you want to put yourself in a position to introduce secondary evidence of the deeds that the places where the papers are presumably kept have been searched, and that they cannot be located by the person who is the custodian, or to put yourself in the position to show that they are destroyed, I am disposed to give you an opportunity to do it, but I could not admit them under the evidence here."

And the case was suspended some hours to aid the plaintiffs' counsel to present the proper testimony, but with no effect.

The court could do naught else but grant the nonsuit, and the order to that end is affirmed.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

(113 S. C. 308)

WATEREE POWER CO. v. RION et al.

SAME v. RION.

(No. 10335.)

(Supreme Court of South Carolina. Jan. 26, 1920.)

1. EMINENT DOMAIN §238(6) — VERDICT OF CONDEMNATION JURY NOT ADMISSIBLE IN EVIDENCE ON APPEAL FROM AWARD.

On appeal from the award of the condemnation jury, the verdict of the condemnation jury is not admissible in evidence, the trial in the circuit court being de novo, and the parties having the right to examine any of the condemnation jurors as witnesses to the probable damage.

2. EVIDENCE §142(1) — AMOUNTS PAID BY CONDEMNOR FOR LAND IN VICINITY ADMISSIBLE.

In a proceeding to condemn land for a water power project where the only sales in recent years had been to the power company, landowners should be allowed to show the amount paid by the company for other similar lands in the same general neighborhood.

3. EMINENT DOMAIN §203(5) — INJURIES TO GENERAL HEALTH WHICH WOULD RESULT FROM FLOODING LANDS CONDEMNED IS ADMISSIBLE.

In a proceeding to condemn lands for water power project, where it was contemplated

that the lands taken should be flooded, the landowners should be allowed to show the injury to health conditions to surrounding lands resulting from a similar impounding of waters.

4. EVIDENCE §317(15) — TESTIMONY THAT CONDEMNOR HAD UNDER CONTEMPLATION BUILDING OF ROADS OVER PROPERTY TAKEN AND IMPROVING SAME INADMISSIBLE.

In proceeding to condemn land for part of a water power project, testimony that the condemnor had under contemplation the building of roads over property taken and the clearing of the bounded area was incompetent, being hearsay, and no more than a loose declaration by the witness not binding on the condemnor.

5. EMINENT DOMAIN §83 — EXTENT OF COMPENSATION THOUGH EASEMENT ONLY IS DESIRED.

Where lands were condemned for water power project, the landowner is entitled to compensation for all lands taken, even though as to some of the lands the condemnor desired only an easement; for the right to use the land condemned is just as much a taking as if the land were actually used all the time.

Appeal from Common Pleas Circuit Court of Fairfield County; R. Withers Memminger, Judge.

Proceeding by the Wateree Power Company against Holbrook Rion and Mrs. Helen Rion for the condemnation of lands, together with proceeding by the same petitioner against Mrs. Helen Rion. All parties appealed from a verdict of the condemnation jury, and from a judgment assessing the damages, defendants and the individual defendant appeal. Reversed.

Barron McKay, Frierson & McCauts, of Columbia, for appellants.

Osborne, Cocke & Robinson, of Charlotte, and McDonald & McDonald and W. D. Douglas, all of Winnsboro, for respondent.

WATTS, J. This was a proceeding brought for condemnation of certain lands. A condemnation jury was impaneled, proceedings duly instituted, and an award of \$51,868 rendered. From this verdict all parties appealed. In September, 1919, the causes were tried together before Judge Memminger and a jury at Winnsboro, resulting in a verdict for Holbrook Rion and Mrs. Helen Rion in the amount of \$6,000, and for Mrs. Helen Rion for \$6,000. After entry of judgment appellants appealed.

[1] Exception 1 is that:

"His honor, the presiding judge, erred in refusing to permit attorneys for respondents to read to the jury the verdict of the condemnation jury, from which appeal was based, such verdict being an integral part of the record in this case, and the respondents being entitled to have such findings made known to the jury in the instant proceedings."

This exception is overruled, and the trial in the circuit court was a trial de novo. What the jury did in the condemnation proceedings before the clerk should not in any way influence the jury in the circuit court.

The appellants could have summoned the jury as witnesses, and examined them as to the probable damages, the same as any other witnesses in the case, as was done with Bratton, who was on the condemnation jury, and examined as to the matters complained of in this exception.

[2] Exceptions 2, 3, and 5 are:

"Exception 2: His honor the presiding judge erred in refusing to admit evidence of the amount paid by the petitioner herein, at dates reasonably near, for lands of the same general nature and in the same neighborhood as the lands here in question, whereby the respondents were prejudiced in being denied the right to show, by the only testimony available, what was the market value of lands in their immediate vicinity; the petitioner having been effectually the only purchaser of the land in the neighborhood since 1909, when its right to develop its water power and to condemn lands was granted.

"Exception 3: His honor the presiding judge erred in refusing to admit evidence of damage by reason of impaired health conditions to lands adjoining the development of the Parr Shoals Power Company similar to the development here projected; such conditions arising by reason of the ponding of water and the resulting malarial conditions incident to the breeding of mosquitoes. \* \* \*

"Exception 5: His honor the presiding judge erred in allowing witnesses for the petitioner to testify that the power company had under contemplation the building of roads over the property in question, and to testify further that the power company proposes to clear out the ponded area and remove the brush and trees therefrom; said testimony being incompetent, in that it was hearsay, and without any support of proper guaranty on the part of the petitioner that such road would be built or such cleaning up effected."

Since 1909, when respondent procured the right to develop property in this vicinity, no sales of real estate have been made, except sales to the respondent. For over ten years the respondent has purchased lands, there being no other purchasers as far as the evidence shows, as the evidence of Elliott, excluded by his honor, was competent, and should have been received as tending to show the value of lands of the same general neighborhood and of the same general nature, and the amount paid within a year of the condemnation proceeding.

The appellants had the right of showing the valuation placed by the respondent upon similar lands in the same general neighborhood, and it was competent to show by Elliott what the respondent had paid him for

his land under the showing made, and for the jury in assessing damages to have the benefit of this evidence in determining the issue submitted to them for value. This exception is sustained.

[3] Exception 3 is sustained. The condition which would naturally result from the ponding of the water, was a proper subject of evidence to be submitted to the jury for their determination, and a condition created in a similar development, under a similar condition, was a proper subject to be admitted and determined.

[4] Exception 5 is sustained. The testimony is incompetent, being hearsay, and being no more than the loose declaration of a witness, without authority to bind the respondent and without authority to guarantee his declaration and boast or in any way bind the respondent, who could promptly repudiate the same as being made without their authority. The witness was not an officer of the respondent and did not show any authority on his part whereby respondent could be bound, and his evidence as to what the respondent intended to do in the vague future was worthless and misleading and prejudicial and clearly hearsay, inadmissible, and incompetent. The plat introduced by respondents does not show any contemplated roads. The evidence of the witness was without binding force either morally or legally on the respondent.

[5] Exception 6 is sustained. It is an unsound statement of the law of the case. The Rions were entitled to recover full damages for the entire area taken, regardless of the area to be covered by water. The appellants are entitled to recover for the land taken and damage caused by the taking and use of land so taken to the remainder of the land. Whether or not the respondent use the entire land so condemned is not the question, but what it acquires the right to do determines the amount of damages.

The right to use the land condemned at any time by the respondent is in contemplation of law just as much taken for the purpose of easement as if actually used all the time by them.

The appellants were entitled to recover full compensation for all the land within the condemned area. The respondent must pay for the value (actual) of the total acreage over which it acquires the right to pond water.

Exception 4 is not considered as being unnecessary, as the judgment is reversed, and new trial granted on other exceptions.

Judgment reversed.

GARY, O. J., and HYDRICK, FRASER, and GAGE, JJ., concur.



(113 S. C. 256)

## STATE v. GIBBS. (No. 10687.)

(Supreme Court of South Carolina. Feb. 23, 1920.)

1. WITNESSES  $\S$  331½—To BE DISCREDITED BY TESTIMONY OF OTHERS THAT WITNESS IS NOT CREDIBLE.

In discrediting a witness the approved practice is to produce testimony of others that the witness is not credible.

2. WITNESSES  $\S$  340—CROSS-EXAMINATION OF WITNESS AS TO MARRIAGE WHILE HAVING A LIVING HUSBAND IMPROPER FOR PURPOSE OF TESTING CREDIBILITY.

Cross-examination of witness as to whether she had married her deceased husband at a time when she had another husband living, for the purpose of testing her credibility as a witness, was improper, and exclusion of answer was not error.

3. WITNESSES  $\S$  387 — CROSS-EXAMINATION AS TO CONTRADICTORY STATEMENT MUST RELATE TO SAME TIME THAT STATEMENT SOUGHT TO BE CONTRADICTED WAS MADE.

In homicide prosecution, cross-examination of witness as to statement of other witness, made after the shooting, for purpose of contradicting testimony of such witness, was improper, where evidence of the witness sought to be contradicted related to what she had said before the shooting.

4. HOMICIDE  $\S$  118(3) — PERSON ON OWN PREMISES NOT REQUIRED TO RETREAT WHEN BEING ASSAULTED WITH DEADLY WEAPONS.

A person on his own premises and outside of his dwelling, but within the curtilage, if assaulted by a deadly weapon, is not bound to retreat, but may stand on his own ground and meet such attacks even to killing his assailant.

5. HOMICIDE  $\S$  109—PREVIOUS DIFFICULTIES AND BEING UNDER A PEACE BOND DOES NOT DEPRIVE ACCUSED OF SELF-DEFENSE PLEA.

That the defendant had had previous difficulties with deceased, and that he may have been under a peace bond, would not deprive him of his plea of self-defense if he comes within the requirements of the self-defense law.

6. CRIMINAL LAW  $\S$  829(5)—REFUSAL TO INSTRUCT ON A PHASE OF SELF-DEFENSE RAISED BY THE EVIDENCE ERROR.

In homicide prosecution, court's refusal to instruct that the fact of prior difficulties did not deprive defendant of his self-defense plea, where the previous difficulties between the parties was an important element in the case, held error, notwithstanding instruction on the elements of self-defense not covering such matter.

Appeal from General Sessions Circuit Court of Greenville County; I. W. Bowman, Judge.

H. M. Gibbs was convicted of manslaughter, and he appeals. Reversed, and new trial ordered.

Bonham & Price and J. Frank Eppes, both of Greenville, for appellant.

J. Robert Martin, of Greenville, for the State.

GAGE, J. Indictment of Gibbs for the murder of Lackey; verdict of manslaughter; judgment, seven years; appeal by the defendant.

The parties were nigh neighbors and small white farmers, and they had aforesaid fallen out about the line betwixt their lands. Both men had shotguns, and the testimony tends to prove that each man discharged his gun, and that one man was killed and the other slightly wounded.

The appellant has argued four questions. Two of them have reference to testimony which was excluded on the state's motion. Two of them have reference to the charge of the court.

The only persons present and witnessing the homicide were the two men and their wives.

1. Mrs. Lackey, the wife of the slain man, was on the witness stand. She was asked on cross-examination in effect if she had not married Lackey while she still had a living husband named Smith. The solicitor objected to the answer, and it was excluded. The court ruled, "I don't think it has anything to do with testing her credibility as a witness;" and that is the issue to be decided, the witness not having declined to answer as she might have done.

[1, 2] In our judgment an affirmative answer would not have affected the credibility of the witness; and the approved practice in this state to discredit a witness is the testimony of others that the witness is not credible. See the cases below. State v. Alexander, 2 Mill. Const. 171; State v. Free, 1 McMul. 494; Anonymous, 1 Hill, 251; State v. Wyse, 33 S. C. 582, 12 S. E. 556. The exclusion of the answer of Mrs. Gibbs was therefore not error, but was right.

2. Thomas Gosnell was testifying in chief for the state. On the cross-examination the counsel for the defendant put this question to him:

"I asked him if he did not, a short time after the shooting, hear Mrs. Lackey say to her mother that she told her husband to go to the house and get his gun and come back down there and shoot these people."

The court ruled, on objection by the solicitor:

"Don't answer that. It would be contradicting the witness, and the foundation has not been laid for that."

[3] The ruling was right. The question was directed to elicit what Mrs. Lackey had said after the shooting. All of her testimony was

about what she had said *before* the shooting. What she said at all out of court was at best only a declaration. It only becomes competent to give such a declaration in evidence when it tends to cast discredit on the present testimony of the witness; and it ought therefore to appear, as it did not appear in this case, that the two alleged inconsistent statements were made in the same time. The rule of law in such cases is familiar.

The defendant's counsel proffered three requests to charge, to wit:

"First. When a man is upon his own premises within the curtilage of his home, he is not bound to retreat when assailed, but may stand his ground and use such force as may be necessary to repel a trespasser, even to the extent of killing the trespasser. Under the law of this state all buildings within a distance of 200 yards of the dwelling used in connection with the dwellings are within the curtilage.

"Second. A person on his own premises and outside of his dwelling, but within the curtilage, if assaulted by a deadly weapon, is not bound to retreat, but may stand on his own ground, and meet such attacks even to killing his assailant.

"Third. I want to ask the court to charge the jury that, although the defendant may have had previous difficulties with the deceased, and although he may have been under a peace bond, still this would not deprive him of his plea of self-defense if he comes within the requirements of the law as given to the jury."

The first request was charged.

The second request, a more particular statement than the first, was modified by the addition of these words:

"Gentlemen, if the assailant is on the public road or on his own premises, this does not apply; but, if he is on the premises within the curtilage, then the owner of the place does not have to retreat."

The third request was neither expressly charged nor expressly refused. About it the court said:

"I think I have covered everything."

[4] Reverting to the second request, it is simple in expression and a correct statement of law, calculated to assist the jury to reach a right verdict. It was admitted at the bar by Mr. Solicitor Martin that both combatants were at the instant within the curtilage of each, for the testimony never put that in issue. But the modification is muddy and misleading. There was no public road in the situation. The defendant was confessedly on his own premises and within the curtilage.

It is not manifest whether the court by the word "assailant" meant Gibbs or Lackey, nor is it plain to whom the court referred, Gibbs or Lackey, when reference was made to the "owner of the place." Both combatants were charged with being assailant, and each was on his own place. The modification ought not to have been made.

[5] The third request was correct, and ought to have been charged.

The court did not either allow it or refuse it, but remarked, as before stated:

"I think I have covered everything."

Counsel for the defendant pressed the request more than once, thus:

"Mr. Price: It is very important, if the court please.

"The Court: I have told the jury if he has made out four requirements then very well.

"Mr. Price: If there has been previous difficulties between the defendant and the deceased, he is not deprived of self-defense.

"The Court: If he has complied with the four requirements laid down, then he has made out his plea."

But the four points which the court had charged, and charged well, did not at all include or suggest the issue of law which arose out of the testimony and which was covered by the third request. After charging the four points minutely, the court summarized them thus:

"You must be without fault in bringing on the difficulty, you must evade the difficulty by retreating, if you can do so without serious bodily injury or endangering your own life, you must believe that you are in danger of losing your own life, and that danger must be either real or apparent, and then you must show that the circumstances were such that a man possessed, of ordinary reason and intelligence would be justified in reaching that conclusion; those are the four points, and all must be made out by the preponderance or greater weight of the testimony. If he has made out these four conditions, then he has made out his plea of self-defense."

[6] The court therefore never charged the jury whether the fact of a prior difficulty betwixt the combatants cut off one of them to plead self-defense, and that was the material matter requested to be charged, and the request was of serious import, and was correct.

The judgment is reversed, and a new trial is ordered.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

(113 S. C. 317)

SUBER v. PARR SHOALS POWER CO.  
(No. 10382.)

(Supreme Court of South Carolina. Feb. 23, 1920.)

## 1. RELEASE §56—OTHER RELEASES INADMISSIBLE ON QUESTION WHETHER PARTICULAR RELEASE WAS OBTAINED BY FRAUD.

In action for damages from overflow of plaintiff's land by erection of dam by defendant power company, involving question of whether plaintiff's release to defendant was fraudulently obtained, testimony as to other deeds and releases of other owners *held* inadmissible on issue of fraud, being *res inter alios acta*.

## 2. FRAUD §52—MUCH LATITUDE ALLOWED IN ADMISSION OF EVIDENCE.

Where fraud is charged, much latitude is allowed in the admission of evidence, but the limits are within the wise discretion of the trial judge.

## 3. FRAUDS, STATUTE OF §119(1)—PURPOSE OF STATUTES.

The statute of fraud requires certain contracts to be in writing so as to avoid the uncertainty of parol evidence, and to avoid contests and litigation.

## 4. FRAUDS, STATUTE OF §119(2)—WRITTEN CONTRACT FRAUDULENTLY OBTAINED VOID.

In order to prevent a statute intended to prevent fraud from being the means of perpetrating fraud, the law treats as nullity a written contract fraudulently obtained.

## 5. APPEAL AND ERROR §970(1) — LOWER COURT'S DISCRETION IN LIMITING TESTIMONY NOT TO BE INTERFERED WITH UNLESS ABUSED.

Appellate court will not interfere with the exercise of discretion by trial court in setting the limits of the testimony on issue of fraud, except in the case of abuse of discretion.

## 6. REFORMATION OF INSTRUMENTS §80—ATTACK ON CONTRACT FOR FRAUD MAY BE INSTITUTED IN COURT OF LAW, WHILE ACTION TO REFORM CONTRACT IS A SUIT IN EQUITY.

An attack on a contract for fraud and an action to reform a contract for mutual mistake are not to be confused, since former action may be instituted in a court of law, while latter action is a suit in equity.

## 7. REFORMATION OF INSTRUMENTS §2—CONTRACT CONTAINING HONEST MISTAKE TO BE REFORMED BEFORE MADE THE BASIS OF AN ACTION.

If there is an honest mistake in the writing of a contract, the contract must first be reformed before it is the basis of an action.

## 8. RELEASE §59 — REMARKS OF COURT IN RULING ON OBJECTION TO EVIDENCE NOT PREJUDICIAL.

In an action involving question of whether a release was procured by fraud, where the question for the court was fraud, and not reformation, remarks of court, in excluding certain testimony, as to proof required to show

invalidity of release, *held* not to have prejudiced defendants by misleading jury into thinking that mere fraud was not sufficient to invalidate release.

## 9. TRIAL §29(2)—REMARKS OF COURT IN REFUSING MOTION FOR NONSUIT HELD NOT IMPROPER AS ON WEIGHT OF EVIDENCE.

Remarks of court in refusing motion for nonsuit that conflict in evidence on certain issue was sufficient to carry case to jury *held* not improper as against objection that court, in making such remarks, intimated that it considered evidence on other issues not mentioned insufficient.

## 10. TRIAL §194(11)—INSTRUCTIONS HELD NOT OBJECTIONABLE AS A CHARGE ON THE FACTS.

In action involving validity of release claimed to have been fraudulently obtained, instruction as to duty of reading instrument presented for one's signature *held* not objectionable as a charge on the facts.

## 11. CONTRACTS §93(2) — PARTY ESTOPPED FROM REPUDIATING CONTRACT IN ABSENCE OF FRAUD.

The law estops a man from repudiating the contract which he has signed in the absence of fraud, notwithstanding failure to read contract before signing it.

## 12. WATERS AND WATER COURSES §179(5)—INSTRUCTION AUTHORIZING RECOVERY OF DAMAGES WHICH WERE THE "IMMEDIATE" RESULT OF INJURY EQUIVALENT TO INSTRUCTION AUTHORIZING DAMAGES WHICH WERE THE "PROXIMATE" RESULT.

In action of damages from overflow caused by erection of dam by defendant, instruction that "plaintiff could only recover damages which were the immediate result of the building of the dam" *held* not misleading in use of word "immediate"; the words "immediate" and "proximate" meaning the same thing (citing Words and Phrases, Proximate Cause).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Immediate; Proximate.]

Fraser, J., dissenting in part.

Appeal from Common Pleas Circuit Court of Newberry County; F. B. Gary, Judge.

Action by W. H. Suber against the Parr Shoals Power Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Wallace & Barron, of Union, and Mower & Bynum and Blease & Blease, all of Newberry, for appellant.

Elliott & Herbert, of Columbia, and Hunt, Hunt & Hunter, of Newberry, for respondent.

FRASER, J. This is an action for damages from the overflow of land of the plaintiff, caused by the erection of a dam by the defendant in Broad river. The complaint alleged injury to the land and to the health of those living on the land. The defendant pleaded a deed to a part of the land and a

release for injury to be suffered by reason of the erection of the dam. The plaintiff claimed that the release was not included in the contract between the parties and was fraudulently obtained. There are 16 exceptions, but not near so many questions in the case.

[1-5] I. It seems that the defendant had secured a number of releases from the landowners along Broad river, and the plaintiff had several of these landowners as witnesses to testify as to their contracts in reference to their deeds and releases. Upon objection the testimony as to other deeds and releases was excluded. This exclusion of testimony is one assignment of error. The testimony was "*res inter alios acta*," and, under the general rule, was inadmissible. It is true that, where fraud is charged, much latitude is allowed, but the limits are within the wise discretion of the trial judge. No abuse of discretion has been shown here. The statute of frauds requires certain contracts to be in writing. The contracts are put in writing so as to avoid the uncertainty of parol evidence and avoid contests and litigation. In order to prevent a statute intended to prevent fraud from being the means of perpetrating fraud, the law treats as a nullity a written contract fraudulently obtained. Fraud assumes innumerable forms, and no general rule can be formed to fit every case, so that it is left to the wise discretion of the court to set the limits of the testimony and an appellate court will not interfere, except in the case of an abuse of discretion—I, e., manifest error. There is no manifest error here, and this assignment of error cannot be sustained.

II. In ruling on the exclusion of the above testimony, his honor said:

"But it occurs to me that the testimony does not prove anything if you get it in. \* \* \* Now, he can only be relieved from it by showing that he was placed in such a situation by either weakness of mind, intemperance, old age, or using the list that Justice McIver uses, lunacy, idiocy, drunkenness, coverture, and other incapacities. As I say, the rule is: Was he placed in such a situation that he could not exercise an independent mind? Unless that can be shown, then he can't be relieved from the voluntary act of signing that paper."

[6-8] There seems to have been a confusion, all too common, between an attack on a contract for fraud and an action to reform a contract for mutual mistake. A contract may be attacked in a court of law for fraud. An action to reform a contract for mutual mistake is a suit in equity. If there is an honest mistake in the writing of a contract, then the contract must first be reformed before it is the basis of an action. It is manifestly unfair to make a different contract in the midst of the trial and require him (the defendant) to defend against the new con-

tract. When his honor came to charge the jury, he told them clearly, time and again, that it made no difference what were the terms of the contract, if the contract was procured by fraud, it was a nullity and no defense whatever. The question before the court was fraud, and not reformation. It is not prejudicial error to make the contract as binding as can be, provided the door was left open for the question of fraud, and that door was left, in the charge, wide open by oft-repeated and clear statements. This exception is overruled.

III. The appellant's argument contains the following:

"The remarks of his honor, in refusing the motion for nonsuit, that a nonsuit would not be proper whatever view he might take of the written instruments, and saying, in connection with his refusal of motion to direct a verdict, that there was a conflict as to what was the height of the dam (the release calling for a dam 84 feet high, and the evidence of the plaintiff showing that it was 36 feet high), and that, taking that view of it, he would refuse the motion because of this conflict, it practically amounted to say that the evidence as to fraud was insufficient; that the plaintiff had voluntarily signed the deed; that he did not fall in the class of an imbecile, idiot, or mentally incapacitated; and that, if it were not for the conflict in the testimony as to height of dam, he would grant the motion."

[9] His honor did not intimate any opinion on the question of fraud in the writing, but said, in effect, that there was one question of fact, to wit, the height of the dam that unquestionably carries the case to the jury. This exception is overruled.

[10, 11] IV. It is claimed that his honor erred in charging:

"The law makes it the duty of a man to exercise ordinary prudence, and ordinary prudence would demand of any man to read an instrument of writing that is presented to him for signature."

It is claimed by appellant that this is a charge on the facts, since negligence is a question of fact for the jury. It may be that his honor was unfortunate in the use of the word "negligence," but that is a question of words. The law does estop a man from repudiating the contract which he has signed in the absence of fraud, and it makes no difference what his failure to read his contract may be called. The exception that raises this question is overruled.

V. The appellant combines his seventh, eighth, and ninth exceptions. The seventh exception states the question fairly and is as follows:

"His honor further erred in charging the jury as follows: 'If it was a fair transaction, if everything was fair about it, and Mr. Suber voluntarily signed it without being overruled, then he is bound by the recitals in that instrument, and it is a question of fact for you to

determine, not me'—the error being, it is respectfully submitted, that if certain misrepresentations were honestly made by the agent of the defendant company in procuring this deed or release, and were made upon the basis of a plat, and that a survey had been made, and that he possessed superior knowledge to the plaintiff, who relied upon his superior knowledge, and was misled thereby, even though such misrepresentations were honestly made, the unfair advantage thereby obtained would in law amount to a technical fraud, sufficient to set aside the deed and release."

The authority cited by appellant fully meets his objection.

In the case of *Crosby v. Land Co.*, 98 S. C. 70-72, 79 S. E. 897, 898, the Supreme Court said:

"Was there fraud? There was. *Rapalja & Lawrence Law Dictionary*: 'Fraud is used in many senses, but the point common to all of them is pecuniary advantage gained by unfair means.'"

This is another instance of confusion between fraud and reformation.

What has been said disposes of the exceptions 10 to 14, inclusive.

VI. Appellant says in his argument:

"We submit that his honor erred when he instructed the jury, as complained of in this exception, that the plaintiff could only recover damages which were the immediate result of the building of the dam."

I think this exception should be sustained. The immediate result of the building of the dam was to raise the water at the dam. The proximate result may have been the overflow of land a mile away. The defendant is liable, if liable at all, for the proximate result of raising the dam. The proximate cause may not be the immediate cause, and the proximate result may not be the immediate result. In *Ruling Case Law*, vol. 22, at page 110, we find:

"The definition of proximate cause and proximate result the text-books and reports vary much in expression and sometimes in idea. Perhaps the best and most widely quoted definition is the following: The proximate cause of an injury is the cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury and without which the result would not have occurred."

At page 112:

"By proximate cause is not meant the last act of cause, or nearest act to injury."

Many definitions are given, but none of them confine proximate cause and proximate result to the immediate cause or the immediate result.

The majority of this court think that the judgment should be affirmed; and it is so ordered.

GARY, C. J. (concurring and dissenting). [12] I concur in the opinion of Mr. Justice FRASER, except in so far as he sustains the fifteenth exception. So much of the charge as is therein quoted was really too favorable to the plaintiff. Furthermore, the words "proximate" and "immediate" mean the same thing.

HYDRICK, J. (concurring and dissenting). I think the fifteenth exception should be overruled, and the judgment should be affirmed. When the charge is read as a whole, it is clear that the jury could not have been misled by the definition of "proximate" as "immediate." If, indeed, they do not mean the same thing, they mean very nearly the same thing. Some of the best dictionaries put them down as synonymous. Some courts hold they are synonymous; others contra. See 6 Words & Phrases, 5761; 32 Cyc. 745. But juries pay little attention to verbal refinements. If the jury had thought that plaintiff ought to recover, they would not have hesitated to find for him on the ground that the dam might not have been the "immediate" cause of the injury complained of.

WATTS, J. I concur in the opinion of Chief Justice herein.

GAGE, J. I vote for affirmance and concur in what the Chief Justice and Justice HYDRICK have said.

(112 S. C. 295)

JAKAR v. JAKAR. (No. 10833.)

(Supreme Court of South Carolina. Jan. 28, 1920.)

1. EVIDENCE §=317(2) — TESTIMONY THAT PLAINTIFF WAS INFORMED DEFENDANT HAD KILLED FORMER WIFE INADMISSIBLE AS HEARSAY IN ACTION FOR ANNULMENT.

In an action for annulment of plaintiff's marriage to defendant, testimony that she was informed that defendant had killed a former wife held inadmissible as hearsay.

2. MARRIAGE §=60(7)—EVIDENCE IN ACTION FOR ANNULMENT INSUFFICIENT TO SHOW MARRIAGE HAD NOT BEEN CONSUMMATED.

Where plaintiff seeking to annul her marriage for want of consent, testified that the marriage was never consummated by cohabitation, and that she and defendant occupied the same room some days, a finding that the marriage was never consummated was not warranted.

3. MARRIAGE §=58(7)—ANNULMENT ALLOWED ONLY ON PROOF OF DECEIT TOUCHING ESSENTIALS OF RELATION.

A marriage can be set aside on the ground of fraud only on proof of deceit touching matters constituting the essentials of the marriage

relation, and a woman cannot procure annulment of a marriage because of the falsity of the man's representations as to his character, social standing, and fortune.

Watts and Gage, JJ., dissenting.

Appeal from Common Pleas Circuit Court of Richland County; Wm. H. Townsend, Judge.

Action by Marie M. Jakar against Isaac Jakar to set aside a marriage. From a judgment denying relief, plaintiff appeals. Affirmed.

The report of the master and decree of the trial judge are as follows:

#### Report of Master.

This cause was referred to me by order of his honor Thomas Sease, presiding judge, dated January 13, 1919, to take the evidence upon all the issues herein and make report thereof with my findings and conclusions of law and fact.

The summons and complaint were duly served upon the defendant on the 13th day of December, 1918, as shown by proof of service attached to the complaint, and the defendant gave no notice of appearance, and filed no plea in this cause.

The action is for the purpose of having declared null and void, on the ground of fraud and deceit, the marriage entered into between the plaintiff and defendant at Columbia, S. C., on the 25th day of September, 1918. I took the testimony of several witnesses offered by the plaintiff, which testimony is herewith reported, and upon this testimony I make the following findings and conclusions, to wit:

(1) The defendant, Isaac Jakar, first met the plaintiff a short time, perhaps a week, before the marriage. He was accompanied in his first visits and several of his visits by another man who he introduced as Capt. Pullen, though he was in reality a lieutenant, as he himself seems to have corrected the error. The defendant visited the plaintiff first at the place where she was employed as a milliner in the city of Columbia, and then saw her at the Y. W. C. A., where she was making her home, on several occasions.

(2) The defendant represented himself as of Belgian birth, a physician who had been an instructor in a medical college in Brussels, and stated that he was an officer with some 20 physicians employed under him, at the hospital at Camp Jackson. He also represented himself as a man of considerable and independent means and extensive education.

(3) He pressed his suit with much ardor and insisted on hastening the marriage upon the plea that the government would make him an allowance on account of being married for his rooms and quarters if he was married, and it was necessary for this purpose that he should be married before the 25th of September to get his application for apartments for officers into Washington by the 1st of the month.

(4) These statements as to his means, as to his rank, and as to his education were made in the presence of the secretary of the Y. W. C. A., and of Miss Smith, a friend of the

plaintiff, and in the presence of Dr. Pullen, who was a commanding officer in the United States army, in the medical service. He also stated that he spoke ten different languages.

(5) The name of the plaintiff before her marriage was Marie Corvette, who had come to this country from Belgium 12 years ago, and the home of her parents was Rowesville, in Orangeburg county, but she had worked for nine seasons as a milliner with Haltiwanger, in Columbia, and was at this time working there, and was rooming at the Y. W. C. A.

(6) Through his representation as a citizen of Belgium he seems to have been able to open a way of communication and social relations with the plaintiff.

(7) During his courtship he seemed to have spent his money freely and acted ostensibly as a man of means, entertaining the plaintiff at the best hotels and restaurants in the city.

(8) He furnished the usual jewelry, to wit, a wedding ring and a diamond ring, which latter, however, plaintiff says, was paste.

(9) Soon after the marriage, he succeeded in borrowing \$50 from the plaintiff's scanty supply, by misrepresentation, and he never paid that back. He also borrowed from a friend of the plaintiff a small sum, and the plaintiff paid that back. He undertook to give a check on a Western bank, and that bank reported he had no funds. He became very harsh and cruel almost immediately after the marriage, and it soon developed that all of his statements about his position, his wealth, and his education, and even the land from which he came, were entirely false. The evidence tends to show that he killed a former wife. He brought other people into his wife's bedroom when she was sick. He visited her father's home in Orangeburg county, and tried to take her away by force, and made an assault on her father with a pistol, and acted more like a maniac than a human being.

(10) The evidence of plaintiff, and this is undisputed, shows that the marriage was never consummated by cohabitation.

Conclusion: In my opinion, the alleged marriage was procured by fraud, misrepresentation, and deceit, and was not and is not a valid contract, and it should be set aside and declared null and void.

#### Decree of Circuit Court.

This case comes on to be heard on the master's report of his findings of fact and conclusions of the law.

[1, 2] I have carefully considered the report of the testimony, and concur generally in the master's findings, except his findings that the evidence tended to show defendant had killed a former wife. The evidence tending to show that was incompetent hearsay, and cannot be considered in court. The plaintiff's testimony that the marriage was never consummated by cohabitation is inconsistent with the circumstances, to which she testifies, that she and defendant occupied the same room for several days after the marriage, and fails to establish to the satisfaction of the court the jurisdictional fact that the marriage was never consummated by cohabitation. *Davis v. Whitlock*, 90 S. C. 242, 73 S. E. 171, Ann. Cas. 1913D, 538; Civil Code, § 3753.

[3] But, if I should be in error in finding that

the evidence fails to establish the fact "that the marriage contract was not consummated by the cohabitation of the parties thereto." I am still of the opinion that the complaint should be dismissed. The contract, from its peculiar nature and on general grounds of public policy, the law regards as especially sacred and inviolable. It cannot be voided or set aside on the ground of fraud, except on the most plenary and satisfactory proof of deceit and imposition, touching matters which constitute the essentials of the marriage relation. *Reynolds v. Reynolds*, 85 Mass. (3 Allen) 606; *Foss v. Foss*, 94 Mass. (12 Allen) 26; *Boehs v. Hanger*, 69 N. J. Eq. 10, 59 Atl. 904. "False representation of a party as to his character, social standing or fortune do not constitute such fraud on the opposite party as to avoid a marriage induced thereby," even though he conceal the fact that he has served a term in the penitentiary. *Wier v. Still*, 31 Iowa, 107; *Fisk v. Fisk*, 6 App. Div. 432; *Williamson v. Williamson*, 34 App. D. C. 536, 80 L. R. A. (N. S.) 301, and note. "The fraudulent representations for which a marriage may be annulled must be of something essential to the marriage relation—of something making impossible the performance of the duties and obligations of that relation or rendering its assumption and continuance dangerous to health or life." *Lyon v. Lyon*, 230 Ill. 371, 82 N. E. 852, 13 L. R. A. (N. S.) 996, 12 Ann. Cas. 25, 27. The misrepresentations made by the defendant in the case at bar were not of such a character as would afford grounds for the annulment of the marriage.

It is therefore ordered and adjudged that the conclusions of the master be reversed, and the complaint dismissed.

W. W. Hawes, of Columbia, for appellant.

WATTS, J. This action was for the purpose of having set aside as null and void for want of consent a marriage entered into between the plaintiff and defendant on September 25, 1918. The defendant was served with summons and complaint on December 13, 1918, and failed to serve notice of appearance, answer or demur.

The case was referred to A. D. McFadden, Esq., on January 13, 1919, by his honor Judge Sease to hear and determine all issues of law and fact, and report the same to the court. He filed his report March 14, 1919, recommending that the marriage be set aside. His honor Judge Townsend by a decree made May 21, 1919, reversed the report of the master, and dismissed the complaint. For a proper understanding of the case, both the report of the master and decree of Judge Townsend should be reported in the case. From the decree of Judge Townsend plaintiff appeals, and by three exceptions imputes error.

Judge Townsend by his decree concurs generally in the master's findings, except as to his findings that the evidence tended to show that the defendant had killed a former wife. This evidence he holds to be incompetent and hearsay, and cannot be considered in court. There is no doubt it is incompetent,

but in justice to the master the defendant made default and failed to appear, and did not object to the evidence, and frequently incompetent evidence becomes competent, when admitted without objection, and the whole evidence in the case portrayed the defendant as such an adventurer and scoundrel that the master considered this statement, and no doubt thought the defendant was capable of doing this very thing.

His honor found that the master was in error in finding that the marriage was never consummated by cohabitation that that finding is inconsistent with the circumstances, to which she testifies, that she and the defendant occupied the same room several days after the marriage, and fails to establish to the satisfaction of the court the jurisdictional fact that the marriage was never consummated by cohabitation. His honor puts his opinion from the circumstances against the sworn, unimpeached evidence of the plaintiff that there was no cohabitation.

Here is a plain, simple, foreign girl, a milliner in the city of Columbia, away from her parents some distance (they live at Rowesville, S. C.) who is taken in by an adventurer and heartless scoundrel. She swears most positively that there was no cohabitation between them after marriage; explains that the influenza was prevailing at that time; that the defendant was detained at Camp Jackson; that she took the disease and was confined to her room; that the defendant was enraged at her being sick. If she needed circumstances to back up her testimony, we have here a strong circumstance that the defendant was angry on account of her sickness, because it foiled him and baffled him in his purpose to cohabit with her.

On the question of cohabitation the decree of the circuit court is wholly without evidence to support it. Her positive evidence, unimpeached, supports her evidence, supported by all the circumstances in the case, his detention at Camp Jackson during the four days she had the room, her sickness, and by reason of which his lecherous desires were foiled, and on this the finding of his honor is reversed.

As to the other ruling of his honor, and the reasons given and authorities quoted which actuated him to reverse the findings of the master and in dismissing the complaint, a much more serious question is presented.

This state will not tolerate divorces, and the contract of marriage is held very sacred, and the annulling of the same contrary to public policy. Every case must be judged by the particular facts of the case. No one will question, after hearing the evidence, that the plaintiff was credulous to the extent of being almost simple; that she was badly imposed upon by a villain of the deepest dye, an accomplished liar, "who did not think the truth, much less speak it"; one who robbed

her and her friend by borrowing money, with no intent to pay it, giving bogus checks, with no funds to pay the same, in violation of the criminal laws of the state; one who is besmirched with the accusation of dealing foully with his former wife. Under all the facts of the case, and the gross fraud perpetrated on the plaintiff by the defendant, there being not the slightest suspicion of collusion in this proceeding between the parties the absence of divorce laws in this state, I think the judgment of the circuit court should be reversed, and the marriage declared not to be a valid contract, and is set aside and declared to be null and void. But a majority of the court think different, and the judgment of the circuit court is affirmed.

GAGE, J. I concur in the opinion of Mr. Justice WATTS.

HYDRICK, J. I concur in the opinion of the circuit court.

GARY, C. J. I dissent [from the opinion of WATTS, J.], for the reasons stated in the decree of his honor the circuit judge.

FRASER, J. I cannot concur with Mr. Justice WATTS. I think the statement that he construes to be a statement of fact is not a statement of fact, but a conclusion of law. Ordinarily the word "cohabit" means living together as man and wife. Under our statute, I think a single act is enough to shut the door to an annulment of marriage. The testimony does not satisfy me that the plaintiff's cause is within the statute. This is a hard case, but the integrity of our marriage law is at stake, and I think it better that an individual should suffer than that the law itself should be annulled.

(150 Ga. 27)

**CITY OF BLAKELY v. HILTON et al.**  
(No. 1397.)

(Supreme Court of Georgia. Feb. 24, 1920.)

(Syllabus by the Court.)

1. TAXATION  $\Leftrightarrow$  271—PERSONALTY IN HANDS OF EXECUTORS OR IN POSSESSION OF HEIR OR LEGATEE IS TAXABLE AT DOMICILE; PERSONALTY IN HANDS OF TRUSTEE UNDER WILL OR OTHERWISE IS TAXABLE AT PLACE OF HIS DOMICILE.

The personal property of a deceased person in the hands of his executors during the settlement of the estate is taxable at the place of the domicile of the decedent, if a resident of the state. When it comes into possession of the heir or legatee it is taxable to the heir or legatee at the place of his domicile. When it goes into the hands of a trustee, under a will or otherwise, it must be taxed to the trustee at the place of his domicile.

(Additional Syllabus by Editorial Staff.)

2. TAXATION  $\Leftrightarrow$  25—LEGISLATURE HAS POWER TO TAX PERSONS DOMICILED OR PROPERTY SITUATED IN STATE.

The Legislature, subject to constitutional limitations, has full power to assess taxes against persons domiciled or property situated within the state.

Error from Superior Court, Early County; W. C. Worrill, Judge.

Action by Sarah Hilton and others, executrix and executors of E. Hilton, deceased, against the City of Blakely, to enjoin the collection of a tax. General and special demurrers to petition overruled, and the defendant excepts and brings error. Affirmed.

Mrs. Sarah Hilton, J. S. Sherman, and H. E. Hightower, as executors of the estate of E. Hilton, sought to enjoin the collection of a tax *ad valorem* for \$3,000, representing the taxes assessed by the municipal authorities of the city of Blakely, a municipal corporation in the county of Early, against the executors as such, for the year 1917, upon certain cotton, money, and notes of the estate of E. Hilton. The petition alleged that the situs of the cotton, money, and notes for taxation was outside of the corporate limits of the city, because: (1) E. Hilton, at the time of his death, was domiciled in the county of Early outside of the city limits; (2) only one of the three executors was a resident of the city, two of them residing beyond the corporate limits of the city and in the county of Early; (3) only two of the eight beneficiaries under the will of E. Hilton were residents of the city; (4) the property sought to be taxed was not used in connection with any business enterprise by the executors within the limits of the city (the cotton was stored in a warehouse within the city for the purpose of sale; the money was on deposit with and the notes were in the custody of a bank within the city for the purpose of safe-keeping only); (5) the principal business of the decedent—farming—had since his death been carried on by his executors beyond the corporate limits of the city, the executors maintaining an office and an agent of the estate, who had general charge of the personal property used in and upon the farms of the decedent, and who collected the accounts and paid the bills of the estate, "all beyond the limits of the city of Blakely." To the petition the city filed a demurrer, both general and special. The demurrer was overruled, and the city excepted. The pertinent allegations of the petition will appear from the opinion, in connection with the general discussion of the question.

Glessner & Collins, of Blakely, for plaintiff in error.

Pottle & Hofmayer, of Albany, for defendants in error.



GEORGE, J. (after stating the facts as above). Section 16 of the charter of the city of Blakely confers upon the city the power to "put an ad valorem tax, not exceeding the constitutional rate, on all property in said city." The charter further provides that—

"The taxing power of said city shall be as general, full and complete as that of the state itself." Acts 1900, pp. 219, 224.

No statute in this state, and no provision in the charter of the city of Blakely, in terms or by necessary construction, fixes the situs for taxation of the personal estate of a deceased person while in course of administration. Generally the rule is prescribed by statute. Sometimes it is taxable to the heir or legatee at his domicile; sometimes to the estate as such, or to the personal representative, at its actual situs, if the deceased was a nonresident; sometimes to the personal representative in his capacity as such at his domicile; and sometimes to the personal representative at the place of his appointment (usually where the deceased resided), or at the place of the last domicile of the deceased, if a resident. See 1 Cooley on Taxation (3d Ed.) 664; Gray's Limitations of Taxing Power, § 109; 1 Desty on Taxation, § 68; Burroughs on Law of Taxation, § 98; 37 Cyc. 958; notes in L. R. A. 1915C, 903, 949. In the absence of statutory rule in this state, or of any decision by this court on the question, resort will be had to the decisions of other courts in similar cases for a just and proper rule.

[1, 2] The rule that such property is taxable to the heir or legatee at his domicile is impracticable. Until settlement of the estate it cannot be certainly known what personality, if any at all, the heir or legatee will receive. The case of Central of Georgia Railway Co. v. Wright, 124 Ga. 630, 53 S. E. 207, in which it was ruled that—

The "substantial, beneficial ownership of the stock [stock in an Alabama corporation owned by the plaintiff in error in that case, and pledged to a New York trust company for the purpose of securing an issue of bonds and in the actual possession of the trust company in the city of New York] being in the Central of Georgia Railway Company, that company is liable to be taxed thereon in Georgia"

—does not require the adoption of the rule. We also eliminate the rule that such property should be taxed at its actual situs, for the reason that the deceased in the present case was a resident of the state. That the Legislature, subject to constitutional limitations, has full power to assess taxes against persons domiciled or property situated within the state is not doubted. Upon the just principle that protection and taxation are correlative, the state has ample power to tax the estates of nonresidents, living or dead, actually located within the state; but that

question is not here involved. The petition in this case alleges that the personality of E. Hilton—chooses in action and certain farm products—was not engaged in any business enterprise within the city. Hence we do not deal with the power of the state to tax personal property which has acquired a business situs in a state or district other than the state or district of the owner's residence. See able review of the decisions of the Supreme Court of the United States upon this question in 15 Columbia Law Review, 377.

A just and proper rule in cases of this character, as we think, is found in *Cornwall v. Todd* (1871) 38 Conn. 443, where it was ruled:

"The personal property of a deceased person, during the settlement of the estate, is taxable in the place of domicile of the deceased. When it comes into the possession of the heir or legatee it must be taxed in the place where the heir or legatee resides. When it goes into the hands of a trustee, under the will or otherwise, it must be taxed where the trustee or cestui que trust resides, as the case may be."

It there appeared that Thomas D. Moss, at the time of his death, resided in the Fifth school district in the town of Cheshire, where his widow still lived and where his real estate was situated. His executor lived in the First school district. The Fifth district levied a tax against the estate of the decedent, including among other property, money at interest. The executor filed a petition in equity to restrain the collector from collecting a tax on the money at interest. By the Connecticut statute it was provided that personal property in the hands of a trustee should be listed in the town in which such trustee resides. In analogy to that statute, it was the contention of the executor that the money at interest could only be taxed for district purposes in the district where he resided. Carpenter, J., delivering the opinion of the court, said:

"That an executor or an administrator, during the settlement of the estate and before final distribution, is in some sense a trustee, cannot be denied; but we do not think he is such a trustee as this statute contemplates. \* \* \* Executors and administrators are officers of the law. Ordinarily they have no interest in the property held by them as such. The legal title vests in them merely to enable them to collect, care for, and dispose of the property, for the payment of debts and for distribution among heirs or legatees. It is for a specific purpose and for a limited time, usually a year, more or less. But when a party is made a trustee by deed or will for the use of another, or for some charitable purpose, the property vests in him usually for a lifetime or longer. In respect to such trusts, there is a reason for declaring the sense of the Legislature as to the place where the trust property shall be taxed; but we see no occasion for requiring the personal property of a deceased person, during the settlement of the estate, to follow the same

rule. \* \* \* Who, for the purposes of taxation, is to be regarded as the owner of this property? We think we may with propriety say that it belongs to the estate. It does not belong to the executor, except in a limited sense, as we have already seen. It does not belong to the heir before distribution; and ordinarily the legatee has no claim until the debts are paid. \* \* \* So far as property is concerned, and for the purposes of collecting and paying debts and doing justice by others, the acts and doings of a deceased person while in life still continue to affect the living. In a certain legal sense, therefore, and for certain purposes, he still lives, and will continue to live until those purposes are fully accomplished. As he is incapable of acting for himself, the executor or administrator represents him. The law requires this property, while in a transition state from the dead to the living, to bear its proportion of the public burdens. For the purposes of taxation, therefore, it must have a situs. None can be more appropriate than the place where the deceased lived and died."

The case from which we have quoted at length does not stand alone. In the case of *City and County of San Francisco v. Lux* (1884) 64 Cal. 481, 2 Pac. 253, the Supreme Court of California, after reviewing prior decisions in that state to the effect that the situs of personal property, especially of intangibles, follows the person of the owner, concluded that—

"The situs of the property, for taxation purposes, does not change upon the death of the owner. The personal property of decedents is taxed at the former domicile of the decedent."

The property involved was money on deposit with a bank, and the question was its taxable situs while in the hands of the personal representative of the estate for the purposes of administration. In the case of *Millsaps v. City of Jackson* (1901) 78 Miss. 537, 30 South. 756, the Supreme Court of Mississippi held that—

"Stocks and bonds of a testator in the hands of executors during administration should be assessed for municipal taxes at the domicile of the testator, and not at the respective domiciles of the executors"

—while conceding that such stocks and bonds, in the hands of executors as trustees, after the termination of their duties as executors, should be assessed for municipal taxes at the respective domiciles of executors. To the same effect see, also, *State v. Beardsley* (1919 Fla.) 82 South. 794. The foregoing cases were not controlled by statutes. The Supreme Court of Appeals of Virginia, in the absence of statute, in the case of *City of Staunton v. Stout's Executors* (1889) 86 Va. 321, 10 S. E. 5, held that—

"Bonds belonging to the estate of a decedent are taxable at his last domicile, without regard to the residence of his executors."

In the later case of *Commonwealth v. Williams' Executors* (1904) 102 Va. 778, 47 S. E. 867, the same court held that debts due the deceased were taxable at the domicile of the executor, but the court seemed to consider the domicile of the executor to be in the place of his appointment (the place where the deceased last dwelt). In the case of *Stephens v. Mayor of Booneville* (1864) 34 Mo. 323, it was ruled that the personalty of a deceased "is taxable in the domicile in which he resided at the time of his death, and not in that of his personal representative." That decision does not refer to any statute; but in the later case of *Taylor v. St. Louis County Court*, 47 Mo. 594, 603, it was said that—

"The statutory provision would be sufficient to justify the conclusion in the case cited, without claiming the proposition to be a general one."

In the following cases, though they turn on statutes, the rule is recognized: *Hardy v. Yarmouth* (1863) 6 Allen (Mass.) 277; *Avery v. De Witt* (1888) 72 Mich. 25, 40 N. W. 39; *Commonwealth v. Camden* (1911) 142 Ky. 365, 134 S. W. 914. Burroughs, in his work on Taxation, 224, states the rule as follows:

"The personal property of decedents is taxed at the domicile of the decedent to the person having the legal title, and not in the name of the deceased person; during the settlement of the estate it must have a situs somewhere, and none so appropriate as where the decedent lived."

In 1 *Desty on Taxation*, 332, § 68, the rule is stated as follows:

"The personal estate of a testator accompanies him wherever he may reside and become domiciled with it, according to the law of his residence. The situs is at the domicile of decedent during settlement of the estate, and must be assessed to the one having the legal title."

In *Gray's Limitations of Taxing Power*, 86, § 109, it is said that the weight of authority is in favor of the proposition that personal property in the hands of an executor is taxable by the state out of whose courts the officer's authority issues. (The general rule in this state is that the ordinary of the county of the residence of the deceased has exclusive jurisdiction to appoint his personal representative. See Civil Code, §§ 3853, 3969, 4792, 4793.) The rule announced in *Cornwall v. Todd*, which we have approved, would appear to be fair and convenient; fair to the estate and the taxing district; convenient to the executors and the taxing authorities.

So long as Mr. Hilton continued to live, it is not pretended that his personal estate was subject to taxation by the city. If the three executors of his will lived in the county, beyond the corporate limits of the city, it is not pretended that any part of the notes or mon-

(102 S.E.)

ey on deposit could be taxed by the city. If, therefore, the taxable credits and cotton belonging to his estate are subject to taxation by the city, it is so because one of his executors happens to be a resident of the city. If this theory be correct, then the power of the city to impose the tax depends entirely upon the residence of the person who may be appointed to take charge of and administer the estate. And one who resided all his life within a municipality might, by appointing as his executor a nonresident of the city, exempt his personal estate, while in process of administration, from taxation by the city. In no just or proper sense can it be said that the personalty assessed by the city in this case constitutes any part of the taxable wealth of the city.

We have not overlooked the general statutory rule for the return of personal property, as provided in the Civil Code, § 1075. The situs of personal property for the purposes of taxation, with certain exceptions not material here, is, under our law, at the domicile of the owner, if a resident of this state. See *City Council of Augusta v. Dunbar*, 50 Ga. 387, 392, 393; *Wright v. Southwestern Railroad Co.*, 64 Ga. 783, 799; *Greene County v. Wright*, 126 Ga. 504, 54 S. E. 951; *High Shoals Mfg. Co. v. Penick*, 127 Ga. 504, 56 S. E. 648; *Wright v. Brunswick*, 140 Ga. 231, 78 S. E. 839, Ann. Cas. 1914D, 287; *Jolner v. Pennington*, 143 Ga. 438, 85 S. E. 318; *Fulton County v. Wright*, 146 Ga. 447, 91 S. E. 487. We are also mindful that upon the death of the owner, intestate, title to all his personal property vests in his administrator for the benefit of his heirs and creditors (Civil Code, § 3929); that, until the required assent by the executor, the legal title to the devised realty and bequeathed personalty of the testator is in the executor (Civil Code, § 3895); and that an executor is a trustee, having title to the devised realty as well as to the bequeathed personalty for the purposes of using the same to pay debts and legacies. *Blake v. Black*, 84 Ga. 392, 399, 11 S. E. 494. But, as we have already seen, the personal representative holds the title for a limited purpose, and the executor is a trustee in a limited sense.

We have also given due weight to the case of *Trustees of the Academy of Richmond County v. Augusta*, 90 Ga. 634, 17 S. E. 61, 20 L. R. A. 151, relied upon by the plaintiff in error to sustain its contention that at least one-third of the personalty assessed for taxes is subject to taxation by the municipality. In that case the city council of Augusta sought to subject to taxation certain choses in action held by several trustees under a trust created by the will of Richard Tubman for the erection of a poorhouse. Some of the trustees resided in the city of Augusta and others outside of the city, in the county. It was held:

"Where trustees as tenants in common own choses in action which are taxable as private

property, and some of the trustees reside within and some without the limits of a municipal corporation, the corporation may tax the pro rata shares of those trustees residing within, but cannot tax the shares of those residing without such limits. This is true irrespective of the question as to whether a majority or minority of the trustees reside within the municipality."

In the course of the opinion by Mr. Justice Simmons it was said:

"Our statutes make no provision for such a case as this, nor is there any decision of this court on the subject. We think, however, a just and proper rule under such circumstances is that furnished by the decisions of other courts in similar cases, which are here cited"—citing *Mayor, etc., of Baltimore v. Stirling*, 29 Md. 48; *Appeal Tax Court of Baltimore City v. Gill*, 50 Md. 396; *State of Ohio ex rel. Harkness v. Matthews*, 10 Ohio St. 431; *Hardy v. Yarmouth*, supra.

The Maryland cases so cited related to property in the hands of trustees as distinguished from ordinary executors. The *Hardy* Case, already cited in this opinion, turned upon a statute of Massachusetts; and it is to be noted that the same statute provides that the situs of a decedent's personal property, while in the hands of his personal representative for the purposes of administration, is at the place where the decedent last dwelt. The ruling in *Harkness v. Matthews*, supra, supports the position of counsel for the city, and it is freely admitted that other equally respectable courts have followed the same rule. Perhaps the analogies of our statute and of our decisions would permit a different conclusion from that reached in the present case. But even if so much be conceded, we are satisfied with the equity of the rule announced, and are not bound to adopt a different one.

What we have said above may apply particularly to the taxable situs of the notes and the money on deposit—choses in action. With respect to the cotton a somewhat different question is presented by the demurrer. In 1912 an amendment to article 7, § 2, par. 2, of the Constitution of this state authorized the General Assembly to exempt from taxation farm products, including baled cotton grown in this state and remaining in the hands of the producer, but no longer than for the year next after their production. *Park's Ann. Code*, § 6554. By an act approved August 13, 1913 (*Acts 1913*, p. 122), it was provided that—

"From and after the passage of this act, all farm products including baled cotton grown in this state and remaining in the hands of the producer but not longer than for the year next after their production shall be exempt from taxation."

The petition does not unequivocally allege that the cotton stored in the city of Blakely

was grown by E. Hilton, or upon lands owned by him in the state of Georgia; nor is it disclosed how long the cotton had been on storage within the city at the time of the assessment. It is alleged that the testator died on April 5, 1916. The assessment was made as of February 1, 1917. The cotton was actually sold by the executors in the summer of 1917. The special demurrer attacked these particular omissions. In the view we take of this question, however, the omissions are immaterial. In *Wright v. Brunswick*, 140 Ga. 231, 78 S. E. 839, Ann. Cas. 1914D, 287, it appeared that Wright was part owner of a vessel registered at the port of Brunswick. The vessel made daily trips from Brunswick to St. Simons, both within the county of Glynn, and to the city of Darien, in the county of McIntosh, returning to Brunswick in the afternoon, where she remained during the night. Wright resided beyond the corporate limits of the city of Brunswick, in the county of Glynn. It was held that Wright's interest in the vessel was not subject to municipal ad valorem taxation by the city of Brunswick. See, also, *City of Albany v. Brown*, 137 Ga. 796, 74 S. E. 518.

The delegation by the General Assembly to the city of Blakely of the power to "put an ad valorem tax \* \* \* on all the property in said city" must therefore be construed to mean the delegation of the power to tax all the property "in the city" for the purposes of taxation under the general rule applicable thereto. Neither the constitutional amendment of 1912 nor the act of 1913 changed the general rule and policy of this state that personal property is taxable only at the domicile of the owner, if a resident of this state. If it be urged that this ruling exempts, as in this case, cotton (tangible personalty) actually within the city, and therefore protected by it, from the just burden of municipal taxation, the reply is that the state has conferred upon the city its power to tax, and that both the citizen of the state residing outside of the city and the city itself, as constituents of the state, are under the operation of the general laws of the state. Our conclusion therefore is that under the allegations of the petition none of the personal estate of the decedent in the hands of his executors for administration, and in process of administration, was liable to taxation by the plaintiff in error. The will is not attached to the petition. If it should appear upon the trial that the executors were in fact testamentary trustees, the rule announced in *Trustees of the Academy of Richmond County v. Augusta*, 90 Ga. 634, 17 S. E. 61, 20 L. R. A. 151, would, of course, be controlling.

Judgment affirmed.

All the Justices concur, except GILBERT, J., absent on account of sickness.

(150 Ga. 23)

**BRUCE v. CENTRAL BANK & TRUST CORPORATION et al. (No. 1277.)**

(Supreme Court of Georgia. Feb. 24, 1920.)

(Syllabus by the Court.)

1. INJUNCTION  $\S$  114(3)—MORTGAGES  $\S$  504—FORECLOSURE SALE UNDER JUDGMENT OBTAINED IN SUIT BROUGHT IN PAYEE'S NAME WITHOUT CONSENT MAY BE ENJOINED.

If the holder of a promissory note and a mortgage on land to secure the same (neither of which has been indorsed, assigned, or otherwise transferred by the payee and mortgagee), suing in the name of the latter (without his knowledge or consent) for the use of such holder, obtains a judgment against the maker for the amount of the note and a foreclosure of the mortgage, and undertakes to enforce collection of the debt by levy and sale of the mortgaged property under the mortgage *fi. fa.* based on the foreclosure, the payee of the note and mortgage may maintain an action to enjoin the sale.

(a) The petitioner, under the facts of the case, was not barred by laches from instituting suit to enjoin the enforcement of the judgment on the note and mortgage *fi. fa.*

(b) The sheriff and the plaintiff's attorney in the action on the note and the foreclosure proceedings were not such improper parties defendant in the suit for injunction as would authorize a dismissal of such suit for misjoinder.

2. SUFFICIENCY OF PETITION.

Applying the foregoing rulings to the allegations of the petition for injunction, it was error to sustain the demurrer to the petition and to dismiss the case.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by Mrs. L. M. Bruce against the Central Bank & Trust Corporation, as receiver of the Neal Bank, and others. Judgment on demurrer for defendants, and plaintiff brings error. Reversed.

The exception is to a judgment sustaining a demurrer to a petition filed in 1918 by Mrs. L. M. Bruce against Central Bank & Trust Corporation, as receiver of the Neal Bank, and others, and dismissing the action. The petition alleged, in substance, as follows: J. L. Bruce, on August 26, 1904, executed a promissory note payable to Mrs. L. M. Bruce, and a mortgage to her on described realty to secure the note, and both instruments were delivered to her. Neither of the papers was ever indorsed or otherwise transferred by her, and they remained her property. In 1907 the Neal Bank instituted an action against the maker of the note for the amount thereof, and to foreclose the mortgage, alleging a transfer thereof by Mrs. Bruce by indorsement. In 1914 the plaintiff's attorney in that action amended the petition by striking the allegations as to transfer by indorsement, and substituting the name of Mrs. L. M.

Bruce, suing for the use of the Central Bank & Trust Corporation as receiver of the Neal Bank. Mrs. Bruce did not consent to the use of her name, and it was so used without her knowledge or authority, and was never ratified by her. Afterward a judgment was rendered in favor of the plaintiff, and the mortgage was foreclosed. Execution was issued and the mortgaged property was about to be sold thereunder, and the money appropriated by the plaintiff in *fi. fa.* After the institution of proceedings to foreclose the mortgage, the Central Bank & Trust Corporation was duly appointed receiver for all the property, business and affairs of the Neal Bank, and is now attempting to enforce the mortgage *fi. fa.* The purported indorsement by Mrs. Bruce of the note secured by the mortgage, under which the Neal Bank and its receiver claimed title to them and the right to use her name to sue for their use, was a forgery, if it ever existed, and was not her act and deed. Irrespective of the validity of the judgment of foreclosure against J. L. Bruce, and whether or not J. L. Bruce or any person will be estopped by that judgment from denying that the Neal Bank or its receiver had a right to use her name for the prosecution of said action and for the enforcement of the *fi. fa.*, petitioner was not estopped by any judgment or otherwise from raising that question, because she was not a party to said action, and was not bound by what was done therein; nor has she ratified the action of the plaintiff in said case in attempting to use her name to sue for the use and benefit of the Neal Bank or its receiver. No reason exists in law or in equity why the Neal Bank should be permitted to use her name to sue for its use or that of another. She does not desire the mortgage foreclosed, and does not desire that the *fi. fa.* be levied, or that the land be exposed to sale. The sheriff is advertising the land for sale under the foreclosure, at the instance of the attorney for the receiver; and, unless enjoined, he will sell the land on the first Tuesday in March, 1918. On June 5, 1915, J. L. Bruce died, owning at that time the land described in the mortgage, and owning practically no other property. Petitioner is the owner of the note and mortgage, and is entitled to recover the amount due thereon from the estate of J. L. Bruce; and the Neal Bank, having no legal or equitable interest in the note and mortgage, is not entitled to recover or collect from the estate of J. L. Bruce any amount thereon, or on any judgment based on said note and mortgage. While the voluntary payment by J. L. Bruce to the Neal Bank would have not have divested or affected petitioner's lien upon the land, and would not have affected her right to recover from J. L. Bruce the amount due on the note and mortgage, yet, since he is deceased, and since he left no property other than that described in the mortgage, and since a judgment has been

obtained in a court of competent jurisdiction in favor of the Neal Bank against said property, if the property is sold under the execution, petitioner will be barred and estopped from proceeding against the property and subjecting it to the payment of the mortgage, and she will suffer irreparable loss. When the land is sold the estate of J. L. Bruce will be insolvent, and she will be unable to collect the amount due her. She prays for injunction to prevent enforcement of the judgment against the land, and to establish her title to the note and mortgage.

The demurrer was on the ground that the petition alleged no cause of action at law or in equity, more particularly for the following reasons:

(a) The defendant has title to the note and mortgage by prescription.

(b) The plaintiff is barred by lapse of time and laches in bringing her action.

(c) The name of Mrs. L. M. Bruce having been substituted as a plaintiff suing for the use of the bank to assert the rights of the bank, she was not a party to the suit in her individual interest, and had no legal right to control the litigation or the *fi. fa.*, but such right was exclusively in the bank.

(d) The object of the plaintiff in the present suit is to prevent the enforcement of the judgment against J. L. Bruce and his property, and, there being no allegation that J. L. Bruce does not owe the amount of the judgment, and no allegation that the mortgage foreclosed is not a lien upon the property to be sold by the sheriff, the remedy of the plaintiff, if any, is not to prevent the sale, but to claim the proceeds of the sale; and no reason is shown why the sale should not proceed against the property of J. L. Bruce.

A further ground of demurrer is that there is a misjoinder of parties defendant, no relief being prayed against the bank's attorney and the sheriff, except that they be enjoined from enforcing the execution.

Quincey & Rice, of Ocilla, and Little, Powell, Smith & Goldstein, of Atlanta, for plaintiff in error.

Hal Lawson, of Abbeville, and Candler, Thomson & Hirsch, of Atlanta, for defendants in error.

FISH, C. J. [1, 2] The judge committed error in sustaining the demurrer and dismissing the petition. The question was between the bank, claiming to be the holder of the note and mortgage, and Mrs. Bruce, who was the payee in the note and the mortgage. As such she was the legal owner of both instruments, and, unless they were transferred in some manner, she continued to be such owner. Her interest could not be divested or limited merely by the act of the bank, to which she had not delivered such papers or otherwise transferred them, employing her name for the use of the bank without her knowledge or assent

In the suit which the bank had instituted against the maker. Counsel have furnished no authority to sustain such a contention. A number of cases have been cited where the question was between the holder of the note and the maker, but they are obviously not in point. If the plaintiff, L. M. Bruce, owned the note and mortgage as alleged, it was entirely with her as to when, if ever, she should proceed to enforce the collection thereof; and until there was danger of a cloud being cast upon her title, or third persons being induced to become involved by bidding at a sale of the property under the mortgage foreclosure, she was not called upon to move in the matter of preventing such a sale or cloud upon her title. Whether or not, the bank having admitted in *judicio* her legal title by suing in her name for its use, she would ever be barred by prescription or laches, she would not be so barred under the facts of this case.

Whether or not the plaintiff's attorney and the sheriff were necessary parties defendant to the suit, they were not such improper parties as would authorize the dismissal of the action.

Judgment reversed.

All the Justices concur, except GILBERT, J., absent on account of sickness.

(150 Ga. 46)

**MITCHELL v. SOUTHERN BELL TELEPHONE & TELEGRAPH CO.**  
(No. 1389.)

(Supreme Court of Georgia. Feb. 25, 1920.)

*(Syllabus by the Court.)*

1. JUDGMENT ~~656~~—JUDGMENT ON GENERAL DEMURRER ON THE MERITS OF THE CASE IS ORDINARILY CONCLUSIVE AS TO MATTERS ALLEGED OR WHICH MIGHT HAVE BEEN ALLEGED; SUSTAINING OF GENERAL DEMURRER TO EQUITABLE PETITION ON GROUND THAT PETITIONER HAS EQUITABLE REMEDY AT LAW DOES NOT BAR PURSUIT OF REMEDY AT LAW.

Ordinarily, where a general demurrer, which goes to the merits of the plaintiff's case, is sustained, the judgment is conclusive as to all matters which were set up in the petition, or which might properly have been alleged therein; but where a general demurrer to an equitable petition is based upon the grounds that the petition sets forth no grounds for equitable relief, and that the plaintiff has a full, complete, and adequate remedy at law (and such was the character of the demurrer, as shown by the record in *Southern Bell Tel. Co. v. Mitchell*, 145 Ga. 539, 89 S. E. 514), and such demurrer is sustained, the judgment is not conclusive upon the merits of the case, but rules merely that a court of equity has no jurisdiction of the cause, for the special reason stated in the demurrer; and the petitioner in the equitable action is not barred by such judgment therein from pursuing his remedy at law.

## 2. DENIAL OF CERTIORARI.

As to the other grounds set up in the petition for certiorari, which was overruled, it does not appear that the court erred in determining them adversely to the plaintiff in certiorari.

Error from Superior Court, Chatham County; P. W. Meldrim, Judge.

Action between W. B. Mitchell and the Southern Bell Telephone & Telegraph Company. Judgment for the latter, and the former brings error. Affirmed.

Geo. H. Richter, of Savannah, for plaintiff in error.

Osborne, Lawrence & Abrahams and D. S. Atkinson, all of Savannah, for defendant in error.

PER CURIAM. Judgment affirmed. All the Justices concur, except GILBERT, J., absent on account of sickness.

(150 Ga. 45)

**COLUMBIAN NAT. LIFE INS. CO. v. MULKEY.** (No. 1380.)

(Supreme Court of Georgia. Feb. 25, 1920.)

*(Syllabus by the Court.)*

1. JUDGMENT ~~423~~—ERROR OF COURT OF APPEALS DOES NOT AUTHORIZE A COURT OF EQUITY TO SET ASIDE DECISION.

In cases falling within the jurisdiction of the Court of Appeals, mere error by that court in deciding questions of law, or in applying principles announced in the decisions of the Supreme Court (which, under the Constitution of this state, are binding upon the Court of Appeals as precedents), or in applying the provisions of the federal Constitution, will not authorize a court of equity to set aside the decision of the Court of Appeals.

## 2. DISMISSAL OF PETITION.

Applying the ruling stated in the preceding note, the judge did not err in dismissing the petition on general demurrer.

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Proceedings between Columbian National Life Insurance Company and Janie Mulkey and others. Petition was dismissed on general demurrer, and the insurance company brings error. Affirmed.

Colquitt & Conyers, of Atlanta, for plaintiff in error.

Horton Bros. and Anderson, Rountree & Crenshaw, all of Atlanta, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur, except GILBERT, J., absent on account of sickness.

(150 Ga. 57)

(102 S.E.)

DOUGLAS v. FORRESTER, Tax Collector,  
et al. (No. 1455.)

(Supreme Court of Georgia. Feb. 28, 1920.)

*(Syllabus by the Court.)***1. APPEAL AND ERROR §637—WRIT OF ERROR NOT DISMISSED ON GROUND THAT BILL OF EXCEPTIONS WAS NOT CORRECTED WITHIN A REASONABLE TIME.**

It is provided in Civil Code, § 6158: "If the judge shall determine that the bill of exceptions is not true, or does not contain all the necessary facts, he shall return the same, within ten days, to the party or his attorney, with his objections to the same in writing. If those objections are met and removed, the judge may then certify, specifying in his certificate the cause of the delay. If the judge sees proper, he may order notice to the opposite party of the fact and time of tendering the exceptions, and may hear evidence as to the truth thereof." A petition for injunction and other equitable relief was dismissed on general demurrer on April 3, and a bill of exceptions, assigning error on such judgment, was tendered to the judge on April 4. The judge did not sign the writ of error, but directed counsel for plaintiff to submit the bill of exceptions to opposing counsel. The direction was complied with, and on April 7 opposing counsel submitted to the court certain written objections to the bill of exceptions. Counsel for both parties appeared before the court at chambers on April 14 to consider the matter. No agreement could be made, and the court took the bill of exceptions to further consider whether he should sign it. On April 21 the judge returned the bill of exceptions to the plaintiff's counsel, with certain objections written thereon. The bill of exceptions was then so corrected by counsel as to conform to the requirements made by the judge, and on April 22 it was sent by registered mail to the judge. The judge certified the bill of exceptions thus corrected on May 14. In his certificate he stated all that is set out above; and, further, that the "bill of exceptions was not received by the court in due course of mail; this through no fault of plaintiff." Held, that the writ of error will not be dismissed on the ground that the bill of exceptions was not corrected within a reasonable time.

**2. TAXATION §336(1), 611(5) — PETITION TO ENJOIN ENFORCEMENT OF TAX FI. FAS. ON ASSESSMENTS BY TAX RECEIVER CONSTRUED GOOD AGAINST GENERAL DEMURRER; RECEIVER WHEN DISSATISFIED WITH A RETURN MADE TO HIM ON OATH MUST ASSESS THE PROPERTY WITHIN THIRTY DAYS.**

By Civil Code, § 1097, the tax receiver, when dissatisfied with a return made to him on oath, is required to assess the property within 30 days after the return is made. If for any cause he omits to do this, he cannot do it afterwards, nor can any court confer that power on him. *Bohler v. Verdery*, 92 Ga. 715, 19 S. E. 36.

(a) Consequently, where one filed a petition for injunction to prevent the enforcement of certain tax fi. fas. against him, alleging that during a series of years he had duly returned all of his taxable property, that these returns had been

received, that he had made payments of all the taxes during those years, being duly receipted therefor, and that subsequently the tax receiver went through the form of making assessments for the years above mentioned, after having given the petitioner written notice to make corrected returns, and on the basis of such assessments issued the fi. fas. sought to be enjoined, the petition should not have been dismissed on general demurrer.

(b) The allegation that the plaintiff had "returned his taxable property as required by law" is construed, as against a general demurrer, to mean that the plaintiff had returned all of his taxable property.

Error from Superior Court, De Kalb County; C. W. Smith, Judge.

Suit for injunction by E. L. Douglas against J. E. Forrester, Tax Collector, and others. Petition dismissed on general demurrer, and plaintiff brings error. Reversed.

J. B. Stewart and Lee Douglas, both of Atlanta, for plaintiff in error.

Green, Tilson & McKinney, of Atlanta, for defendants in error.

ATKINSON, J. Judgment reversed. All the Justices concur, except GILBERT, J., absent on account of sickness.

(149 Ga. 822)

**REDDICK v. STATE (No. 1523.)**

(Supreme Court of Georgia. Feb. 18, 1920.)

Certified Questions from Court of Appeals.

Joe Reddick was convicted of a violation of the prohibition law, and he brought error, and the Court of Appeals certified a question. Question answered in the negative.

For opinion of Court of Appeals conforming to this opinion, see 102 S. E. 132.

Davidson & Callaway, of Eatonton, for plaintiff in error.

Doyle Campbell, Sol. Gen., of Monticello, for the State.

PER OURIAM. After the selection of a jury in the trial of a criminal case, in which the accused has participated (assuming from the question under review that the defendant in the instant case did participate in the selection of a jury), and after the introduction of evidence upon the merits of the case has commenced, the defendant will be deemed to have waived formal arraignment, and it is then too late for him to demur; and the court did not err in refusing to allow the defendant to demur, nor in overruling the motion to quash.

HILL and GILBERT, JJ. (dissenting). Where a criminal case proceeds to trial with-

out formal arraignment, or waiver of arraignment, or plea, it is not too late, until a verdict has been returned, to demur to the indictment. *Bryans v. State*, 34 Ga. 323. But where the accused, without arraignment, waiver thereof, or plea, allows the trial to proceed to verdict, takes part in the introduction of evidence, and sits by during the charge of the court, it is too late to demur. *Lampkin v. State*, 87 Ga. 516, 524, 13 S. E. 523; *Hudson v. State*, 117 Ga. 704, 45 S. E. 66.

The Court of Appeals certified the following question:

"The exceptions pendente lite in this case (omitting formal parts) are as follows: '(1) That at the September term, 1918, of Putnam superior court, he [the defendant] was convicted for the violation of the prohibition law, in that he was convicted for operating a still and illegally making and manufacturing whisky. (2) That upon the call of said case there was no formal arraignment or plea entered, and that after a jury had been impaneled and the state's first witness was upon direct examination, defendant's attorneys discovered for the first time a fatal defect in the indictment upon which the defendant was being tried [the alleged fatal defect being that the indictment charged that the offense was committed "on the 6th day of July, nineteen hundred and ———"]; that this was not negligence on the part of defendant nor his counsel, for the reason that defendant, being a poor man, was not able to employ counsel until a few minutes before his case was called, and, in the hurry and confusion and trying to expedite the business of the court, the error and defect was only then discovered. Defendant called the same to the attention of the court, and the circumstances, and offered to demur and moved to quash, but, upon objection from the state, was overruled. (3) That after verdict defendant moved in arrest of judgment, and said motion is now of file and contains the allegations set out herein. And now in open court at the said September term, 1918, and within the time allowed by law, he presents the exceptions, and prays that the same may be certified and allowed. Defendant excepts: (1) To the ruling of the court ordering him to trial without formal arraignment and plea; (2) to the ruling of the court refusing the defendant the right to demur and move to quash; (3) to the order of the court overruling the motion in arrest of judgment. And says all of these errors of which he complains."

"The main bill of exceptions contains the following recitals: 'Upon the call of said case there was no formal arraignment nor plea entered and, after the state had examined its first witness in chief and turned the same over to counsel for the defendant for cross-examination, defendant's counsel for the first time had an opportunity to see the indictment and discovered a fatal defect in the indictment, to wit, [the indictment] charged the offense as having been committed on the 6th day of July, nineteen hundred and ———, and offered to demur to the indictment, and the court overruled the same; and the defendant moved to quash the indictment

on the grounds that said indictment charged the defendant with committing the offense in the year nineteen hundred, and there were no allegations in the indictment or exceptions stated therein to take it out of the bar, therefore the offense was barred by the statute of limitations, to which offer to be allowed to demur and motion to quash the court overruled on the ground that defendant had waived the defect by going to trial. Whereupon the defendant stated that he had not waived arraignment, and had not been called upon to do so, and declined to waive arraignment, and demanded that he be arraigned, which the court overruled on the ground that he waived being formally arraigned by engaging in the trial, to which rulings of the court the defendant excepted pendente lite.' The main bill of exceptions contains a proper assignment of error upon the exceptions pendente lite.

"Did the court err in refusing to allow the defendant to demur to the indictment, or in refusing to quash the indictment, or in overruling the motion in arrest of judgment? See *Bryans v. State*, 34 Ga. 323."

(149 Ga. 303)

JACKSON v. JACKSON et al. (No. 1459.)

(Supreme Court of Georgia. Feb. 13, 1920.)

(Syllabus by the Court.)

1. HUSBAND AND WIFE  $\S$ 280—HUSBAND ESTOPPED TO CLAIM THAT CONTRACT IN LIEU OF ALIMONY WAS OBTAINED BY FRAUD AND ANNULLED BY SUBSEQUENT COHABITATION.

On April 24, 1917, a husband and wife, while living in a bona fide state of separation, entered into a written contract whereby certain property was conveyed and certain notes given to the wife as a provision for her support in lieu of alimony. In the contract the husband was referred to as a party of the first part, and the wife as party of the second part. After describing the property the contract provided: "It is further understood and agreed that upon the filing of any suit for divorce by party of the first part, this agreement shall be submitted to the court, and approved by the court, and shall be entered as a part of the record in said case, and shall have the same force and effect as a judgment and decree for alimony, and that upon the rendition of any final decree for divorce between said parties the provisions of this agreement shall be incorporated in and made a part of such final decree, and the provisions for the payments to be made by the party of the first part may be enforced by party of the second part in any manner that alimony judgments may be enforced." On October 30, 1917, the wife instituted an action against her husband for total divorce, on the grounds that for three years prior and up to the date of the filing of the suit the husband had been guilty of habitual intoxication and cruel treatment toward the wife, which she had not condoned. The defendant acknowledged service of the petition and process, but filed no answer. Two verdicts were rendered, granting the wife a total divorce. The defendant appeared at the trial during which the



(102 S.E.)

second verdict was rendered, personally and by his attorney, and asked for the removal of his disabilities by the jury. The attorney for the wife, while holding the contract in his hand, asked the wife "if they hadn't settled the alimony and property rights," and the husband did not "intimate anything to the contrary." The attorney representing the husband, in asking for the removal of his disabilities, stated that the question between the parties as to the alimony had been settled, and upon such basis appealed to the jury to remove the husband's disabilities. The jury returned a verdict granting the total divorce between the parties, and removing the disabilities of the husband as well as those of the wife. No express reference was made in the verdict or decree to the subject of alimony, or to the contract in respect thereto.

Under the pleadings and the evidence in the divorce suit, the verdict and decree was conclusive between the parties upon the question of habitual drunkenness and cruel treatment by the husband uncondoned by the wife. *McLeod v. McLeod*, 144 Ga. 359, 87 S. E. 286. Under the circumstances, the husband would be estopped from subsequently maintaining a suit to cancel the contract making provision for the wife in lieu of alimony, on the ground that the contract had been obtained by fraud, and that intervening the dates of the contract and the commencement of the divorce suit the wife and husband had voluntarily resumed cohabitation as husband and wife, and that the contract had been annulled by such cohabitation. See *McDaniel v. German American Ins. Co.*, 134 Ga. 189, 67 S. E. 668. The judge did not err in directing a verdict for the defendants.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by B. R. Jackson against N. M. Jackson and others. A verdict for defendants was directed, and plaintiff brings error. Affirmed.

Geo. F. Gober and Westmoreland, Anderson & Smith, all of Atlanta, for plaintiff in error.

W. Carroll Latimer and Branch & Howard, all of Atlanta, for defendants in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(150 Ga. 38)

McFARLIN v. CAMP. (No. 1508.)

(Supreme Court of Georgia. Feb. 24, 1920.)

(Syllabus by the Court.)

JUDGMENT  $\S$  457—REAL PARTIES IN INTEREST MUST BE MADE PARTIES IN ACTION TO SET ASIDE DECREE.

Where an equitable petition was filed against several parties, and verdict and decree were rendered, determining and fixing the various conflicting claims and rights of the parties plaintiff and defendant, and a commissioner was named to execute the decree of the court by selling the land and making certain payments according to the terms of the decree, one who was

a party to the suit in which the decree was rendered could not maintain an action against the commissioner to set aside the decree, and for injunction, without making the persons really at interest parties to the action.

Error from Superior Court, Franklin County; W. L. Hodges, Judge.

Suit by Doskie McFarlin against R. T. Camp, Commissioner. Judgment for defendant, and plaintiff brings error. Affirmed.

J. A. McDuff, of Hartwell, and W. A. Stevenson, of Commerce, for plaintiff in error.

W. W. Stark and E. C. Stark, both of Commerce, W. R. Little and J. W. Landrum, both of Carnesville, and Geo. L. Goode, of Toccoa, for defendant in error.

BECK, P. J. Upon an equitable petition filed by Williford, Burns & Rice Company against Mrs. Doskie McFarlin et al., it was decreed and adjudged that certain lands involved in the controversy be sold by a commissioner appointed by the court for that purpose, and that the purchaser at the sale have the entire interest in the title of all the parties in the suit to the land sold. This decree also provided for the payment of the debts due to the plaintiffs and others, for cancellation of deeds upon the payment of such debts, and for the settlement of various interests, which it is not necessary here to specify. R. T. Camp was named as the commissioner, and his compensation was fixed. Before the sale Mrs. Doskie McFarlin brought her petition against R. T. Camp, alleging that he was proceeding wrongfully and illegally to advertise the land for sale; that he was illegally appointed; that the parties at interest did not consent, or have knowledge that he had been authorized to advertise the land for sale; that she had consented for J. W. Landrum to sell the land at a fixed price, for a compensation of \$50, but Camp, without her knowledge or consent, had been named as commissioner, and he was to receive \$100 as compensation for his services; that the verdict and decree purported to be by consent, but she did not consent thereto; that Camp could not make a legal and equitable title to the land, as there were certain rights of minors involved; and that the land was not being properly advertised. The court refused to grant a temporary restraining order on this petition, and the petitioner excepted.

None of the various parties at interest, whose rights were apparently fixed and settled by the decree, were made parties. An injunction was sought merely against the commissioner, who was performing a ministerial duty in executing the decree of the court. The verdict and decree in the case appear to have been rendered by consent, and they determined and settled the conflicting interests of creditors, heirs, and parties who

were interested in the estate involved. None of the parties materially interested were made parties defendant to the petition of Mrs. McFarlin. The court properly refused the restraining order.

Judgment affirmed.

All the Justices concur, except GILBERT, J., absent on account of sickness.

(150 Ga. 36)

**HARLEY v. AMERSON.** (No. 1444.)

(Supreme Court of Georgia. Feb. 24, 1920.)

*(Syllabus by the Court.)*

1. **PLEADING**  $\S$ 254—**DEMURRER THAT AMENDMENT TO PETITION WAS NOT GERMANE AND SET UP INDEPENDENT CAUSES OF ACTION INSUFFICIENT AS NOT SUFFICIENTLY SPECIFIC.**

Where a tenant instituted an equitable action against his landlord to reform a contract of rental and to enjoin the prosecution of a distress warrant and a statutory dispossessory proceeding, an amendment to the petition filed at the trial term, setting forth various claims for special damages arising from a breach of the contract, some of which were germane to the petition, and a claim of general damages for malicious abuse of process, was not subject to demurrer which merely raised the point that the amendment "was not germane, \* \* \* and sought to set up independent causes of action"; the demurrer itself not specifying any particular portion of the amendment which was not germane to the original cause of action and which set up an independent cause of action.

2. **SUFFICIENCY OF PETITION.**

The petition as amended was not subject to general demurrer.

3. **SUFFICIENCY OF EVIDENCE.**

The evidence was sufficient to support the verdict for the plaintiff.

4. **NEW TRIAL**  $\S$ 105 — **NEWLY DISCOVERED EVIDENCE IMPEACHING AND CUMULATIVE IN CHARACTER INSUFFICIENT AS GROUND.**

The alleged newly discovered evidence is merely impeaching and cumulative in character, and not sufficient to require a reversal of the judgment refusing a new trial.

Error from Superior Court, Hancock County; J. B. Park, Judge.

Action by C. A. Amerson against W. I. Harley. Judgment for plaintiff, and defendant brings error. Affirmed.

R. B. Harley and R. H. Lewis, both of Sparta, for plaintiff in error.

Wiley & Lewis, of Sparta, for defendant in error.

ATKINSON, J. Judgment affirmed.

All the Justices concur, except GILBERT, J., absent on account of sickness.

(150 Ga. 39)

**WHIDDON v. FLETCHER et al.** (No. 1509.)

(Supreme Court of Georgia. Feb. 24, 1920.)

*(Syllabus by the Court.)*

**JUDGMENT**  $\S$ 702—**JUDGMENT VALIDATING BOND ISSUE BINDING UPON TAXPAYER SEEKING TO ENJOIN LEVY OF TAX TO PAY BONDS.**

Where an election, held to determine whether bonds should be issued for the purpose of building and equipping a schoolhouse in a local school district, resulted in favor of such issuance, and the bonds were duly validated in accordance with the terms of the Civil Code of 1910,  $\S$  445 et seq., a citizen and taxpayer of the district who could have made himself a party to the proceedings to validate the bonds, but failed to do so, was concluded by the judgment rendered, and could not thereafter enjoin the levy and collection of a tax to pay the interest and principal of the bonds, and the issuance and sale, on the ground that there had never been levied in said district as a unit, distinguished from other districts of said county and from the county itself, a local tax for school purposes as provided by the act of 1912 (Acts 1912, p. 176; Park's Ann. Pol. Code,  $\S$  1545(a)). *Thomas v. Blakely*, 141 Ga. 488, 81 S. E. 218, and cases there cited.

Error from Superior Court, Tift County; R. Eve, Judge.

Proceedings by A. W. Whiddon against I. M. H. Fletcher and others, trustees. Judgment for defendants, and plaintiff brings error. Affirmed.

H. H. Hargrett, of Tifton, for plaintiff in error.

C. W. Fulwood, of Tifton, for defendants in error.

ATKINSON, J. Judgment affirmed. All the Justices concur, except GILBERT, J., absent on account of sickness.

(150 Ga. 41)

**POPE v. ROBINSON.** (No. 1526.)

(Supreme Court of Georgia. Feb. 24, 1920.)

*(Syllabus by the Court.)*

1. **WITNESSES**  $\S$ 159(5)—**EVIDENCE BY PARTY AS TO SIGNATURE OF DEED BY DECEASED GRANTOR INADMISSIBLE IN ACTION TO VACATE JUDGMENT.**

Where, in an equitable action brought by one in possession of land to have vacated and set aside a previous judgment in favor of the defendant against the plaintiff, recovering the land, and praying that the defendant be enjoined from interfering with "the possession, occupancy, or title" of the plaintiff, and where, on the trial of the case, the plaintiff was permitted, over objection, to testify that she did not sign the deed offered in evidence by the de-

endant [the deed purporting to be from the plaintiff to the grantor of the defendant], the admission of such evidence was erroneous; the grantee in such deed being dead, and the assignee of such grantee being a party defendant to the suit. Civil Code 1910, § 5858.

## 2. GROUNDS OF REVERSAL NOT SHOWN.

None of the other assignments require a reversal.

Error from Superior Court, Laurens County; J. L. Kent, Judge.

Suit between Mattie Robinson and J. T. Pope. Judgment for the former, and the latter brings error. Reversed.

Roger D. Flynt, of Dublin, for plaintiff in error.

R. Earl Camp, of Dublin, for defendant in error.

HILL, J. Judgment reversed. All the Justices concur, except GILBERT, J., absent on account of sickness.

(149 Ga. 752)

## MATHIS et al. v. GLAWSON. (No. 1432.)

(Supreme Court of Georgia. Feb. 10, 1920.)

### (Syllabus by the Court.)

#### 1. WILLS §616(6)—BEQUEST OF LIFE ESTATE NOT ENLARGED BY POWER OF DISPOSAL IF DEVISEE SHOULD DIE WITHOUT CHILDREN.

A will, executed in 1860 and duly probated shortly thereafter, contained provisions whereby certain bequests were made to Sarah, the only daughter of the testator. In a subsequent item the will declared: "It is my will that the land, negroes, and property that fall to my daughter upon a division and distribution of my estate shall be her sole and separate property and for her sole and separate use, together with the increase, rents, issues, and profits therefrom during her natural lifetime, free from all debts, liabilities, and obligations of any husband she may have, and after her death said property to go to her children. In event that said daughter should die without children, then I invest and clothe her with the right to dispose of said property by deed, will, or otherwise as she may think proper." In 1864 commissioners duly appointed divided the property, and, among other things, set apart certain land to Sarah. Twenty years thereafter Sarah sold 101¼ acres of the land to Joseph Glawson for \$1,063.37, and upon such consideration conveyed the land to him by a warranty deed, purporting to convey the fee-simple title in the usual form. The deed did not mention the will, or expressly refer to any power contained in the will, or indicate that she was conveying otherwise than as absolute owner of the fee. The grantee entered and remained in possession of the land. Twenty-eight years after making the deed Sarah died, having married, but never having given birth to a child. The heirs at law of the testator, within seven years

after the death of Sarah, instituted an action against an heir at law of Joseph Glawson, to recover the land. The petition was dismissed on demurrer, and the plaintiffs excepted. *Held:*

The bequest to Sarah, "free from all debts, liabilities, and obligations of any husband she may ever have, and after her death said property to go to her children," imported a life estate only for Sarah, which was not enlarged into a fee by the further provision, "in event that said daughter should die without children, then I invest and clothe her with the right to dispose of said property by deed, will, or otherwise as she may think proper."

#### 2. WILLS §689—RIGHT OF DISPOSAL IF DONEE SHOULD DIE WITHOUT CHILDREN HELD TO CONSTITUTE A POWER TO DISPOSE OF ESTATE IN REMAINDER.

The provision, "In event that said daughter should die without children, then I invest and clothe her with the right to dispose of said property by deed, will, or otherwise as she may think proper," contemplated the contingency that Sarah might not leave a child at her death, and amounted to a power to Sarah to dispose of the estate in remainder "by deed, will, or otherwise as she may think proper."

#### 3. WILLS §691, 692, 693(1)—INTENT OF TESTATOR GOVERNS IN CONSTRUCTION OF POWER; WHEN POWER DEPENDENT UPON CONTINGENCY MAY BE EXERCISED.

In determining the character and extent of the power, the intention of the testator must be given effect. The donee could not have exercised the power at or after her death. Accordingly, properly construed, the provision of the will creating the power contemplated that the donee might execute the power at any time during her life, the effect thereof to be postponed until her death, at which time the contingency upon which the existence of the power depended must have happened.

(a) Under this view, an attempt by the donee to execute the power before the happening of the contingency upon which it should exist would not render her act invalid, if the contingency actually happened.

(b) The case differs from *Satterfield v. Tata*, 132 Ga. 256, 64 S. E. 60; *New v. Potts*, 55 Ga. 420.

#### 4. WILLS §692, 693(5) — CONVEYANCE BY LIFE TENANT CONSTRUED AS EXERCISE OF POWER OF DISPOSAL UNDER WILL.

Whether or not the deed from Sarah to Glawson was a good execution of the power contained in the will depends upon a construction of the will and also of the deed; the final test as to a proper construction of those instruments being: What was the intention of the testator as to the limit or breadth of the power, and the intention of the donee manifested by her deed as to whether she was attempting to exercise the power? Much has been said on similar subjects, unnecessary to be repeated. *Mahoney v. Manning*, 133 Ga. 784, 66 S. E. 1082; *Nort v. Healy Real Estate Co.*, 136 Ga. 287, 71 S. E. 471. As ruled in the preceding note, under a proper construction of the will the power was exercisable at any time during the life of Sarah, the full effect thereof to be post-

poned and determined at her death, when the contingency upon which it depended must have been determined. Therefore at the time of executing the deed she could exercise the power, subject to be defeated or to become effective at the time of her death. She could also convey her life estate which at the date of the execution of the deed was fully vested. Her deed purported to convey the entire estate and to be based upon a valuable consideration, which it is not alleged was not a full and fair price for the entire estate. The deed also contained a clause of general warranty of title. Under these circumstances the only reasonable inference is that Sarah intended, by executing the deed, to convey all that it purported to convey, the full fee-simple title; as only the life estate was vested in her, and her right to convey the fee depended upon exercise of the power. An interpretation that she did not intend to exercise the power would not give full effect to the language of her deed.

##### 5. DISMISSAL OF PETITION.

The judge did not err in dismissing the petition on general demurrer.

Error from Superior Court, Jones County; J. B. Park, Judge.

Action by S. B. Mathis and others against J. E. Clawson. Petition dismissed on demurrer, and plaintiffs bring error. Affirmed.

Sibley & Sibley, of Milledgeville, and Saml. H. Sibley, of Atlanta, for plaintiffs in error.

Hardeman, Jones, Park & Johnston and C. A. Clawson, all of Macon, and W. W. Burgess and F. Holmes Johnson, both of Gray, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(149 Ga. 836)

KEYSTONE PECAN CO. v. CLARK et al.  
(No. 1394.)

(Supreme Court of Georgia. Feb. 14, 1920.)

##### (Syllabus by the Court.)

##### 1. REFUSAL OF INTERLOCUTORY INJUNCTION.

Under the pleadings and the evidence the court did not err in refusing to grant an interlocutory injunction.

##### 2. APPEAL AND ERROR §175 — ISSUE NOT MADE BY PLEADINGS IS NOT BEFORE THE COURT.

An issue not made by the pleadings of either party is not before the court, though evidence upon the issue was submitted upon the hearing for interlocutory injunction, and counsel for both parties, in their briefs of file in this court, treat the issue as in the case. See Hicks v. Marshall, 67 Ga. 713; Martin v. Nichols, 127 Ga. 705, 56 S. E. 995.

Error from Superior Court, Calhoun County; W. M. Harrell, Judge.

Action for injunction by the Keystone Pecan Company against Mrs. L. B. Clark, administratrix, and others. Interlocutory injunction denied, and plaintiff brings error. Affirmed.

Milner & Farkas, of Albany, for plaintiff in error.

Yeomans & Wilkinson, of Dawson, for defendants in error.

PER CURIAM. Judgment affirmed. All the Justices concur.

(150 Ga. 40)

WOOTEN v. EVANS, Sheriff, et al.  
(No. 1521.)

(Supreme Court of Georgia. Feb. 24, 1920.)

##### (Syllabus by the Court.)

SEDUCTION §37—INDICTMENT NOT CHARGING PERSUASION AND PROMISE OF MARRIAGE TO BE FRAUDULENT WAS SUFFICIENT.

An indictment charging the accused with the offense of seduction, and alleging that he "did by persuasion and promise of marriage seduce a virtuous unmarried female, and by such persuasion and promise of marriage induced her to yield to his lustful embraces," is sufficient without charging further that the persuasion and promise of marriage were false and fraudulent.

Error from Superior Court, Jeff Davis County; J. P. Highsmith, Judge.

Habeas corpus by Walter Wooten against D. L. Evans, Sheriff of Jeff Davis County. Judgment for defendant, and petitioner brings error. Affirmed.

Chastain & Henson, of Douglas, and W. W. Bennett, of Baxley, for plaintiff in error.

Alvin V. Sellers, Sol. Gen., of Baxley, and S. D. Dell, of Hazlehurst, for defendant in error.

BECK, P. J. Walter Wooten brought his petition for habeas corpus against D. L. Evans, sheriff of Jeff Davis county, alleging that he is being illegally restrained of his liberty by the defendant; that the cause of the restraint is under an alleged sentence passed upon his conviction for the offense of seduction; and that the conviction and sentence were illegal and void, because the indictment under which he was tried did not charge any crime. The judge to whom this petition was presented refused to issue the writ.

The indictment under which the defendant was tried and convicted, and upon which the sentence now attacked as illegal is based, charges Walter Wooten, the petitioner, with the offense of seduction, and alleges that he

(102 S.E.)

"did by persuasion and promise of marriage seduce [the woman alleged to have been seduced] a virtuous unmarried female, and induce her to yield to his lustful embraces, and allow him, the said Walter Wooten, to have carnal knowledge of her." It is not contended that the indictment in other respects was not full, complete, and regular; but it is insisted that in order to charge a crime it should have been alleged in the indictment that the persuasion of marriage was false and fraudulent, and therefore the allegations were insufficient to charge the offense of seduction.

The indictment was sufficient. We have no doubts on the question. The conviction stands.

Judgment affirmed.

All the Justices concur, except GILBERT, J., absent on account of sickness.

(150 Ga. 70)

DENTON v. PARSONS. (No. 1638.)

(Supreme Court of Georgia. March 9, 1920.)

*(Syllabus by the Court.)*

1. EXECUTORS AND ADMINISTRATORS §131—WILLS §600(1) — PETITION TO RECOVER LANDS FOR DISTRIBUTION DEMURRABLE WHERE NOT ALLEGING NECESSITY FOR DISTRIBUTION; WIFE HELD TO TAKE FEE SIMPLE WITH POWER OF DISPOSITION.

Denton, as administrator with will annexed, brought suit to recover land and mesne profits, of which his testate died seized and possessed; the sole alleged purpose of such recovery being "for the purpose of making distribution among the legatees and heirs at law of said deceased." The will devised the land of the testator (including that sought to be recovered in this suit) to his wife, Rozana Elvina, "with all rights, members, and appurtenances to said lots of land in any wise belonging, free from all charge and limitation whatever, to her own proper use, benefit, and behoof forever, to dispose of the same by will or otherwise, as she may deem proper." To this petition a general demurrer was interposed, which was sustained. The plaintiff excepted. *Held*, that the court did not err in sustaining the general demurrer. Under the terms of the will the wife obtained fee simple title to the land, and was expressly empowered to dispose of the same by will or otherwise as she might deem proper. Moreover, the plaintiff's petition failed to allege that the estate owed any debts which would require a sale of the lands, or any reason why it was necessary for him to distribute the estate.

Error from Superior Court, Paulding County; F. A. Irwin, Judge.

Action by J. P. Denton, administrator, against F. D. Parsons. General demurrer to petition sustained, and plaintiff brings error. Affirmed.

W. E. Spinks, of Dallas, for plaintiff in error.

A. L. Bartlett and C. B. McGarity, both of Dallas, for defendant in error.

GILBERT, J. Judgment affirmed. All the Justices concur, except BECK, P. J., absent on account of sickness.

(150 Ga. 75)

WAYCASTER v. WAYCASTER. (No. 1811)

(Supreme Court of Georgia. March 9, 1920.)

*(Syllabus by the Court.)*

1. PRESIDING JUDGE HAS POWER IN SUITS FOR DIVORCE TO GRANT ALIMONY OR DECREE SUMS SUFFICIENT FOR SUPPORT OF WIFE AND FAMILY.

Carrie Waycaster brought an action against Thurman Waycaster for divorce, and for permanent and temporary alimony. The petition was filed on August 11, 1919, and was made returnable to the September term of court. On August 18th the judge passed an order requiring the defendant to show cause before him, at a designated time and place, why temporary alimony and counsel fees should not be granted to the petitioner as prayed. At the appearance term the defendant demurred to the petition, on the ground that it set out no cause of action for divorce. He also filed a special plea alleging that the superior court had no jurisdiction over alimony, but that the judge of such court had exclusive jurisdiction; that the defendant should not be required to answer as to temporary alimony, for the reason that no petition had been presented to the judge of the superior court in term time, based upon a pending action for divorce; that the rule nisi was passed by the court when there was no pending action for divorce; that the petition for divorce was filed on August 11, 1919, the order to show cause why temporary alimony and counsel fees should not be granted was signed on August 13, 1919, and the defendant was served on August 18, 1919. *Held*:

"In suits for divorce, the judge presiding may, either in term or vacation, grant alimony, or decree a sum sufficient for the support of the family of the husband dependent upon him, and who have a legal claim upon his support, as well as for the support of his wife." Civ. Code 1910, § 2980.

2. DIVORCE §210 — NOTWITHSTANDING PENDING DEMURRER, SUIT IS PENDING AS RESPECTS ALLOWANCE OF TEMPORARY ALIMONY.

Notwithstanding the general demurrer attacking the sufficiency of the petition, a suit for divorce will be considered as pending until a judgment is rendered sustaining the general demurrer. The sufficiency of the petition to withstand the demurrer is one of the issues to be determined by the court, and temporary alimony may properly be awarded to afford the wife the means of contesting all of the issues.

in the case. *Parker v. Parker*, 148 Ga. 196, 96 S. E. 211 (3); *Harrison v. Harrison*, 133 Ga. 31, 65 S. E. 126.

**3. DIVORCE**  $\Leftrightarrow$ 214(2)—ORDER TO SHOW CAUSE AGAINST AWARD OF TEMPORARY ALIMONY MAY BE PASSED ON APPLICATION THEREFOR INCLUDED IN SUIT FOR DIVORCE IN SUPERIOR COURT.

An order requiring the husband to show cause, at a designated time and place, why temporary alimony should not be awarded to the wife, signed, "W. L. Hodges, Judge, Superior Court, Northern Circuit," is a valid rule nisi which may be legally passed upon an application for temporary alimony included in and as a part of a suit for divorce addressed to and filed in the superior court. *Harrison v. Harrison*, supra.

**4. DIVORCE**  $\Leftrightarrow$ 214(2)—RULE NISI TO SHOW CAUSE AGAINST AWARD OF TEMPORARY ALIMONY MAY ISSUE BEFORE SERVICE OF PETITION FOR PURPOSE OF DIVORCE.

After filing, the rule nisi could lawfully issue prior to the service of the petition for the purpose of the divorce trial; the attendance of the defendant on the hearing for temporary alimony being in response to the rule nisi, and not by virtue of the service of process. *Hogan v. Hogan*, 148 Ga. 152, 95 S. E. 972 (2).

Error from Superior Court, Franklin County; W. L. Hodges, Judge.

Action by Carrie Waycaster against Thurman Waycaster for divorce and for permanent and temporary alimony, in which there was an order requiring defendant to show cause before judge why temporary alimony and counsel fees should not be granted, and defendant brings error. Affirmed.

J. H. & Emmett Skelton, of Hartwell, and Goode & Owen, of Toccoa, for plaintiff in error.

W. R. Little and R. T. Camp, both of Carnesville, for defendant in error.

GILBERT, J. Judgment affirmed. All the Justices concur, except BECK, P. J., absent on account of sickness.

(150 Ga. 54)

**MORRISON et al. v. FIDELITY & DEPOSIT CO. OF MARYLAND et al.**  
(No. 1307.)

(Supreme Court of Georgia. Feb. 28, 1920.)

(Syllabus by the Court.)

**1. DESCENT AND DISTRIBUTION**  $\Leftrightarrow$ 122—CREDITOR MAY RECOVER PERSONAL JUDGMENT AGAINST HEIR RECEIVING ASSETS IN AMOUNT SUFFICIENT TO PAY CLAIM.

Where a person dies owing a debt, his creditors may in equity follow assets left by such person in the hands of a distributee; and where the assets received by the distributee

are sufficient to pay the debt, the creditors may obtain a personal judgment against the distributee for the amount of his debt. *Caldwell v. Montgomery*, 8 Ga. 106; Civ. Code 1910, § 3785.

**2. DESCENT AND DISTRIBUTION**  $\Leftrightarrow$ 143—CREDITOR MUST SUE HEIR WITHIN TERM APPLICABLE TO CASE AGAINST DECEDENT.

In such case the creditor must sue upon his claim within the statutory term applicable to his case against the decedent. *Caldwell v. Montgomery*, supra.

**3. LIMITATION OF ACTIONS**  $\Leftrightarrow$ 22(7) — SUITS FOR BREACH OF BONDS BARRED IN 20 YEARS.

Where the debt is for damages from a breach of a bond, the term of limitations is 20 years from the breach of the bond. *Caldwell v. Montgomery*, supra. This applies to actions for breach of bonds for title to land, as ruled in the case cited, and to actions for breach of official bonds of sheriffs in this state. *Harris v. Black*, 143 Ga. 497, 85 S. E. 742; *Slaton v. Morrison*, 144 Ga. 473, 87 S. E. 390.

**4. PRINCIPAL AND SURETY**  $\Leftrightarrow$ 190(8)—INDEMNITY AGREEMENT CONSTRUED TO INCLUDE ATTORNEY'S FEES; INDEMNITY AGREEMENT NOT WITHIN STATUTE RELATING TO 10 DAYS' NOTICE FOR RECOVERY OF ATTORNEY'S FEES.

An agreement by a principal with his surety that the former will "indemnify, and keep indemnified, the said company from and against any loss, costs, charges, suits, damages, counsel fees, and expenses of whatever kind or nature which said company shall or may for any cause, at any time, sustain or incur, or be put to, for or by reason or in consequence of said company having entered into or executed said bond," will authorize the company to recover reasonable attorney's fees incurred for prosecuting a suit for reimbursement of money paid out by the surety on account of the principal's breach of his bond.

A contract of the character just indicated does not fall within the operation of Civ. Code 1910, § 4252, relatively to the giving of 10 days' notice. *Oliver Typewriter Co. v. Fielder*, 7 Ga. App. 525, 67 S. E. 210.

**5. SUFFICIENCY OF PETITION.**

Applying the principles ruled above, the petition for intervention in this case was not subject to demurrer on the ground that it did not set forth a cause of action, or that the cause of action was barred by the statute of limitations.

**6. RES ADJUDICATA.**

The case differs on its facts from *Morrison v. Slaton*, 148 Ga. 294, 96 S. E. 422, in which the plaintiff was not the plaintiff in this case, and there was no issue in that case between the plaintiff therein and the defendant in this case. The ruling there made is not res adjudicata as to the present case. 15 R. O. L. § 487. In deciding that case the court overlooked the case of *Caldwell v. Montgomery*, supra, which was controlling. In so far as the decision in the *Morrison* Case rules that a different statute of limitations would apply to an action against the administrator of the estate

of the distributee of the deceased principal named in the bond than would apply to the surety on the bond, that decision must yield to the older case of *Caldwell v. Montgomery*, supra, and will not be followed.

#### 7. PETITION FOR INTERVENTION.

The petition for intervention also set forth a cause of action against the surety on the bond of the administrator of the distributee, and that surety was a proper party to the case. *Bailey v. McAlpin*, 122 Ga. 616, 50 S. E. 388; *Mercer v. Hudgins*, 145 Ga. 289, 88 S. E. 966.

#### 8. GROUNDS OF DEMURRER.

The judge did not err in overruling all the general and special grounds of demurrer to the petition for intervention.

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Proceedings between H. C. Morrison, administrator, and others and the Fidelity & Deposit Company of Maryland and others. Judgment for the latter, and the former bring error. Affirmed.

Wm. H. Fleming, of Augusta, for plaintiffs in error.

Barrett & Hull, of Augusta, for defendants in error.

ATKINSON, J. Judgment affirmed. All the Justices concur, except GILBERT, J., absent on account of sickness.

(150 Ga. 71)

#### SHELTON v. STATE. (No. 1735.)

(Supreme Court of Georgia. March 9, 1920.)

#### (Syllabus by the Court.)

1. CRIMINAL LAW  $\S$  825(3)—FAILURE TO CHARGE, IN ABSENCE OF REQUEST, THAT CERTAIN "FELONIES" MIGHT BE PUNISHED AS FOR A MISDEMEANOR, NOT REVERSIBLE ERROR; "JUSTIFIABLE HOMICIDE."

In a prosecution for homicide, the accused contended that the deceased, at the time of the homicide, was making a felonious assault upon his person. In his instructions to the jury the court charged that "justifiable homicide" is the killing of a human being in self-defense or in defense of the person against one who manifestly intends or endeavors by violence or surprise to commit a felony upon the person killing, as provided in the Penal Code of 1910,  $\S$  70. In defining the term "felony," the court charged that "a felony is an offense punishable by death or imprisonment in the penitentiary, and not otherwise." The exception to the charge is that "the term 'felony' means an offense, for which the offender, on conviction, shall be liable to be punished by death or imprisonment in the penitentiary, and not otherwise," as defined in the Penal Code of 1910,  $\S$  2. Held, that the failure of the court, in the absence of request, to instruct the jury that certain felonies, among them assault with intent

to murder, might be punished as for a misdemeanor, in the circumstances stated in the Penal Code 1910,  $\S$  1062, is not reversible error.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Felony; Justifiable Homicide.]

2. CRIMINAL LAW  $\S$  825(1)—FAILURE TO CHARGE OTHER INSTRUCTIONS CLAIMED TO BE PERTINENT, WITHOUT A REQUEST, IS NOT ERROR.

The failure of the court to give in charge, in connection with pertinent and legal instructions given, other instructions claimed to be legal and pertinent, there being no request for such further instructions, is not a good assignment of error. See *Cantrell v. State*, 141 Ga. 98, 99, 90 S. E. 649; *Booker v. State*, 16 Ga. App. 280, 85 S. E. 255.

#### 3. SUFFICIENCY OF EVIDENCE.

The evidence authorized the verdict, and the court did not err in overruling the motion for new trial.

Error from Superior Court, Bartow County; M. C. Tarver, Judge.

Fred Shelton was convicted of an offense, his motion for a new trial was denied, and he brings error. Affirmed.

O. O. Pittman, of Cartersville, and W. B. Mebane, of Rome, for plaintiff in error.

Joe M. Lang, Sol. Gen., of Calhoun, Clifford Walker, Atty. Gen., and M. O. Bennet, of Atlanta, for the State.

GEORGE, J. Judgment affirmed. All the Justices concur, except BECK, P. J., absent on account of sickness.

(150 Ga. 66)

#### GOOLSBY v. STATE. (No. 1542.)

(Supreme Court of Georgia. March 9, 1920.)

#### (Syllabus by the Court.)

1. CRIMINAL LAW  $\S$  822(3)—CHARGE ON JUSTIFIABLE HOMICIDE USING WORDS "MANIFESTLY INTENDS AND ENDEAVORS" INSTEAD OF STATUTORY WORDS "MANIFESTLY INTENDS OR ENDEAVORS" HELD NOT TO REQUIRE NEW TRIAL.

In the trial of a defendant charged with murder, where the defense of justifiable homicide was relied on, on the ground that at the time of the fatal shot the deceased was shooting at the accused with a pistol, an inaccuracy in charging section 70 of the Penal Code 1910, defining justifiable homicide, by the use of the words "manifestly intends and endeavors," instead of the words "manifestly intends or endeavors," will not require the grant of a new trial.

(a) In the case of *Taylor v. State*, 131 Ga. 765, 63 S. E. 296, relied on by the defendant, it was not held that such an inaccuracy would be cause for a reversal in a case of the character above mentioned.

**2. CRIMINAL LAW** *§*822(8)—CHARGE LIMITING RIGHT TO KILL TO PREVENT DECEASED FROM KILLING DEFENDANT OR TO PREVENT A FELONY ON DEFENDANT'S PERSON, IN VIEW OF OTHER PARTS OF CHARGE, HELD NOT MISLEADING.

In one part of the charge on justifiable homicide the defense was limited to the right to kill in order to prevent the deceased from taking the life of the defendant, or to prevent a felony being committed upon his person. Other portions of the charge, concretely applying the law to the facts in evidence, were sufficiently broad to comprehend all other matters of defense relied on by the defendant; and the instruction complained of, when considered in connection with the charge in its entirety, was not unduly restrictive or misleading.

**3. AMENDED MOTION FOR NEW TRIAL.**

Other grounds of the amended motion for new trial, which complained of the charge, and of omission to charge, are without merit, and are not of such character as to require elaboration.

**4. REFUSAL OF NEW TRIAL.**

The verdict was authorized by the evidence, and there was no error in refusing a new trial.

Error from Superior Court, Early County; W. C. Worrill, Judge.

Ulysses Goolsby was convicted of an offense, his motion for a new trial was denied, and he brings error. Affirmed.

W. C. Munday and G. H. Cornwell, both of Atlanta, for plaintiff in error.

B. T. Castellow, Sol. Gen., of Cuthbert, R. R. Arnold, of Atlanta, Clifford Walker, Atty. Gen., and M. C. Bennet, of Atlanta, for the State.

ATKINSON, J. Judgment affirmed. All the Justices concur, except BECK, P. J., absent on account of sickness.

(149 Ga. 837)

**DENNARD et al. v. FARMERS' & MERCHANTS' BANK.** (No. 1446.)

(Supreme Court of Georgia. Feb. 26, 1920.)

*(Syllabus by the Court.)*

**1. REFUSAL OF TRIAL BY JURY.**

This case is controlled by the decision in *Bradley v. State*, 111 Ga. 168, 36 S. E. 630, 50 L. R. A. 691, 78 Am. St. Rep. 157. Accordingly the judge did not err in declining to grant a jury trial on the issue sought to be made by the plaintiff in error under Civ. Code 1910, § 4643.

**2. SUFFICIENCY OF EVIDENCE.**

The judge was authorized to find under the evidence the defendants guilty of contempt.

Error from Superior Court, Thomas County; W. E. Thomas, Judge.

Proceedings between C. S. Dennard and others and Farmers' & Merchants' Bank of Coolidge. Judgment for the latter, and the former bring error. Affirmed.

See, also, 101 S. E. 672.

Titus, Dekle & Hopkins, of Thomasville, for plaintiffs in error.

Clifford E. Hay, of Thomasville, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur, except GILBERT, J., absent on account of sickness.

GEORGE, J., concurs specially.

(150 Ga. 26)

**PERRY v. MONROE et al.** (No. 1357.)

(Supreme Court of Georgia. Feb. 24, 1920.)

*(Syllabus by the Court.)*

**1. PETITION AS AMENDED SUFFICIENTLY DESCRIBED LAND SUED FOR.**

The petition as amended sufficiently described the land sued for. It set forth a cause of action, and was not subject to any of the grounds of demurrer.

**2. APPEAL AND ERROR** *§*302(3)—GROUND OF MOTION FOR NEW TRIAL ASSIGNING ERROR IN ADMISSION OF EVIDENCE NOT SET OUT IN MOTION OR ATTACHED THERETO PRESENTS NOTHING FOR DECISION.

A ground of a motion for new trial assigning error on the admission in evidence, over stated objections of movant, of a document which is neither set out literally or in substance in the motion, nor attached thereto as an exhibit properly identified, but is merely referred to as set out in the brief of evidence, presents no question for decision. *Ford v. Blackshear*, 140 Ga. 670, 79 S. E. 576.

**3. DENIAL OF NEW TRIAL.**

In so far as any of the grounds of the amended motion for new trial was sufficient in form, it was not sufficiently meritorious to require the grant of a new trial.

**4. REFUSAL OF NEW TRIAL.**

There was evidence to authorize the verdict, and the refusal of a new trial was not error.

Error from Superior Court, Liberty County; W. W. Sheppard, Judge.

Action between J. A. Perry and Elizabeth Monroe and others. Judgment for the latter, and the former brings error. Affirmed.

Oliver & Oliver, of Savannah, for plaintiff in error.

N. J. Norman and W. R. Hewlett, both of Savannah, for defendants in error.

FISH, C. J. Judgment affirmed. All the Justices concur, except GILBERT, J., absent on account of sickness.



(150 Ga. 48)

(102 S.E.)

**ELROD v. CAMP, FLANIGAN & TOOLE**  
et al. (No. 1402.)

(Supreme Court of Georgia. Feb. 26, 1920.)

*(Syllabus by the Court.)*

1. **BILLS AND NOTES**  $\S$  460—SEPARATE SUIT CANNOT BE MAINTAINED AGAINST ONE JOINT MAKER UNLESS THE OTHER IS DEAD OR CANNOT BE FOUND AND SERVED.

Camp, Flanigan & Toole sold to W. M. Elrod and J. H. Elrod certain land, delivering to them a bond to make them title upon the payment, by "the said parties of the second part" (the two Elrods), of the purchase price, a substantial portion of which was paid in cash, and for the balance a series of joint promissory notes were given by the two Elrods to Camp, Flanigan & Toole, which notes were specifically and fully described in the bond, as to date, maturity, principal, interest, etc. The purchasers went into possession, and upon default in payment of several of the notes at maturity, Camp, Flanigan & Toole brought suit on them against W. M. Elrod alone, who in his answer denied that he was indebted on the notes, and set up several reasons why he was not. On the trial the defendant moved to dismiss the case, on the ground that the notes were joint only, and that an action thereon would not lie against him alone; it not being alleged that J. H. Elrod, the other joint maker, was dead or beyond the jurisdiction of the court, or that he could not be served. Thereupon the plaintiffs were allowed to amend their petition as follows: "Plaintiffs show to the court that while the notes sued upon are signed by W. M. Elrod and J. H. Elrod jointly, that soon after the trade was made and after W. M. Elrod and J. H. Elrod had been in possession of said tract of land for about one year, the said J. H. Elrod, who is a son of W. M. Elrod, moved off the land, and turned over all of his interest to his father, and since that time W. M. Elrod has been in exclusive possession and control of said tract of land and has exercised sole ownership of same, and has repeatedly informed plaintiffs that the said J. H. Elrod has no further interest in said tract of land or the payment of the notes given therefor or the bond for title thereto. The said J. H. Elrod stated to plaintiffs that all of his interest had been transferred to his father, W. M. Elrod. Plaintiffs consented to the release of said J. H. Elrod from any liability under and by virtue of said notes, and now and here renounce any claim or demand against said J. H. Elrod on said notes. Wherefore plaintiffs pray that the final decree rendered in this cause release and relieve said J. H. Elrod from any liability upon the notes sued upon or any other notes of the series of which they are a part, and further that by proper decree plaintiffs be relieved and released from any obligation to J. H. Elrod and B. Elrod by virtue of the bond for title executed by plaintiffs or plaintiffs and J. B. Williams to W. M. Elrod, J. H. Elrod, and B. Elrod." The defendant objected to the allowance of this amendment and the evidence introduced by plaintiffs to sustain the same; and a verdict being rendered against him, among other complaints of alleged

errors, he assigned error upon the overruling of his motion to dismiss the case, the allowing the amendment, and the admission of specified evidence to sustain it. These assignments of error are here for review and adjudication. *Held:*

The liability of the makers of the notes being joint only, a separate suit against one could not be maintained, where it did not appear that the other was dead or could not be found and served. *Graham v. Marks*, 95 Ga. 38, 21 S. E. 986; *Lippincott v. Behre*, 122 Ga. 543, 50 S. E. 467.

2. **FRAUDS, STATUTE OF**  $\S$  72(1)—ESSENTIALS OF CONTRACT FOR SALE OF LANDS OR INTEREST THEREIN STATED.

For "any contract for sale of lands, or any interest in or concerning them," to be "binding on the promisor, the promise must be in writing, signed by the party to be charged therewith, or some person by him lawfully authorized." *Civ. Code* 1910,  $\S$  3222 (4).

3. **FRAUDS, STATUTE OF**  $\S$  181(1)—CONTRACT REQUIRED TO BE IN WRITING CANNOT BE SUBSEQUENTLY MODIFIED BY PAROLE.

"A contract which must, under the statute of frauds, be in writing, and which, accordingly, is put in writing and duly executed, cannot be subsequently modified by a parol agreement." *Willis v. Field*, 132 Ga. 242, 63 S. E. 828; *Moore v. Collier*, 133 Ga. 762, 66 S. E. 1080; *Jarman v. Westbrook*, 134 Ga. 19, 67 S. E. 403.

4. **FRAUDS, STATUTE OF**  $\S$  181(1)—WRITTEN CONTRACT FOR SALE OF LANDS CANNOT BE SUBSEQUENTLY MODIFIED BY PAROLE; UNAUTHORIZED PAROL MODIFICATION OF WRITTEN CONTRACT DID NOT JUSTIFY SUIT AGAINST ONE OF JOINT MAKERS OF NOTES GIVEN THEREUNDER.

The contract between the plaintiffs and W. M. Elrod and J. H. Elrod was for the sale of land, and, as the statute requires, was put in writing and duly executed. The amendment allowed sought to modify this contract by a subsequent parol agreement to the effect that J. H. Elrod, one of the obligees in the bond for title, and one of the makers of the joint notes, had by parol agreement with W. M. Elrod, the other obligee in the bond, and the other maker of the joint notes, transferred or released all his interest in the land and bond for title to W. M. Elrod, and that the latter had assumed sole liability on the notes, and that the plaintiffs had agreed with the two Elrods as to this release, and that J. H. Elrod should be released from liability on all the purchase-money notes, and that W. M. Elrod alone should be bound thereby, and that the plaintiffs should be relieved from any obligation on the title bond to J. H. Elrod.

(a) It was not permissible to modify the written contract for the sale of land by the subsequent parol contract set out in the amendment.

(b) The amendment therefore did not allege a valid reason to authorize the plaintiffs to sue W. M. Elrod alone on the joint notes; and, accordingly, the judge erred in allowing the amendment and overruling the motion to dismiss the case.

Error from Superior Court, Barrow County; A. J. Cobb, Judge.

Action by Camp, Flanigan & Toole and others against W. M. Elrod. Judgment for plaintiffs, and defendant brings error. Reversed.

P. Cooley, of Jefferson, and Jno. J. & R. M. Strickland, of Athens, for plaintiff in error.

W. H. Quarterman and Lewis O. Russell, both of Winder, for defendants in error.

FISH, C. J. Judgment reversed. All the Justices concur, except GILBERT, J., absent on account of sickness.

(149 Ga. 824)

BAGGETT et al. v. GARRETT et al.

GARRETT et al. v. BAGGETT et al.

(Nos. 1531, 1540.)

(Supreme Court of Georgia. Feb. 13, 1920.)

(Syllabus by the Court.)

**DISMISSAL OF CROSS-BILL ON AFFIRMANCE OF MAIN BILL OF EXCEPTIONS.**

This case was referred to an auditor, who filed his report making rulings both on questions of law and of fact. Exceptions of law and fact were filed to the auditor's report, which were overruled, and the auditor's report was sustained and made the judgment of the court; to which ruling and judgment the plaintiffs excepted. Some of the assignments of error in the main bill of exceptions are incomplete. In so far as others are sufficient to raise questions for decisions by this court, *held*, upon a careful review of the evidence and consideration of the law, that the findings of the auditor are all supported, and that such assignments do not show cause for reversal. The cross-bill of exceptions assigns error on the overruling of demurrers by the defendant. As the judgment on the main bill of exceptions is affirmed, the cross-bill is dismissed.

Error from Superior Court, Laurens County; J. L. Kent, Judge.

Action between Mrs. M. A. Baggett and others and A. W. Garrett, administrator, and others. Case referred to auditor. Exceptions of law and fact filed to his report were overruled, and the report sustained and made the judgment of the court, and plaintiffs except and bring error, and defendants take a cross-bill of exceptions. Affirmed on main bill, and cross-bill dismissed.

Ira S. Chappell, of Dublin, for plaintiffs in error.

Larsen & Crockett and R. Earl Camp, all of Dublin, for defendants in error.

HILL, J. Judgment affirmed on the main bill of exceptions. Cross-bill dismissed. All the Justices concur.

(25 Ga. App. 24)

HILL v. WEST. (No. 11107.)

(Court of Appeals of Georgia, Division No. 1. March 3, 1920.)

(Syllabus by the Court.)

1. **APPEAL AND ERROR**  $\S$ 730(1)—**ASSIGNMENT OF ERROR IN FAILING TO CHARGE ON ADMISSIONS NOT CONSIDERED WHERE NO REASON FOR CHARGE IS STATED.**

An assignment of error in the following words: "Because the court erred in failing to charge the jury on the subject of admission, and especially in failing to charge the jury that admissions, when proven, should be scanned with care," without more, cannot be considered by this court; no reason being assigned why this charge should have been given. The attention of the court was not called to any part of the record which would require this charge, and no reason is assigned why a charge on the question of admission should have been given.

2. **NEWLY DISCOVERED EVIDENCE; OVERRULING OF MOTION FOR NEW TRIAL.**

The newly discovered evidence was not sufficient to have authorized the granting of a new trial. The evidence, though conflicting, authorized the verdict, which has the approval of the trial judge. For no reason assigned was it error to overrule the motion for a new trial.

Error from Superior Court, Gilmer County; N. A. Morris, Judge.

Action by Maggie West, administratrix, for use, etc., against L. L. Hill. Judgment for plaintiff, motion for new trial denied, and defendant brings error. Affirmed.

Thos. A. Brown, of Blue Ridge, and A. N. Edwards, of Ellijay, for plaintiff in error.

Clark Ray, of Ellijay, and Wm. Butt, of Blue Ridge, for defendant in error.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(25 Ga. App. 30)

W. T. RAWLEIGH MEDICAL CO. v. BURNEY et al. (No. 11095.)

(Court of Appeals of Georgia, Division No. 1. March 3, 1920.)

(Syllabus by the Court.)

1. **EVIDENCE**  $\S$ 71—**PRESUMPTION OF RECEIPT OF LETTER DOES NOT ARISE UNLESS EVIDENCE AFFIRMATIVELY SHOWS THAT IT WAS WRITTEN, ADDRESSED, AND "MAILED."**

Before the presumption of the receipt of a letter by the addressee arises, the evidence must affirmatively show that the letter was written, properly addressed and stamped, and mailed. *Hamilton v. Stewart*, 106 Ga. 472, 478, 34 S. E. 123; *National Building Association v. Quin*, 120 Ga. 358(3), 364, 47 S. E. 962; *Bush v.*

McCarty, 127 Ga. 306, 314, 56 S. E. 430, 9 Ann. Cas. 240; Rawleigh Medical Co. v. Burney, 22 Ga. App. 492, 96 S. E. 578.

(a) By the term "mailed" is necessarily meant the deposit of the letter in a United States post office or United States postal mail box, or in the custody of a United States mail collector.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Mailed.]

**2. EVIDENCE ⇨71—EVIDENCE HELD NOT TO AUTHORIZE PRESUMPTION THAT LETTER WAS RECEIVED.**

In this case the evidence wholly failed to establish affirmatively the essential fact that the letter alleged to have been written and mailed by the defendant to the plaintiff was deposited in any post office or United States postal mail box, or intrusted to any United States mail collector. On the contrary, the evidence showed that the letter, after having been written, properly stamped and addressed, was merely placed in a cigar box in a grocery store, which box was used as a place to hold letters which were to be subsequently carried by some agent or employé of the grocery company to the post office and there mailed. While there was some evidence that, subsequent to the placing of the letter in question in the cigar box, the letters therein (several letters being in the box on that occasion) were carried by an employé of the grocery company to the post office and there mailed, there was no direct or positive evidence that this particular letter was so carried and mailed. The employé who on that occasion carried the mail from the grocery store to the post office testified that he could not say how many letters he carried to the post office that night, or what letters they were, and that he did not recollect seeing this particular letter when he carried the mail. It was possible, under the facts shown, that the letter in question was either misplaced in the grocery store before the mail was carried to the post office, or that it was lost while in transit thereto. Under this evidence, the presumption referred to above never arose.

**3. EVIDENCE ⇨89—PRESUMPTION OF ADDRESSEE'S RECEIPT OF LETTER IS REBUTTABLE.**

Moreover, where the presumption mentioned above does arise, it is rebuttable, and is entirely overcome by the uncontradicted evidence of the addressee that the letter was never received by him, unless there is aliunde evidence that it was in fact received. *Hamilton v. Stewart*, supra; *Cassel v. Randall*, 10 Ga. App. 587, 73 S. E. 858; *Parker v. Southern Ruralist Co.*, 15 Ga. App. 334, 83 S. E. 158; *Lowenstein v. Johnston*, 23 Ga. App. 261, 98 S. E. 111.

(a) The mere fact that a return address is written upon the outside of the envelope, and that the letter was never returned to that address, does not within itself amount to such aliunde evidence. This ruling is not in conflict with the decision in *Strauss v. Pearlman*, 15 Ga. App. 86, 82 S. E. 578, or with that in *Lowenstein v. Johnston*, supra. In the *Strauss Case* there were other aliunde circumstances besides the return address upon the envelope; and in the *Lowenstein Case* there was no return address upon the envelope, but there were additional circumstances which tended to im-

peach the addressee's testimony that he had never received the letter.

**4. EVIDENCE ⇨89—PRESUMPTION THAT LETTER MAILED TO CORPORATION WAS RECEIVED HELD REBUTTED BY UNDISPUTED EVIDENCE OF AGENT IN CHARGE OF CORRESPONDENCE.**

Where a properly stamped and addressed letter is mailed to a corporation, the presumption that it is received by it is completely rebutted by the undisputed testimony of an agent of the corporation, who has entire charge of all its correspondence, that the letter was never received, unless there is additional evidence which tends to impeach or discredit his testimony. *Parker v. Southern Ruralist Co.*, supra.

**5. EVIDENCE HELD TO SHOW NONRECEIPT OF LETTER MAILED TO A CORPORATION.**

Under the above rulings the evidence in this case demanded a finding that the letter in question had never been received by the plaintiff, and, accordingly, the verdict in favor of the defendant was unauthorized.

**6. OTHER GROUND OF MOTION FOR A NEW TRIAL.**

In view of the above holding it is considered unnecessary to pass upon the special grounds of the motion for a new trial.

Error from Superior Court, Jasper County; J. B. Park, Judge.

Action by the W. T. Rawleigh Medical Company against J. L. Burney and others. Judgment for the defendants, and plaintiff brings error. Reversed.

Hardeman, Jones, Park & Johnston, of Macon, for plaintiff in error.

Greene F. Johnson, of Monticello, for defendants in error.

BROYLES, O. J. Judgment reversed.

LUKE and BLOODWORTH, JJ., concur.

LONG v. STATE.

PAYNE v. SAME.

(Nos. 11099, 11100.)

(Court of Appeals of Georgia, Division No. 1.  
March 8, 1920.)

(Syllabus by the Court.)

**1. CRIMINAL LAW ⇨656(8)—JUDGES ⇨39, 49(1, 2)—BIAS NO DISQUALIFICATION OF JUDGE IN ABSENCE OF STATUTORY PROVISIONS; EXPRESSION OF OPINION AS TO FACTS AS DISQUALIFICATION DEFINED.**

Bias or prejudice on the part of a judge does not disqualify him, in the absence of statutory provisions on the subject. 17 Am. & Eng. Enc. Law, 738; 23 Cyc. 582; Elliott v. Hipp, 134 Ga. 848, 68 S. E. 736, 137 Am. St. Rep. 272, 20 Ann. Cas. 423.

(a) The only statutory provisions in Georgia on the subject of the disqualification of a

judge are in section 4642 of the Civil Code of 1910. *Elliott v. Hipp*, supra. In the instant case it follows that the court did not err in overruling the special plea, which set up that the judge should disqualify himself for the reason that he refused to allow the defendants, although charged with a misdemeanor only, to make bail; and, further, that he stated in his charge to the grand jury, and in the presence of the petit jurors, that he would take full responsibility for not allowing the defendants to make bail. Nor was this statement of the court violative of section 1058 of the Penal Code of 1910, which forbids the judge to express any opinion as to the facts. That section relates only to statements made during the actual trial of the case, or in the charge to the petit jury trying the case. *White v. State*, 7 Ga. App. 20, 65 S. E. 1073.

**2. CRIMINAL LAW**  $\S$  603(2), 1034 — **ESSENTIALS OF MOTION FOR CONTINUANCE STATED.**

Where a motion for a continuance is based upon the ground of absent witnesses, the motion is insufficient, unless all of the provisions of section 987 of the Penal Code 1910 (Civ. Code 1910,  $\S$  5715) are complied with; and where the trial judge refuses a continuance this court will not interfere, unless the showing for a continuance has complied in every respect with the provisions of the statute. *Wardlaw v. McConnell*, 46 Ga. 273(1); *Hollingsworth v. State*, 17 Ga. App. 725, 88 S. E. 213 (1), and citation; *McClain v. State*, 17 Ga. App. 750, 88 S. E. 409; *Betenbo v. Brooks*, 17 Ga. App. 754, 88 S. E. 411.

(a) It is not error to deny an application for a continuance based upon the ground of the absence of a witness, where the movant failed to show that such application was not made for the purpose of delay, although the showing in other respects was complete. *Cobb v. State*, 110 Ga. 314, 35 S. E. 173, and citations; *Aiken v. Carmichael*, 127 Ga. 407, 56 S. E. 440.

(b) Upon the hearing of the defendants' motion for a continuance, based upon the absence of an alleged material witness, the movants failed to show that the application was not made for the purpose of delay but to enable them to procure the testimony of the absent witness. This court therefore, under the above rulings, has no authority to interfere with the discretion of the trial judge in denying the motion.

**3. CRIMINAL LAW**  $\S$  823 — **CHARGE AS TO CIRCUMSTANTIAL EVIDENCE NOT REQUIRED WHERE CONVICTION DOES NOT WHOLLY DEPEND THEREUPON AND NO WRITTEN REQUEST MADE.**

The special grounds of the motion for a new trial, complaining of the failure of the court to charge the jury upon the law of circumstantial evidence, do not show that the conviction of the defendants depended wholly upon circumstantial evidence, or that any timely written request for such charge was given. These grounds therefore raise no question for determination by this court.

**4. SUFFICIENCY OF EVIDENCE.**

The verdict was authorized by the evidence, and it does not appear that the court erred in refusing the grant of a new trial.

Error from Superior Court, Fannin County; N. A. Morris, Judge.

Frank Long and John Payne were convicted of an offense, and they bring error. Affirmed.

B. L. Smith, of Blue Ridge, and Clay & Giles, of Marietta, for plaintiffs in error. Jno. T. Dorsey, Sol. Gen., of Marietta, and Wm. Butt, of Blue Ridge, for the State.

**BROYLES, C. J.** Judgments affirmed.

**LUKE and BLOODWORTH, JJ.**, concur.

(24 Ga. App. 785)

**PIDCOCK v. WEST.** (No. 10833.)

(Court of Appeals of Georgia, Division No. 1. March 2, 1920.)

(Syllabus by the Court.)

**1. TRIAL**  $\S$  260(3) — **REQUESTED INSTRUCTIONS COVERED BY OTHER INSTRUCTIONS GIVEN ARE PROPERLY REFUSED.**

The court did not err in refusing to give to the jury certain requested instructions as to the burden of proof, as the charge given covered substantially the principle embraced in the request.

**2. DAMAGES**  $\S$  132(3) — **\$1,500 NOT EXCESSIVE FOR INJURY TO LEFT ARM.**

There is nothing in the record or in the amount of the verdict to indicate that the verdict was the result of prejudice or bias on the part of the jury.

**3. EVIDENCE**  $\S$  192 — **PHYSICAL DEMONSTRATION OF INJURIES NOT ERROR.**

For no reason assigned did the court err in permitting the plaintiff "to make physical demonstration of her alleged injury."

**4. DAMAGES**  $\S$  167 — **CARLISLE MORTALITY TABLE HELD ADMISSIBLE IN ACTION FOR INJURIES SUSTAINED IN AUTOMOBILE COLLISION.**

The court did not err in admitting in evidence the "Carlisle Mortality Table," over the objections that it was irrelevant, that there was no allegation or proof of permanent injury to the plaintiff or reduced earning capacity, and no proof of the value of her services.

**5. DAMAGES**  $\S$  216(7) — **INSTRUCTIONS AS TO FUTURE PAIN AND SUFFERING NOT ERRONEOUS.**

None of the objections urged as to the excerpt from the charge of the court in reference to compensation for future pain and suffering are good.

**6. HIGHWAYS**  $\S$  184(2) — **EVIDENCE SUFFICIENT TO SUPPORT VERDICT FOR PLAINTIFF INJURED IN AUTOMOBILE COLLISION.**

There is evidence to support the verdict.

Error from Superior Court, Colquitt County; W. E. Thomas, Judge.

Action by Mrs. R. C. West against C. W. Pidcock, Sr. Judgment for plaintiff, and defendant brings error. Affirmed.

W. F. Way, of Moultrie, for plaintiff in error.

Jas. Humphreys and Parker & Gibson, all of Moultrie, for defendant in error.

**BLOODWORTH, J.** This suit is based upon injuries received by the plaintiff in an automobile collision, in which the car of the defendant ran into the car in which the plaintiff was riding. A verdict of \$1,500 in favor of plaintiff was returned, and the defendant excepted.

[1] 1. The court did not err in failing to give to the jury a requested instruction as follows:

"I charge you as a matter of law that there is no presumption of negligence against the defendant, and consequently the burden is on the plaintiff, not only to prove injury as alleged, but to prove that the defendant was guilty of some one or more acts of negligence set forth in the petition, and that such negligence of the defendant was the proximate cause of the injury received by the plaintiff."

The court did charge:

"The burden is upon the plaintiff to establish her case. The plaintiff must recover, if at all, by proving to your satisfaction by a preponderance of the testimony that the defendant was negligent in one or more of the ways in which plaintiff alleges in her petition that the defendant was negligent. She cannot recover for any other or different acts of negligence than those alleged in her petition, and it must appear, further, that in consequence of this negligence she was injured."

The charge given covered substantially the principle embraced in the request.

[2] 2. Complaint is made that the verdict "was so grossly excessive as to conclusively suggest bias and prejudice in favor of the plaintiff." To this contention we cannot assent. The record contains no proof of prejudice or bias, and the amount of the damages awarded would not justify such a conclusion. Plaintiff was in the car belonging to Mr. West. She swore:

"My left arm was knocked out of place, and my hand all mashed, and a place cut in my arm on the under side. My wrist joint was dislocated, and a bone in my hand was broken or crushed. The gash was cut across my wrist. I come on to town with my son in his car, and got Dr. Harrell to give me medical assistance. He put my arm in a brace, and bandaged it from my elbow to my fingers. I wore my arm in those splints a little over five weeks. For three months my suffering was intense. Of course it was not so bad all the time, but for four or five weeks, though, it was pretty intense. The suffering has not entirely disappeared, and at times I suffer a great deal, and have had but little use of my arm since. I have not entirely recovered the use of my left hand. It is very tender to work in any way. \* \* \* As a result from

the injury I cannot do my own sewing. I can sweep just a little. I have to do the sweeping with my right hand. If there is much weight to the cooking utensils, I cannot handle them with my left hand. If I do I drop them."

The physician who attended Mrs. West swore:

"I found the wrist dislocated, cut across here [the doctor indicating]; do not remember which pressure, a gash about two inches long, and her arm was bruised, and the arm up here was bruised pretty well. I could not detect at that time that there were any broken bones. The wrist was dislocated and some of the bones were out of place, and after that I decided that there must have been some of those little bones broken. Now I am not an X-ray, but my opinion is that they are. I made an examination of the wrist about a week ago, and thought that I could detect one little bone that was broken or bruised. No, sir; the injury has not entirely recovered. In my opinion as a physician the injury is permanent. I cannot say to what extent it will disable her from the use of her left hand. I am a practicing physician, and have been for about 20 years. During that 20 years I have had ordinary experience of practicing medicine and treating wounds of this nature. Based upon that experience, my opinion is that this injury is permanent."

Under this evidence we cannot say that the verdict is so large as to "shock the moral sense." See *Realty Bond & Mortgage Co. v. Harley*, 19 Ga. App. 186(2), 187, 91 S. E. 254, and cases cited; *Atkinson v. Taylor*, 13 Ga. App. 100, 78 S. E. 830(1), and cases cited.

[3] 3. For no reason assigned did the court err in permitting "the plaintiff to make physical demonstration of her alleged injury," nor in making the same in the manner in which it was made. See *Civil Code 1910, § 4644(4)*; *Richmond & Danville R. Co. v. Childress*, 82 Ga. 719, 9 S. E. 602, 3 L. R. A. 808, 14 Am. St. Rep. 189. In this connection see, also, *Macon & Birmingham Ry. Co. v. Ross*, 133 Ga. 83, 65 S. E. 146(1), and cases cited; *Temples v. Central Ry. Co.*, 19 Ga. App. 308, 91 S. E. 502(5), 313, and cases cited.

[4] 4. It is alleged that the court erred in admitting the "Carlisle Mortality Table" over the objections that in the absence of an allegation and proof of reduced earning capacity, and of a permanent injury, it was not admissible; that "it was immaterial and irrelevant;" that "plaintiff had not charged her injury to be permanent;" and that "there was no proof of the value of her services." As against these objections the court properly admitted the mortality table in evidence. In *Powell v. Augusta & Summerville R. Co.* 77 Ga. 200, 8 S. E. 759, Chief Justice Bleckley said:

"Where there is evidence tending to show that the state of impaired health and diminished ability to labor attributable to the injury may endure through life, the mortality tables are admissible in evidence to aid the jury in dealing

with the element of time involved in their computation of the damages. There was such evidence in this case, and the tables were therefore relevant. One who is to live long in pain is more damaged than one who has to endure suffering but for a brief term. Test this by applying it to two cases and contrasting them, the first in which pain is to last only for a day, and the second for 20 years. It may be thought that the loss of ability to labor is not pain, but this is a mistake. There is no greater blessing of life than ability to labor, even though the proceeds may belong to another. It is better for happiness, as well as for virtue, to work for nothing than to be idle. A physical injury that destroys the power of a human being to labor is one of the most serious injuries that it is possible to inflict. True, it is not to be measured by pecuniary earnings where the suit is by a married woman, for such earnings, as a general rule, belong to the husband, and the right of action for their loss is in him, but the wife herself has such an interest in her working capacity as that she can recover something for its destruction and what she is to be allowed ought to be more or less according to the length of time during which her privation is likely to continue. Such privation may well be classed with pain and suffering, especially where it involves the breaking up of established habits. To man or woman accustomed to work, enforced idleness is torture."

The Powell Case was a suit for pain and suffering to the wife, and there was no claim for diminished earning capacity.

[§] 5. The following objections were urged as to the charge of the court in reference to compensation for future pain and suffering:

"Because the plaintiff had not alleged her injuries to be permanent. Because there was no proof that her injuries were permanent. Because there was no proof of the value of her services or the extent to which the value of her services had been diminished by reason of the alleged injury sustained. Because the annuity tables according to the Carlisle Table of Mortality had not been introduced or admitted in evidence, and therefore the following portions of the charge, to wit, 'If you allow her an amount for any future mental and physical pain and suffering, you must reduce that amount to its present cash value, figured at the rate of 7 per cent. per annum,' left the jury without any basis upon which to figure and ascertain what amount, figured at 7 per cent. per annum, would be the present cash value. Because the introduction and use to [of?] the mortality table without the use and introduction of the annuity tables is improper and illegal, and any charge based thereon improper."

None of these objections are good. As shown in paragraph 2 of this opinion, the evidence supports the petition as to the injury being permanent. The court charged the jury that—

"The plaintiff sues and contends for damages for pain and suffering. The court instructs you further that pain and suffering is an element of damages which the law recognizes. If you be-

lieve, from the evidence in this case, that the plaintiff is entitled to recover of the defendant any sum on account of pain and suffering resulting from the injury alleged and as stated in the declaration, then the amount of such recovery would be and is left by the law to the enlightened consciences of impartial jurors. The court instructs you further that if you find that the plaintiff is entitled to recover, under the evidence and under the rules of law given you in charge, you would be authorized to find such amount in damages as would compensate her for the physical and mental pain which she has suffered as a direct and proximate result of the defendant's negligence, if you find that the defendant was negligent. This would be such compensation, however, as would be compensation without injustice to the defendant. If you find that she has suffered pain, mental and physical, up to the present time, if you find that her injury is such as will probably cause her future pain and suffering, mental and physical, you would be authorized to allow her compensation for such mental or physical pain and suffering. If you allow her an amount for any future mental and physical pain and suffering, you must reduce that amount to its present cash value, figured at the rate of 7 per cent. per annum. The court instructs you, further, that certain tables have been introduced in evidence for your consideration, and these are called mortality tables. You may use them or you may not, and then it is left to you as to what use you will give them. The court instructs you, further, the only material information you can derive from it is the time which an average person of equal age with the one under consideration in the present case may be expected to live."

In *Ball v. Mabry*, 91 Ga. 782, 18 S. E. 64(3), it is held:

"In a proper case it is not error to charge that the plaintiff is entitled to recover for the pain and suffering he will probably endure in the future."

In *Sou. Ry. Co. v. Wright*, 6 Ga. App. 185, 64 S. E. 709, Judge Russell said:

"The instruction of the learned trial judge that if the injuries are permanent there is no rule of law given by which you may estimate the damages in a case of this kind, save the enlightened conscience of impartial jurors, etc., evidences that the idea of diminished capacity to earn money was intended to be excluded from the consideration of the jury, and must have been so understood by it."

That portion of the charge in this case in reference to the present cash value of future pain and suffering is not erroneous because the "annuity table" was not introduced in evidence. This table can be used with profit, and is frequently a great timesaver in arriving at the present cash value, but is not essentially necessary.

[§] 6. The presiding judge approved the verdict found by the jury, there is evidence to support it, and this court will not disturb it.

Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(24 Ga. App. 803)

## THRASHER v. STATE. (No. 11048.)

(Court of Appeals of Georgia, Division No. 1.  
March 2, 1920.)*(Syllabus by the Court.)*

## 1. CRIMINAL LAW §576(8)—RIGHT OF ACCUSED TO DEMAND TRIAL STATED.

A true bill was returned against accused on October 15, 1917. At the November term, 1918, a demand for trial was made, and it was overruled "on the ground that there was no jury in session, that the demand was not in proper form, and that there had been more than two terms of court preceding said demand." Notwithstanding the refusal of the judge to allow the demand, the exceptions pendente lite dated July 2, 1919, recited that "said demand was spread upon the minutes of said court on December 26, 1918, and since that time two terms of court have passed by, the January term, 1919, and the March term, 1919, and now is the May term or third term of said court, the above case is set for trial on June 11, 1919. Whereupon counsel for defendant made a motion that defendant be discharged, on the ground that two terms, excluding the November term, 1918, had elapsed without bringing said defendant to trial, and that automatically he was discharged by operation of law, but it was proper that the discharge be formally ordered and signed by the judge to clear the proof."

The court did not err in refusing to order the discharge of the defendant. The Penal Code (1910) § 983, provides that "Any person against whom a true bill of indictment is found, for an offense not affecting his life, may demand a trial at the term when the indictment is found; or at the next succeeding term thereafter, or at any subsequent term, by special permission of the court, which demand shall be placed upon the minutes of the court." In construing this section, Mr. Justice Cobb, in *Dublin v. State*, 126 Ga. 582, 55 S. E. 487, said: "Under the provisions of that Code [1863], the demand may be entered as a matter of right at the first or second term, and at any subsequent term by special permission of the court. Code of 1863, § 4534. Such is the law at the present time. Penal Code, § 958 [now section 983]." Following this construction, except in cases affecting life, the accused may enter a demand as a matter of right "at the term when the indictment is found or at the next succeeding term thereafter." After the second term no demand can be entered except "by special permission of the court." If the demand is made after the second term from the finding of the indictment, and is denied, this ends the matter, unless exceptions pendente lite to the refusal are filed and approved. In this case the exceptions pendente lite were to the refusal of the court to discharge the defendant under the alleged demand, and not to the refusal of the court to allow the demand. See, in this connection, *Dublin v. State*, 126 Ga. 582, 55 S. E. 487; *Moore v. State*, 63 Ga. 165; *Roebuck v. State*, 57 Ga. 154; *Couch v. State*, 28 Ga. 64.

## 2. GROUND FOR GRANT OF NEW TRIAL.

In ground 6 of the motion for new trial, as it appears in the record, there is nothing that would authorize the grant of a new trial.

## 3. CHARGE TO JURY.

Section 1013 of the Penal Code (1910) was applicable to the facts in the case, and the court did not err in giving it in charge to the jury, as complained in ground 10 of the motion for a new trial.

## 4. CHARGE TO JURY.

Under the facts of the case, and when considered in connection with the entire charge of the court, there is no error in the excerpts from the charge complained of in grounds 12 and 18 of the motion for a new trial.

## 5. CRIMINAL LAW §913(4)—EXCESSIVENESS, ILLEGALITY, OR IRREGULARITY OF SENTENCE NOT GROUND FOR NEW TRIAL.

"Objection that the sentence imposed in a criminal case is excessive, or for any reason illegal or irregular, cannot be properly made the ground of a motion for a new trial." *Sable v. State*, 22 Ga. App. 768, 97 S. E. 271, and cases cited.

## 6. SUFFICIENCY OF EVIDENCE.

No error of law appears; the jury is the final arbiter of the facts, and the judge who saw and heard the witnesses approved the finding of the jury, and this court will not interfere.

Error from Superior Court, Fulton County; John D. Humphries, Judge.

G. T. Thrasher was convicted of an offense, and he brings error. Affirmed.

John P. Haunson, of Atlanta, for plaintiff in error.

John A. Boykin, Sol. Gen., and E. A. Stephens, both of Atlanta, for the State.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(24 Ga. App. 803)

## McVAY BROS. v. DODD. (No. 10959.)

(Court of Appeals of Georgia, Division No. 1.  
March 2, 1920.)*(Syllabus by the Court.)*

## APPEAL AND ERROR §655(2)—BILL OF EXCEPTIONS NOT PRESENTED UNTIL MORE THAN 60 DAYS FROM DATE OF TRIAL WILL BE DISMISSED.

This case was tried on the 15th of July, and it affirmatively appears from the bill of exceptions that it was not presented to the judge until the 15th of September, more than 60 days from the date of the trial. The motion to dismiss the bill of exceptions must be sustained. Civ. Code 1910, § 6152; *Jones v. State*, 146 Ga. 8, 90 S. E. 280.

Error from Superior Court, Bleckley County; E. D. Graham, Judge.

Proceedings between McVay Bros. and Harry Dodd, trustee. Judgment for the lat-

ter, and the former brings error. Bill of exceptions dismissed.

C. A. Weddington, of Cochran, and M. H. Boyer, of Hawkinsville, for plaintiff in error.

H. F. Lawson, of Hawkinsville, for defendant in error.

**BLOODWORTH, J.** Bill of exceptions dismissed.

**BROYLES, C. J., and LUKE, J.,** concur.

(25 Ga. App. 10)

**LONG v. STATE.** (No. 11171.)

(Court of Appeals of Georgia, Division No. 1  
March 2, 1920.)

*(Syllabus by the Court.)*

**CHARGE OF COURT; SUFFICIENCY OF EVIDENCE.**

The error assigned upon two excerpts from the charge of the court is wholly without merit. The charge of the court was most fair, and fully presented the issues in the case. The evidence amply authorized the verdict finding the defendant guilty.

Error from Superior Court, Fulton County; John D. Humphries, Judge.

Charles Long was convicted of an offense, and he brings error. Affirmed.

Claude D. Rowe and G. H. Cornwell, both of Atlanta, for plaintiff in error.

John A. Boykin, Sol. Gen., and E. A. Stephens, both of Atlanta, for the State.

**LUKE, J.** Judgment affirmed.

**BROYLES, C. J., and BLOODWORTH, J.,** concur.

(25 Ga. App. 23)

**MATHEWS et al. v. GREEN.** (No. 11092.)

(Court of Appeals of Georgia, Division No. 1  
March 4, 1920.)

*(Syllabus by the Court.)*

**DISMISSAL OF AFFIDAVIT OF ILLEGALITY.**

The affidavit of illegality in this case was properly dismissed.

Error from City Court of Statesboro; Remer Proctor, Judge.

Proceeding between J. L. Mathews and others and A. B. Green. Affidavit of illegality dismissed, and the former bring error. Affirmed.

R. Lee Moore and Brannen, Booth & Co-wart, all of Statesboro, for plaintiffs in error.

Anderson & Jones, of Statesboro, for defendant in error.

**BLOODWORTH, J.** Judgment affirmed.

**BROYLES, C. J., and LUKE, J.,** concur.

(24 Ga. App. 796)

**SALMON v. FLOYD COUNTY.** (No. 10941.)

(Court of Appeals of Georgia, Division No. 1  
March 2, 1920.)

*(Syllabus by the Court.)*

**TAXATION** ~~§~~549(1, 4)—**TAX RECEIVER OF FLOYD COUNTY IS ENTITLED TO SAME COMPENSATION FOR 1918 AS THE TAX COLLECTOR FOR THAT YEAR; TAX RECEIVER'S SERVICES TO COUNTY DO NOT END WITH COMPLETION OF HIS DIGEST.**

The only question raised in this case is whether, under section 1202 of the Civil Code of 1910, as amended by an act of the Legislature approved August 17, 1918 (Laws 1918, p. 110), the tax receiver of Floyd county is entitled to be compensated for his services for the year 1918, as provided therein. It is contended on the part of the county that the act of 1918 supra did not entitle him to receive more than was allowed him by the law effective on January 1st of that year. No constitutional question being raised in this case, and the sole question being as to the time when the said act was applicable in behalf of the tax receiver, we held that he was entitled to receive for his services as tax receiver for the year 1918 the same compensation that the tax collector of Floyd county was paid for the year 1918 for services as tax collector. We are of the opinion that the compensation of the tax receiver is not due and collectible until after the taxes are collected by the tax collector. We are of the further opinion that the services of the tax receiver to the county do not end with his completing his digest, but, as provided in section 1197 of the Civil Code of 1910, he is required to receive tax returns at any time when a taxpayer applies to him to give in such returns. Having the opinion that we do, we hold that it was error to sustain the general demurrer to the plaintiff's petition.

Error from City Court of Floyd County; W. J. Nunnally, Judge.

Action by J. Z. Salmon against Floyd County. General demurrer to petition sustained, and plaintiff brings error. Reversed.

Maddox & Doyal, of Rome, and Rosser, Slaton, Phillips & Hopkins, of Atlanta, for plaintiff in error.

Denny & Wright, of Rome, for defendant in error.

**LUKE, J.** Judgment reversed.

**BROYLES, C. J., and BLOODWORTH, J.,** concur.



(25 Ga. App. 34)

## DOOLEY v. WILBANKS. (No. 11126.)

(Court of Appeals of Georgia, Division No. 1.  
March 4, 1920.)

(Syllabus by the Court.)

CONTRACTS  $\Leftrightarrow$  235—VENDOR AND PURCHASER  
 $\Leftrightarrow$  179—RIGHTS OF DEBTOR UNDER AGREEMENT TO PAY IN SPECIFICS OR IN MONEY  
 STATED; VENDEE HAD OPTION TO PAY IN COTTON.

All agreements to pay in specifics being presumed to be made in favor of the debtor, he has the option of paying either in specifics or in money amounting to the value of the specifics; and ordinarily this value will be their market value at the time of the maturity of the obligation. However, where it appears from the agreement that it was the intent of the parties thereto that the debt should be paid in specifics on the basis of a certain fixed money value thereof, irrespective of their market value on the date of the maturity of the obligation, then the debtor has the right to pay, in lieu of the specific articles called for, their money value on the basis fixed in the agreement.

Error from Superior Court, Habersham County; J. B. Jones, Judge.

Action by Garnett Dooley, administrator, against J. H. Wilbanks. Judgment for defendant, and plaintiff brings error. Affirmed.

I. H. Sutton, of Clarkesville, Jno. J. & Roy M. Strickland, of Athens, and P. Cooley, of Jefferson, for plaintiff in error.

J. J. & Sam Kimzey, of Cornelia, for defendant in error.

BROYLES, C. J. J. H. Wilbanks, the defendant in this case, on September 24, 1912, entered into an option contract with G. W. and J. C. Dooley to buy from the latter a certain farm containing 332 acres of land, wherein the vendors agreed to sell the land at \$17 per acre if all cash was paid at the time of the purchase, or for 180 500-pound bales of good white merchantable cotton to be paid as follows: 15 bales in the year of the contract and 15 bales per year thereafter for 11 years. The contract provided that "in case party of the second part don't raise the cotton on the farm then party of the second part shall have the privilege to pay cash on the basis of 10 cent. per pound cotton for the amount of the 15 bales." It was further provided in the contract that if Wilbanks bought the land for cotton he should pay \$500 cash (\$50 of which had been paid to secure the option), and that "\$500 is to be equal to 10 bales of cotton, and is to be considered as 10 bales of cotton." It was also agreed that Wilbanks had the right and privilege to pay as much cotton in any year as he desired, until all of the debt was paid, and that he was to give one note for 5 bales of cotton to be delivered the first

year, and 11 notes for 15 bales each. In pursuance of this contract Wilbanks, on November 25, 1912, gave a series of notes for the purchase money of the land, and in each of them he promised to pay to the plaintiff a specified number of 500-pound bales of cotton "based on 10 cents per pound, *regardless of the market price on date of delivery.*" (Italics ours.) Each note recited that it was "given for the purchase money of certain land in accordance with the contract between G. W. Dooley and J. C. Dooley and J. H. Wilbanks, dated September 24, 1912," and that it was "secured by a mortgage dated this day, given by said Wilbanks," and the record shows that Wilbanks on November 25, 1912, executed a security deed (referred to in the notes as a mortgage) to G. W. Dooley and C. W. & W. A. Savage covering 308 acres of the land in question (it appearing that when the land was surveyed it was found that the tract consisted of 308 instead of 332 acres). The security deed contained the following provisions:

"This conveyance is made for the following purpose and none other: Said J. H. Wilbanks is indebted to the said G. W. Dooley and C. W. & W. A. Savage in the sum of 167 bales and 130 pounds of good white merchantable cotton, *based on 10 cents per pound regardless of market price or prices on date of delivery* [italics ours], each of said above 167 bales of cotton to weigh 500 pounds each, with interest at the rate of 8 per cent. per annum after maturity, based on said cotton at 10 cents per pound. \* \* \* This mortgage note is given for the purchase money in accordance with the contract between G. W. Dooley and J. C. Dooley and J. H. Wilbanks, dated September 24, 1912, and by agreement of all parties C. W. & W. A. Savage have taken the place of J. C. Dooley in said contract. \* \* \* The consideration of this mortgage, to wit, 167 bales and 130 pounds of good white merchantable cotton, based on 10 cents per pound, is hereby credited with 14 bales weighing 500 pounds each and 130 pounds of good white merchantable cotton, based on 10 cents per pound, the receipt whereof is hereby acknowledged."

The plaintiff brought suit on three of the notes signed by Wilbanks, and alleged that the latter had failed and refused to deliver the cotton on the dates for delivery specified in the notes, and that cotton on said dates was worth approximately 30 cents per pound, and he asked for damages for a breach of the contract on the basis of that value.

Upon the trial the undisputed evidence showed that the defendant at the maturity of the notes tendered to the plaintiff in cash the value of the cotton based upon 10 cents per pound, and that the tender was declined by the plaintiff, who demanded a settlement on the basis of the then market value of the cotton, which was approximately 30 cents per pound.

After the evidence was all in, each party requested the court to direct a verdict in accordance with his contentions, and the court, agreeing with the contentions of the defendant, directed a verdict for the plaintiff for \$1,100 only (the exact amount which had been tendered by the defendant in settlement of the three notes sued on), with interest thereon from the date of the maturity of the obligations; and the costs of the suit were taxed against the plaintiff.

We think that the judge properly construed the option contract, and the notes and security deed given in pursuance thereof, as constituting one single contract, and that he correctly held that this contract and the undisputed evidence adduced upon the trial showed that it was the intent of the parties that the value of all cotton to be delivered by the defendant should be fixed at 10 cents per pound, regardless of its market value at the date of the maturity of the obligations. Under all the facts of the case it appears that this is the just and fair construction of the contract. See, in this connection, *Sims v. Cox*, 40 Ga. 77, 2 Am. Rep. 560. It is true that in that case the purchaser of the land expressly guaranteed that the cotton would be worth 16½ cents per pound to the vendor when delivered, and in the instant case there is no guaranty, in so many words, that the cotton would be worth 10 cents per pound to the vendor of the land when delivered to him. We think, however, that under all the facts of the case there was virtually and in effect such a guaranty, and that it was manifestly the intention of the parties, as shown by the language in the option contract and in the notes and the security deed, that all the cotton received by the vendor of the land should be of the value of 10 cents per pound, irrespective of its then actual market price. As throwing light upon the intent of the parties and how they regarded the contract, the undisputed evidence upon the trial showed that in some years when cotton was worth less than 10 cents per pound the defendant delivered cotton to the vendor and paid him, in addi-

tion thereto, sufficient money to bring the value of the cotton up to 10 cents per pound. It is not clear, however, from the record, whether or not these money payments were made because of a failure by the defendant in those years to grow upon the land the stipulated number of bales of cotton (15) which were to be delivered each year, but there is a fair inference from the evidence that the money payments were not made for that reason, but to carry out the virtual agreement of the parties that all cotton delivered should be of the value of 10 cents per pound.

All agreements to pay in specifics are presumed to be made in favor of the debtor, who may pay in specifics, or in lieu thereof he may pay the amount of the debt in money, amounting to the value of the specifics at the date of the maturity of the obligation, at the place where it was payable, if a specific place was mentioned in the note, and, if no specific place was mentioned, then at the place where the note was executed, with lawful interest thereon. Civil Code (1910), §§ 4270, 4271. Where it appears, however, from the agreement, that it was the intent of the parties thereto that the debt should be paid in specifics on the basis of a certain fixed money value thereof, irrespective of their market value at the date of the maturity of the obligation, then the debtor can at his option pay the money value of the specific articles called for on the basis fixed in the agreement. *Sims v. Cox*, supra.

The construction placed upon the covenants of a contract by the parties thereto, as shown by their acts and conduct, is entitled to much weight, and may be conclusive upon them. *Candler v. Georgia Theater Co.*, 148 Ga. 188, 96 S. E. 226 (5) L. R. A. 1918F, 389.

It is unnecessary to decide whether or not the court erred in allowing interest on the principal sum, as this part of the directed verdict is not excepted to by either party.

Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(24 Ga. App. 811)

## CLAY v. STATE. (No. 11093.)

(Court of Appeals of Georgia, Division No. 1.  
March 2, 1920.)*(Syllabus by the Court.)*

INDICTMENT AND INFORMATION  $\S$  190—ACCUSED PROPERLY CONVICTED OF ATTEMPTING TO DISTILL UNDER INDICTMENT CHARGING ILLICIT DISTILLING; "LIQUOR."

The indictment in this case charged that the accused "did unlawfully distill, manufacture, and make spirituous liquors, malted liquors, mixed liquors and beverages, a part of which is alcoholic." The verdict was: "We, the jury, find the defendant guilty of attempt to make liquor." The defendant filed a motion in which he alleged that the judgment should be arrested, because it "appears on the face of the record that he was presented by the grand jury and tried for the offense of distilling, and that the jury found him guilty not of the offense charged, but of attempt to distill." This motion was overruled, and the movant excepted.

Section 1061 of the Penal Code of 1910 is as follows: "Upon the trial of an indictment for any offense, the jury may find the accused not guilty of the offense charged in the indictment, but, if the evidence warrants it, guilty of an attempt to commit such offense, without any special count in the indictment for such attempt." This court has held that "generally the word 'liquor' implies 'intoxicating liquor.'" *Smith v. State*, 17 Ga. App. 118, 86 S. E. 283 (1), and cases cited. It is established law in this state that "a verdict is to be given a reasonable intendment, and, when ambiguous, may be construed in the light of the issues actually submitted to the jury under the charge of the court; and if, when so construed, it expresses with reasonable certainty a finding supported by the evidence, it is to be upheld as legal." *Barbour v. State*, 8 Ga. App. 27, 28, 68 S. E. 458, and citations. In *Warren v. State*, 12 Ga. App. 695, 78 S. E. 202, the second paragraph of the decision is as follows: "On the trial of an accusation of larceny from the house, the jury found the following verdict: 'We, the jury, find the defendant not guilty as charged in the bill of indictment, but guilty of an attempt to commit larceny.' Held, verdicts must not be avoided unless from necessity; and, giving to this verdict a reasonable construction, the jury intended to find the accused guilty of an attempt to commit the crime charged in the accusation, to wit, larceny from the house, and not an attempt to commit simple larceny. Civil Code 1910,  $\S$  5927." Judge McCay in *Arnold v. State*, 51 Ga. 145, 146, said: "Verdicts are to have a reasonable intendment and to receive a reasonable construction, and are not to be set aside unless from necessity. Code,  $\S$  3561 [now section 1059 of the Penal Code of 1910]; [*Wood v. McQuire's Children*] 17 Ga. 361 [63 Am. Dec. 246]; [*Gardner v. Kersey*] 39 Ga. 664 [99 Am. Dec. 484]. And this is the general spirit of the Code, as well as the expression of the more universal tendency of jurisprudence towards freedom from that slavish adherence to technical nicety which is the reproach of the common law. In every verdict

there must be a reference to the indictment and the issue to make it have any meaning. The verdict is the response of the jury to the charge and to the issue formed upon it." See, also, *Autrey v. State*, 23 Ga. App. 143, 144, 97 S. E. 753; *Espy v. State*, 19 Ga. App. 743, 92 S. E. 229; *Kidd v. State*, 10 Ga. App. 149, 75 S. E. 266; *Wilson v. State*, 62 Ga. 167.

Under the above rulings the court properly overruled the motion in arrest of judgment.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Liquor.]

Error from Superior Court, Hancock County; J. B. Park, Judge.

Lewis Clay was convicted of a violation of the prohibition law, and he brings error. Affirmed.

Robt. H. Lewis, of Sparta, for plaintiff in error.

Doyle Campbell, Sol. Gen., of Monticello, for the State.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(25 Ga. App. 7)

## LEWIS v. STATE. (No. 11155.)

(Court of Appeals of Georgia, Division No. 1.  
March 2, 1920.)*(Syllabus by the Court.)*

1. CRIMINAL LAW  $\S$  1064(4) — UNLESS GROUND OF MOTION FOR NEW TRIAL IS SO COMPLETE AS NOT TO REQUIRE REFERENCE TO OTHER PARTS OF RECORD, IT WILL NOT BE CONSIDERED.

The first ground of the amendment to the motion for a new trial complains of the admission of evidence relative to whisky found in a house not identified in any way in this ground, and there described only as "the house." In order to ascertain what house is referred to, it would be necessary to look to the brief of evidence, and this we are not required to do. "Under repeated decisions of this court and of the Supreme Court, each special ground of a motion for a new trial must be complete within itself; and when so incomplete as to require a reference to the brief of the evidence, or to some other portion of the record, in order to determine what was the alleged error and whether such error was material, the ground will not be considered by the reviewing court." *McCall v. State*, 23 Ga. App. 770, 99 S. E. 471(1).

2. EXCLUSION OF EVIDENCE.

The court did not err in refusing to rule out the evidence of which complaint is made in the second ground of the amendment to the motion for new trial.

3. CHARGE OF COURT.

When considered in connection with the remainder of the charge of the court, there is no error in the portion of which complaint is made

in the fourth ground of the amendment to the motion for new trial.

**4. CRIMINAL LAW §829(22) — FAILURE TO GIVE IN CHARGE THE INDETERMINATE SENTENCE LAW HARMLESS, IN VIEW OF CHARGE GIVEN.**

Failure to give in charge to the jury the Indeterminate Sentence Law (Laws 1919, p. 387) could not have been harmful to the accused, for the judge charged the jury, "if you find him guilty, you can go further and say, 'We recommend him to the mercy of the court,' which would mean a misdemeanor punishment," and the jury did so recommend.

**5. APPROVED VERDICT AFFIRMED.**

The evidence authorized the verdict which has the approval of the presiding judge; no error of law appears, and the judgment is affirmed.

Error from Superior Court, Haralson County; F. A. Irwin, Judge.

Proceeding by the State against Ike Lewis. From the judgment, Lewis brings error. Affirmed.

Griffith & Matthews, of Buchanan, for plaintiff in error.

J. R. Hutcheson, Sol. Gen., of Douglasville, for the State.

BLOODWORTH, J. Affirmed.

BROYLES, C. J., and LUKE, J., concur.

(25 Ga. App. 30)

**NEWBERRY v. STATE. (No. 11156.)**

(Court of Appeals of Georgia, Division No. 1.  
March 8, 1920.)

*(Syllabus by the Court.)*

**1. CRIMINAL LAW §614(1)—REFUSAL OF CONTINUANCE FOR ABSENCE OF WITNESS PROPER, WHERE PREVIOUS CONTINUANCE GRANTED ON SAME GROUND AND TESTIMONY IS NOT MATERIAL.**

It does not appear that the judge abused his discretion in overruling the defendant's motion for a continuance, based upon the absence of a witness. Upon the hearing of the motion it appeared that the defendant had previously obtained one or two continuances of the case because of absence of witnesses; and, further, in the state of the record, it does not appear that the testimony of the absent witness was material.

**2. CRIMINAL LAW §547(3)—TESTIMONY AS TO WHAT DECEASED WITNESS SWORE ON DEFENDANT'S COMMITMENT TRIAL ADMISSIBLE.**

Under the ruling in Mitchell v. State, 71 Ga. 128 (4a, b), the court did not err in admitting the testimony of a witness as to what an-

other witness (since deceased) swore on the defendant's commitment trial; the witness stating that he remembered the substance of the deceased witness' testimony as given on that trial.

**3. CRIMINAL LAW §668—PERMITTING DEFENDANT TO MAKE SUPPLEMENTARY STATEMENT AFTER EVIDENCE BY STATE IS DISCRETIONARY WITH TRIAL COURT.**

"It is not a matter of right for the accused to make a second statement to the court and jury, because the state has introduced additional evidence, which strengthens the case against him." Boston v. State, 94 Ga. 590. 21 S. E. 603; Knox v. State, 112 Ga. 373, 37 S. E. 416. Whether he should be allowed to supplement his first statement with another is discretionary with the trial court. Dixon v. State, 116 Ga. 186, 42 S. E. 357." Williams v. State, 138 Ga. 825, 76 S. E. 347. Under this ruling, and the facts of the instant case, it does not appear that the judge abused his discretion in refusing to allow the defendant to make a second statement.

**4. CRIMINAL LAW §954(4)—GROUND OF MOTION FOR NEW TRIAL COMPLAINING OF EVIDENCE AS TO DEFENDANT'S CHARACTER, AS NOT BEING "WITHIN STATUTORY PROVISIONS," WAS WITHOUT MERIT.**

There is no substantial merit in that ground of the motion for a new trial which complains that the court erred in allowing a witness to testify as follows: "Yes; I know William Henry Parks. I know his general character. I would say it is above the average negro; from his character I would believe him in a court of justice;" the ground of objection being that the "testimony was not within the statutory provisions."

**5. SUFFICIENCY OF INSTRUCTIONS.**

The charge of the court was full and fair, and substantially covered the law of the case. If more particular instructions upon any feature of the case were desired by the defendant, a timely and appropriate written request therefor should have been tendered.

**6. SUFFICIENCY OF EVIDENCE.**

The verdict was authorized by the evidence, and the court did not err in overruling the motion for a new trial.

Error from Superior Court, Marion County; G. H. Howard, Judge.

Isom Newberry was convicted of an offense, and he brings error. Affirmed.

W. B. Short and Geo. P. Munro, both of Buena Vista, for plaintiff in error.

C. F. McLaughlin, Sol. Gen., of Columbus, for the State.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

— For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(24 Ga. App. 793)

MYERS v. BROOKS. (No. 10931.)

(Court of Appeals of Georgia, Division No. 1.  
March 2, 1920.)*(Syllabus by the Court.)*COURTS  $\Leftrightarrow$  66(3)—NEW TRIAL  $\Leftrightarrow$  117(3)—AD-  
JOURNMENT HELD TO TERMINATE TERM OF  
COURT RELATIVE TO RIGHT TO FILE NEW  
TRIAL.

Under the facts of this case the term of court in which the case was tried had expired before the motion for a new trial was made, and the motion was properly dismissed.

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

Action by U. S. Brooks against J. H. Myers. Judgment for plaintiff, and defendant brings error. Affirmed.

The bill of exceptions recites that—

"About 10 days after the said trial, to wit, on March 14, 1919, the judge of said court, the Hon. H. A. Mathews, in his office in the courthouse adjoining the superior court room, at Macon, Ga., in the presence of McDougald Nisbet, deputy clerk of said court, and G. S. Westcott, deputy sheriff of said county, in attendance upon the said judge and court, orally stated that the business of the February term, 1919, of Bibb superior court was concluded, and announced that the February term, 1919, was adjourned, and orally instructed the said deputy sheriff to formally announce the adjournment of said court. The said deputy sheriff did then and there formally announce the adjournment of said term of said court, which was the usual and customary manner of adjourning said court for many years past. The said judge then left Macon for his home in Ft. Valley, Ga., with no intention of returning to Macon for the purpose of transacting any further business of said February term of said court. All juries had been discharged for the said term. Thereafterwards, to wit, on March 15, 1919, the judge of said court, in his office in the city of Macon, signed a written order in which he undertook to revoke said oral order of adjournment, and therein he declared the February term, 1919, of Bibb superior court to be still in session, but in recess until the further order of court. At the time such written order was signed and entered by the said judge, no entry had been made on the minutes of the oral order of adjournment, no written order of adjournment had been made, signed, or entered, no other action taken looking towards adjournment of the said term of court, other than hereinbefore set out, except that the clerk of the court had written up the minutes of that term of the court and was, at the time the written order was presented to him, then ready to actually enter said oral order of adjournment upon the minutes, which was the customary and usual manner of entering the order of adjournment in said court. After the signing of said written order and before any other had been made, signed, or entered, counsel for John H. Myers, defendant in the above-

stated case, on the same date, to wit, March 15, 1919, presented to the said judge, the Hon. H. A. Mathews, a motion for new trial in said case, upon which motion the said judge issued his rule nisi dated March 15, 1919, setting the hearing of said motion for 10 o'clock on the 5th day of April, 1919, and allowing until the actual hearing of the motion for the movant to present to the court a brief of evidence in said case, and to amend the said motion."

The hearing of the motion was continued from time to time until June 7th. The bill of exceptions further shows that—

"Respondent to said motion presented in writing a motion to dismiss the motion for new trial upon two main grounds, to wit: First, because the said motion was presented after the adjournment of the term to which the said case was tried; and, second, because movant did not present a brief of the evidence in said case on or before the 19th day of April, 1919."

At the hearing the judge passed the following order:

"It appearing from the record in this case that the motion for new trial in this case was filed after the court had been regularly adjourned for the February term, 1919, of the term at which the case was tried, and that this adjournment was not affected by any subsequent order which could continue or revive the term of the court at which said case was tried, it is thereupon, on motion of respondent, ordered that the motion for new trial filed in this case be, and the same is hereby, dismissed."

To this order the movant excepted.

Chas. H. Garrett, of Macon, for plaintiff in error.

Walter De Fore and Jas. C. Estes, both of Macon, for defendant in error.

BLOODWORTH, J. (after stating the facts as above). When the presiding judge dismissed the juries, announced that the business of the term was closed, that the term was adjourned, and had the deputy sheriff in attendance on the court to announce that fact, and "the said judge then left Macon for his home in Ft. Valley, Ga., with no intention of returning to Macon for the transaction of any further business of said February term of said court," the term expired, "died a natural death." Such a term, once dead, is dead forever, and can know no resurrection morn. There is no law which specifically provides that the judge shall sign a special order adjoining a term of the superior court, and an adjournment may be valid and complete even when there is no such order and the judge has not signed the minutes showing the fact of adjournment. See *Worthington v. State*, 134 Ga. 261, 67 S. E. 805. This case is not analogous to those where the law requires an order or judgment to be in writing, and where the judge orally announces what he proposes to write in the order or

judgment. Such cases come within the well-recognized principle that—

"A court of record has full power, in the exercise of a sound discretion, to revive or vacate its judgments during the term at which they are made."

As has been said of such cases, "They are about to expire, but are not dead." Under certain conditions the judge, during the term at which it is tried, has power to save an expiring case, but he has no power, by written order or otherwise, after the term has been formally adjourned—is absolutely dead—to revive and vitalize that term.

Under the facts of this case the term of court had expired before the motion for a new trial was filed, and as all such motions must be made during term time, the judge did not err in dismissing the motion. See Civil Code 1910, § 6089; Keen v. Davis, 141 Ga. 608, 81 S. E. 868; Collier v. State, 115 Ga. 17, 18, 41 S. E. 261.

Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(25 Ga. App. 21)

SCOTT v. SANDERS. (No. 11098.)

(Court of Appeals of Georgia, Division No. 1.  
March 3, 1920.)

(Syllabus by the Court.)

1. ANIMALS §100(1)—REMEDY UNDER STOCK LAW FOR DAMAGES BY TRESPASSING ANIMALS CUMULATIVE.

The common-law rule that, where through the negligent keeping of a hog by its owner it strayed upon the land of another and injured his crops, it was a trespass for which the owner of the hog was answerable in damages, and the party injured might either impound the animal until the owner should satisfy his damages, or he might bring an action for the trespass, is still of force in this state; and it is immaterial whether the stock law was of force in the county. The remedy given by the stock law in our Code is not exclusive, but cumulative. Bonner v. De Loach, 78 Ga. 50, 2 S. E. 546.

2. ANIMALS §95(2) — POSSESSION OF IMPOUNDED HOG DOING DAMAGE LAWFUL, BAR-  
RING RECOVERY IN TROVER.

Under the above ruling the defendant in the instant case had a right to impound the hog until the owner of the same had satisfied his damages. His possession, therefore, was lawful, and the owner of the hog could not recover it by a suit in trover.

Error from City Court of Dublin; R. D. Flynt, Judge.

Proceedings between Q. L. Scott against T. V. Sanders. Judgment for the latter, and the former brings error. Reversed.

S. P. New, of Dublin, for plaintiff in error.  
W. C. Davis, of Dublin, for defendant in error.

BROYLES, C. J. Judgment reversed.

LUKE and BLOODWORTH, JJ., concur.

(25 Ga. App. 19)

WILSON v. SMALL. (No. 11090.)

(Court of Appeals of Georgia, Division No. 1.  
March 3, 1920.)

(Syllabus by the Court.)

APPEAL AND ERROR §1097(1)—NEW TRIAL §68—RULINGS ON FORMER APPEAL ARE THE LAW OF THE CASE ON A SUBSEQUENT APPEAL; FIRST GRANT OF NEW TRIAL IS NOT ERROR WHERE EVIDENCE DOES NOT DEMAND VERDICT.

When this case was here before (20 Ga. App. 674, 93 S. E. 518), the controlling questions of law were settled by this court, and the rulings then made became the law of the case. Upon the trial now under review the evidence did not demand the verdict returned, and the court accordingly did not err in granting a new trial; it being the first grant thereof to the defendant in error.

Error from City Court of Macon; Du Pont Guerry, Judge.

Action by R. L. Wilson against W. E. Small, administrator. Verdict for plaintiff, and from the granting of a new trial he brings error. Affirmed.

Hardeman, Jones, Park & Johnston, of Macon, for plaintiff in error.

Gunn & Powers and P. F. Brock, all of Macon, for defendant in error.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(24 Ga. App. 305)

JARRELL v. GILLESPIE. (No. 11080.)

(Court of Appeals of Georgia, Division No. 1.  
March 2, 1920.)

(Syllabus by the Court.)

BILLS AND NOTES §537(1)—WHERE DEFENDANT ASSUMED BURDEN AND HIS EVIDENCE SHOWED NO LEGAL DEFENSE, A VERDICT WAS PROPERLY DIRECTED FOR PLAINTIFF.

This was a suit on an unconditional promissory note. On the trial the defendant's attorney "in open court, before any evidence was offered, admitted the execution of the note and assumed the burden and claimed the opening

and conclusion." The evidence introduced by the defendant failed to show a legal defense, and the judge properly directed a verdict for the plaintiff.

Error from Superior Court, Effingham County; A. B. Lovett, Judge.

Action by N. J. Gillespie against W. B. Jarrell. Verdict for plaintiff, and defendant brings error. Affirmed.

W. B. Stubbs and G. N. Alford, both of Savannah, for plaintiff in error.

Oliver & Oliver and W. S. Connerat, all of Savannah, for defendant in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(24 Ga. App. 779)

**EUNICE v. RELIANCE FERTILIZER CO.**  
et al. (No. 10807.)

(Court of Appeals of Georgia, Division No. 1.  
March 2, 1920.)

*(Syllabus by the Court.)*

**GARNISHMENT §209—MOTION BY HOLDER OF PRIOR LIENS INSUFFICIENT TO JUSTIFY DISTRIBUTION OF FUNDS.**

The judgment denying the motion to distribute funds was not erroneous for any reason assigned.

Error from City Court of Blackshear; R. G. Mitchell, Jr., Judge.

Action by the Reliance Fertilizer Company against C. W. Eunice, wherein G. B. Eunice intervenes. Judgment for plaintiff, and intervenor brings error. Affirmed.

Parker & Parker, of Waycross, for plaintiff in error.

Memory & Memory, of Blackshear, for defendant in error.

BLOODWORTH, J. The Reliance Fertilizer Company sued C. W. Eunice. Pending this suit a garnishment was obtained by the plaintiff and summons served on the Blackshear Bank on the 25th day of February, 1919, and on the next day judgment was obtained on the original suit. On March 10, 1919, the bank answered the summons of garnishment, admitting indebtedness to the defendant, C. W. Eunice, in the sum of \$850. On March 11, 1919, G. B. Eunice filed in said court a motion in which he alleged that he held *fi. fas.* against C. W. Eunice which were prior liens to that of the fertilizer company, and prayed "that the funds in the hands of the garnishee be directed by the court to be paid to the petitioner on his judgments, according to the law as made and provided in such cases." On the same day he served no-

tice on the bank above named that he claimed "any and all funds held up in its possession" under the garnishment proceedings in favor of the Reliance Fertilizer Company against C. W. Eunice. He also served notice upon the sheriff that he had *fi. fas.* which constituted a prior lien on the said fund, and placed said *fi. fas.* in the hands of the sheriff. On March 17, 1919, the court rendered judgment against the bank in favor of the fertilizer company, and execution issued on this judgment. The bank paid to the attorney for the fertilizer company the amount which it answered it was indebted to C. W. Eunice, and took up the execution issued on the judgment against the bank, and also took a receipt showing settlement of said judgment. On June 18, 1919, the motion to distribute funds was called for a hearing. The record shows that on this alleged motion no order of any kind was ever entered by the court; there was no order making any one a party to the proceedings, and no one was served or acknowledged service thereof. On the hearing of the motion the movant introduced certain evidence. The bill of exceptions recites that—

"The defendants nor either of them introduced any evidence, but counsel for Reliance Fertilizer Company took the position that there were no parties defendant before the court or proceedings to authorize a judgment distributing funds. After argument of counsel the court rendered judgment in said case, refusing and denying the motion to distribute, holding that there was no motion before the court sufficient to subject the fund claimed to distribution."

G. B. Eunice excepted to this ruling and brought the case to this court for review, naming the Blackshear Bank, J. W. Roberson, sheriff, and the Reliance Fertilizer Company as defendants in error.

The ruling complained of was right.  
Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(25 Ga. App. 19)

**BANK OF BACONTON v. DE BERRY et al.**  
**DE BERRY et al. v. BANK OF BACONTON.**  
**COWAN v. SAME.** (Nos. 11081-11083.)

(Court of Appeals of Georgia, Division No. 1.  
March 3, 1920.)

*(Syllabus by the Court.)*

**AWARD OF NONSUIT.**

Upon all the facts of the case, the court did not err in awarding a nonsuit.

Error from City Court of Camilla; Ben Q. Burson, Judge.

Actions by the Bank of Baconton against D. P. De Berry and others and against R. F.

Cowan. Judgment of nonsuit, and plaintiff brings error, and defendants in each action take cross-bills of exceptions. Affirmed on main bill of exceptions and cross-bills dismissed.

Peacock & Gardner, of Camilla, J. J. Hill, of Pelham, and C. E. Crow and J. D. Gardner, both of Camilla, for plaintiff in error. Johnson & Warren, E. E. Cox, and E. M. Davis, all of Camilla, for defendants in error.

BROYLES, C. J. Judgment on main bill of exceptions affirmed; cross-bills dismissed.

LUKE and BLOODWORTH, JJ., concur.

(24 Ga. App. 810)

**CITIZENS' BANKING CO. v. JONES.**  
(No. 11091.)

(Court of Appeals of Georgia, Division No. 1.  
March 2, 1920.)

*(Syllabus by the Court.)*

**APPEAL AND ERROR** §=1005(2)—WHERE VERDICT AUTHORIZED BY EVIDENCE IS APPROVED BY TRIAL COURT ITS OVERRULING OF MOTION FOR NEW TRIAL MUST BE AFFIRMED.

This case is here upon the general ground that the evidence does not authorize the verdict; the special ground being without merit and having been virtually abandoned in the brief of counsel for plaintiff in error. The plaintiff's evidence amply authorizes, indeed if it does not demand, a verdict in his favor. The evidence of the defendant likewise is as strong in its favor. The record shows there have been two trials of this case. In the first trial judgment was rendered for the plaintiff and in the second trial the plaintiff obtained a like judgment. The court granted the defendant a new trial in the first instance and refused a new trial in the second instance. The court unqualifiedly approved the verdict of the jury upon the second trial, in the exercise of his discretion, by overruling the motion for a new trial. Where there is evidence to authorize the verdict and the verdict is approved by the trial court, this court, under the uniform rulings of the Supreme Court and of this court, must affirm the judgment overruling the motion for a new trial.

Error from City Court of Eastman; Gordon Knox, Judge.

Action by A. E. Jones against the Citizens' Banking Company. Judgment for plaintiff, motion for new trial denied, and defendant brings error. Affirmed.

Roberts & Smith and W. M. Clements, all of Eastman, for plaintiff in error.

W. A. Wooten and O. J. Franklin, both of Eastman, for defendant in error.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J. concur.

(26 Ga. App. 12)

**ADAMS v. STATE.** (No. 11198.)

(Court of Appeals of Georgia, Division No. 1.  
March 2, 1920.)

*(Syllabus by the Court.)*

**CRIMINAL LAW** §=789(3)—FAILURE TO CHARGE UPON REASONABLE DOUBT WAS REVERSIBLE ERROR.

The defendant in this case was charged with the offense of abandoning his minor child. The court in charging the jury failed to charge that the burden of proof was upon the state to satisfy their minds beyond a reasonable doubt of the guilt of the defendant as charged. We must agree with the exception of the defendant to the court's failure to charge upon the question of reasonable doubt. It was error to overrule the motion for a new trial in this case.

Error from City Court of Nashville; W. R. Smith, Judge.

Elijah Adams was prosecuted for abandoning his minor child, his motion for a new trial after judgment was overruled, and he brings error. Reversed.

Story & Story, of Nashville, for plaintiff in error.

J. H. Gary, Sol., and W. D. Bule, both of Nashville, for the State.

LUKE, J. Judgment reversed.

BROYLES, C. J., and BLOODWORTH, J. concur.

(25 Ga. App. 14)

**MAXWELL BROS. v. HARRISON.**

**HARRISON v. MAXWELL BROS.**

(Nos. 10930, 10936.)

(Court of Appeals of Georgia, Division No. 1.  
March 3, 1920.)

*(Syllabus by the Court.)*

**1. ESTOPPEL** §=88(1)—PROMISE TO PAY DEBT IF GIVEN TIME WILL NOT ESTOP DEFENSE OF PARTIAL FAILURE OF CONSIDERATION, THOUGH FACTS ON WHICH IT IS BASED WERE KNOWN WHEN PROMISE WAS MADE.

That a debtor, after the maturity of the debt, addresses to the creditor one or more letters in which he asks for indulgence and promises to pay the debt if its collection is not pressed, will not estop him from subsequently setting up the defense of partial failure of consideration, even though the facts upon which this defense is based were known to him at the time he wrote the payee to the effect stated, is settled in Pearson v. Brown, 105 Ga. 802, 31 S. E. 746.

(a) This ruling is not in conflict with Harder v. Carter, 97 Ga. 273, 23 S. E. 82, or Lunsford v. Malsby, 101 Ga. 39, 28 S. E. 498. The Supreme Court, in Pearson v. Brown, supra, pointed out the distinction.



**2. ADMISSIBILITY OF EVIDENCE; OVERRULING OF MOTION FOR NEW TRIAL.**

It was not error to admit the evidence complained of in the motion for a new trial. The evidence authorized the verdict, which has the approval of the trial judge, and for no reason assigned was it error to overrule the motion for a new trial.

Error from Superior Court, Taliaferro County; B. F. Walker, Judge.

Action between Maxwell Bros. and J. M. Harrison. Judgment for the latter, motion for new trial denied, and the former brings error, and the latter takes a cross-bill of exceptions. Affirmed on main bill, and cross-bill of exceptions dismissed.

J. S. Watkins, of Augusta, for plaintiff in error.

Alvin G. Golucke, of Crawfordville, for defendant in error.

LUKE, J. Judgment on main bill of exceptions affirmed; cross-bill of exceptions dismissed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(25 Ga. App. 16)

**JACKSON v. STATE.** (No. 11050.)

(Court of Appeals of Georgia, Division No. 1. March 3, 1920.)

*(Syllabus by the Court.)*

**LARCENY** §77(1) — CHARGE AS TO EFFECT OF POSSESSION OF RECENTLY STOLEN GOODS NOT MISLEADING.

The excerpt from the charge of the court is subject to the criticism that it slightly inaccurately states the inference raised against one who is found in possession of stolen goods recently after the commission of a larceny of the goods. It does not, however, instruct the jury that recent possession creates a presumption of law that the defendant is guilty of larceny of the goods. The charge in this case is different from the charges given in *Falvey v. State*, 85 Ga. 158, 11 S. E. 607, and *Cuthbert v. State*, 3 Ga. App. 600, 60 S. E. 322, and citations. The charge complained of in the instant case instructs the jury that they would be authorized to presume that the defendant found in possession of the stolen property was the thief, unless his possession be explained. In the *Cuthbert Case* the jury were instructed that recent possession is a circumstance which the law considers sufficient to justify the as-

sumption that he is the thief. The charge of the court did not mislead the jury, and the evidence authorized the conviction of the defendant, and for no reason assigned was it error to overrule the motion for a new trial.

Error from Superior Court, Terrell County; W. C. Worrill, Judge.

Tom Jackson was prosecuted for an offense, his motion for new trial after judgment was denied, and he brings error. Affirmed.

R. R. Jones, of Dawson, for plaintiff in error.

B. T. Castellow, Sol. Gen., of Cuthbert, and R. R. Arnold, of Atlanta, for the State.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(25 Ga. App. 15)

**DRURY v. CAMERON & BARCLAY CO.**  
(No. 10038.)

(Court of Appeals of Georgia, Division No. 1. March 3, 1920.)

*(Syllabus by the Court.)*

**APPEAL AND ERROR** §781(7) — WHERE JUDGMENT EXCEPTED TO HAS BEEN PAID THE QUESTIONS RAISED BY BILL OF EXCEPTIONS ARE MOOT AND THE WRIT OF ERROR WILL BE DISMISSED.

It appearing from the motion and the affidavit of counsel for the defendant in error that the judgment excepted to by the plaintiff in error has been paid by him, the questions raised by the bill of exceptions have become moot, and the writ of error must be dismissed.

Error from Superior Court, Camden County; J. P. Highsmith, Judge.

Action between P. W. Drury and the Cameron & Barclay Company. Judgment for the latter, and the former brings error. Dismissed.

Cowart & Vocelle, of St. Marys, for plaintiff in error.

S. C. Townsend, of St. Marys, for defendant in error.

LUKE, J. Dismissed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(25 Ga. App. 26)

**HEADLEY v. MAXWELL MOTOR SALES CORPORATION.** (No. 11115.)(Court of Appeals of Georgia, Division No. 1  
March 3, 1920.)*(Syllabus by the Court.)***1. CORPORATIONS — 423—CORPORATION'S LIABILITY FOR WORDS OF ITS AGENTS DEFINED.**

"A corporation is not liable for damages resulting from the speaking of false, malicious, or defamatory words by one of its agents, even where in uttering such words the speaker was acting for the benefit of the corporation and within the scope of the duties of his agency, unless it affirmatively appears that the agent was expressly directed or authorized by the corporation to speak the words in question." *Behre v. National Cash Register Co.*, 100 Ga. 213, 27 S. E. 986(1), 62 Am. St. Rep. 320; *Osborn v. Woolworth*, 106 Ga. 459, 32 S. E. 581; *Southern Ry. Co. v. Chambers*, 126 Ga. 408, 55 S. E. 37 (4), 7 L. R. A. (N. S.) 926; *Jackson v. Atlantic Coast Line R. R. Co.*, 8 Ga. App. 495, 69 S. E. 919.

(a) This principle of law has been so often reaffirmed by the Supreme Court that it is considered useless to grant the request of counsel for the plaintiff in error that the above-named cases be submitted to the Supreme Court for review, if this court should consider them controlling in the instant case.

**2. SUFFICIENCY OF EVIDENCE.**

Under the above ruling, and the pleadings in the instant case, the court did not err in sustaining the special demurrer to the petition, or, the plaintiff having refused to amend the petition to meet this demurrer, in thereafter dismissing the plaintiff's case on motion of the defendant, since, with the elimination of that paragraph of the petition which was attacked by the special demurrer, the petition did not show a cause of action.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by J. P. Headley against the Maxwell Motor Sales Corporation. Judgment for

defendant, and plaintiff brings error. Affirmed.

Winfield Payne Jones, of Atlanta, for plaintiff in error.

Anderson, Rountree & Crenshaw, of Atlanta, for defendant in error.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(25 Ga. App. 27)

**THOMPSON v. ASA G. CANDLER, Inc., et al.** (No. 11121.)(Court of Appeals of Georgia, Division No. 1  
March 3, 1920.)*(Syllabus by the Court.)***1. ADMISSIBILITY OF EVIDENCE.**

Under all the facts of the case the court did not err in excluding the documentary evidence offered by the plaintiff.

**2. SUFFICIENCY OF EVIDENCE.**

The evidence adduced by the plaintiff failed to prove as against any of the defendants any act of negligence as alleged in the petition as amended. The court therefor properly awarded a nonsuit.

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by John Thompson against Asa G. Candler, Incorporated, and others. A nonsuit was entered, and plaintiff brings error. Affirmed.

Mark Bolding and J. Caleb Clarke, both of Atlanta, for plaintiff in error.

Candler, Thomson & Hirsch and Roy Lewis, all of Atlanta, for defendants in error.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(25 Ga. App. 6)

RASKIN v. STATE. (No. 11142.)

(Court of Appeals of Georgia, Division No. 1.  
March 2, 1920.)*(Syllabus by the Court.)*

**CRIMINAL LAW** §1216(2)—SENTENCE TO CHAIN GANG FOR 18 MONTHS, 9 MONTHS FOR EACH OF TWO COUNTS, WAS SENTENCE AGGREGATING 18 MONTHS.

The question presented in this case is a construction of the following sentence, based upon a verdict of a jury finding the defendant guilty upon two counts in an accusation charging the defendant with the violation of the prohibition statute, to wit: "It is considered and ordered that the said defendant be for the space of 18 months (9 months on each count) put to work on the chain gang of Chatham county on the public road, or on such other public works as the county authorities, to wit, the commissioners and ex-officio judges of Chatham county, may employ the chain gang." It is contended by the plaintiff in error that under this sentence the 9 months would be served concurrently. We do not agree with this contention. We think the true construction is that the defendant was sentenced to 9 months on each count, aggregating 18 months. If the sentence had said nothing more than "9 months on each count," and had not provided how the sentence should be served, then of course the 9 months would have been served concurrently. The defendant having served a portion of his sentence, it was not error to require him to serve the remainder of the sentence. The judge of the superior court did not err in overruling the certiorari.

Error from Superior Court, Chatham County; P. W. Meldrim, Judge.

Abe Raskin was convicted of a violation of the prohibition statute, certiorari to the superior court was overruled, and he brings error. Affirmed.

Robt. L. Colding, of Savannah, for plaintiff in error.

Walter C. Hartridge, Sol. Gen. of Savannah, for the State.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(24 Ga. App. 815)

MAYNARD v. WIGHT. (No. 11119.)

(Court of Appeals of Georgia, Division No. 1.  
March 2, 1920.)*(Syllabus by the Court.)*

**APPEAL AND ERROR** §356 — WHERE BILL OF EXCEPTIONS IS NOT SERVED WITHIN TIME WRIT OF ERROR WILL BE DISMISSED.

A motion is made to dismiss the bill of exceptions in this case upon the ground that it was not served within the time required by

Civil Code 1910, § 6160. Inasmuch as the defendant in error preserved his right to dismiss upon the ground now urged in his acknowledgment of service, and the record showing (and by the record this court is bound) that service of the bill of exceptions was not had in the time required by law, the writ of error must be dismissed.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Proceedings between D. K. Maynard and Ed. L. Wight. Judgment for the latter, and the former brings error. Writ dismissed.

Albert Kemper and Thos. E. Scott, both of Atlanta, for plaintiff in error.

E. M. Habersham and W. I. Heyward, both of Atlanta, for defendant in error.

LUKE, J. Writ of error must be dismissed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(24 Ga. App. 807)

HART v. METROPOLITAN DISCOUNT CO.  
(No. 11084.)(Court of Appeals of Georgia, Division No. 1.  
March 2, 1920.)*(Syllabus by the Court.)*

1. **BILLS AND NOTES** §378, 517—ESTOPPEL §72—TESTIMONY OF MAKER THAT BLANKS IN DELIVERED INSTRUMENT WERE FILLED WITHOUT HIS KNOWLEDGE OR CONSENT WOULD NOT SUPPORT PLEA OF NON EST FACTUM OR CONSTITUTE DEFENSE AGAINST BONA FIDE TRANSFEREE; RULE AS BETWEEN INNOCENT PERSONS.

Testimony of one whose name appears as the maker of a negotiable instrument that he signed and delivered it without filling various blanks therein and with the understanding that the blanks would not be filled until he should thereafter consent to the completion of the instrument and its use, and that thereafter without his knowledge or consent the blanks were filled in, would not support a plea of non est factum, or constitute a valid defense against a bona fide transferee for value and before maturity.

(a) When one of two innocent persons must suffer by the act of a third person, he who puts it in the power of a third person to inflict the injury must bear the loss. See Hancock v. Empire Cotton Oil Co., 17 Ga. App. 170, 86 S. E. 434.

2. **BILLS AND NOTES** §369—TRANSFEREE OF NEGOTIABLE PAPER BEFORE MATURITY IS NOT AFFECTED BY AGREEMENT BETWEEN OTHER PARTIES THERETO UNLESS HE HAS ACTUAL NOTICE.

The transferee of a negotiable paper who receives it before it is due cannot be affected by any agreement or understanding between other parties to the paper, unless notice of such agreement or understanding is brought home to the transferee.

**3. TRIAL  $\S$ 143 — IMMATERIAL CONFLICTS IN TESTIMONY DO NOT RENDER DIRECTED VERDICT ERRONEOUS.**

The mere fact that there are conflicts in the testimony does not render the direction of a verdict in favor of a party erroneous, when it appears that the conflicts are immaterial, and that, giving to the opposite party the benefit of the most favorable view of the evidence as a whole and all legitimate inferences therefrom, the verdict against him is demanded. See *Dorris v. Farmers' & Merchants' Bank*, 22 Ga. App. 514, 96 S. E. 450, and cases cited.

**4. VERDICT DEMANDED BY EVIDENCE.**

The evidence in this case demanded the verdict directed.

Error from Superior Court, Marion County; G. H. Howard, Judge.

Action between J. A. Hart and the Metropolitan Discount Company. Judgment for the latter, and the former brings error. Affirmed.

T. B. Rainey and Geo. P. Munro, both of Buena Vista, for plaintiff in error.

John C. Butt, of Buena Vista, for defendant in error.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(25 Ga. App. 5)

FICKLEN et al. v. ELBERTON & E. R. CO. (No. 11122.)

(Court of Appeals of Georgia, Division No. 1. March 2, 1920.)

*(Syllabus by the Court.)*

**EMINENT DOMAIN  $\S$ 243(2) — IN ACTION FOR DAMAGES FROM CONSTRUCTION OF RAILROAD ACROSS LAND AND THE INCLOSURE OF CERTAIN CLAIMED WAYS OF ENTRANCE THERETO NONSUIT HELD PROPER, DAMAGES HAVING BEEN ASSESSED ON CONDEMNATION.**

The plaintiffs sued the defendant for damages, alleging that they had been damaged by reason of the construction of a railroad across their land and the inclosing of certain claimed ways of entrance thereto, etc. At the conclusion of the plaintiffs' evidence the court granted a nonsuit, and upon this judgment error is assigned. An examination of the evidence shows that the plaintiffs were inconvenienced by reason of the railroad embankment and the closing of a certain passageway, which, however, was not a private way or a public road as defined by law, and that there is a way to get across the railroad and reach the lands of the plaintiffs, though not as convenient as one would wish. But before the railroad was built condemnation proceedings were had, and the plaintiffs' damages were, by a verdict of a jury in the superior court upon an appeal from the return of the assessors in the condemna-

tion proceeding, assessed as to the very lands now giving rise to the claim for damages. We see no error in the judgment of the court in granting the nonsuit. See *Cox v. E. T. V. & G. Ry.*, 68 Ga. 446; Civil Code 1910, § 807.

Error from Superior Court, Wilkes County; B. F. Walker, Judge.

Action by F. H. Ficklen and others against the Elberton & Eastern Railroad Company. Judgment of nonsuit, and plaintiffs bring error. Affirmed.

Carroll D. Colley and Clement E. Sutton, both of Washington, Ga., for plaintiffs in error.

W. A. Slafon, of Washington, Ga., for defendant in error.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(25 Ga. App. 11)

GARDNER v. STATE. (No. 11172.)

(Court of Appeals of Georgia, Division No. 1. March 2, 1920.)

*(Syllabus by the Court.)*

**1. SUFFICIENCY OF INSTRUCTIONS.**

When read in connection with the entire charge, there is no error in either of the excerpts therefrom of which complaint is made in the motion for new trial.

**2. CRIMINAL LAW  $\S$ 805(1)—EXCEPTION TO CORRECT CHARGE FOR FAILURE TO GIVE OTHER LEGAL PROPOSITIONS NOT GOOD.**

Under the facts of this case, the court did not err in failing to give in charge to the jury section 75 of the Penal Code of 1910. Besides this ground of the motion complains that the judge, after charging a certain proposition of law of which no complaint is made, erred in not giving in connection therewith other specified legal propositions. This court and the Supreme Court have held that an exception to a correct charge because of the failure to give in the same connection some other pertinent legal proposition is not a good assignment of error. *Conley v. State*, 21 Ga. App. 134, 94 S. E. 261 (1), and cases cited.

**3. REQUESTED INSTRUCTIONS.**

The court did not err in refusing to give in charge to the jury the request embodied in the fourth ground of the motion for new trial.

**4. CRIMINAL LAW  $\S$ 938(1)—CUMULATIVE EVIDENCE NO GROUND FOR NEW TRIAL WHERE DIFFERENT RESULT NOT PROBABLE.**

The alleged newly discovered evidence in this case is cumulative, and would probably not produce a different result on another trial. It consists of a threat made by deceased against the defendant. On the trial the defendant introduced evidence of such a threat; so it appears that a new witness was discovered in-

stead of new evidence. It is simply more evidence of the same kind to the same point. Pen. Code 1910, § 1088; *Brinson v. Faircloth*, 82 Ga. 185 (1), 187 (1), 7 S. E. 923; *Burgess v. State*, 93 Ga. 304, 20 S. E. 331; *Hanye v. Candler*, 99 Ga. 214, 25 S. E. 606; *Jinks v. State*, 117 Ga. 716, 44 S. E. 814.

#### 5. SUFFICIENCY OF EVIDENCE.

There is ample evidence to support the verdict.

Error from Superior Court, Marion County; G. H. Howard, Judge.

Proceedings between Pink Gardner and the State. Judgment adverse to Gardner was rendered, and he brings error. Affirmed.

W. D. Crawford, of Buena Vista, for plaintiff in error.

C. F. McLaughlin, Sol. Gen., of Columbus, for the State.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(25 Ga. App. 12)

HENDRIX et al. v. STATE. (No. 11198.)

(Court of Appeals of Georgia, Division No. 1, March 2, 1920.)

(Syllabus by the Court.)

CRIMINAL LAW § 824(1)—HOMICIDE § 305—INSTRUCTIONS AS TO ISSUES NECESSARY ALTHOUGH NOT REQUESTED; WHERE EVIDENCE SHOWED CONSPIRACY TO KILL, A FAILURE TO CHARGE AS TO RESPONSIBILITY OF DEFENDANTS IF THERE WAS NO CONSPIRACY WAS ERROR.

Father and son were jointly indicted for murder and tried together. The evidence shows that each of them shot at deceased, that several shots were fired, and the wounds, as well as the bullets taken from the body, disclosed that pistols of different caliber were used. The evidence fails to point out which wound or wounds caused the death of deceased. It is the duty of the judge in charging the jury, even without being requested to do so, to cover every material issue in the case. The defendants insisted that there was no conspiracy between them to do any unlawful act of violence to the deceased, but that he made an assault on the father, shooting him, and that the father shot in self-defense, and the son in defense of his father, each acting independently. The plaintiffs in error insist that the court ignored their theory that the defendants were acting independently, and that "in the absence of a conspiracy or concert of action on the part of both defendants, or of the procurement one by the other, each was responsible only for the wounds inflicted by himself and would not be legally responsible for the wounds inflicted by the other, so that, if under such circumstances one shot and killed the decedent, the jury would not be authorized to find both guilty." As there is evidence which would authorize a charge of conspiracy, the

judge should have charged thereon, and it was error, demanding the grant of a new trial, for the court to fail to charge that, if the evidence showed no conspiracy or concert of action, then each of the defendants would be responsible for the wounds inflicted by himself only, and, if the evidence showed that only one of them killed the deceased, then one alone would be guilty.

When the above principles are applied in the trial of this case, the errors in the charge complained of will be cured. As a new trial is to be had, it is not necessary to pass upon the other alleged errors, as they will not likely reappear in another trial.

Error from Superior Court, Rockdale County; John B. Hutcheson, Judge.

Milburn Hendrix and another were jointly indicted for murder, and from the judgment they bring error. Reversed.

O. R. Vaughn, of Conyers, and King & Johnson, of Covington, for plaintiffs in error.

Geo. M. Napier, Sol. Gen., of Decatur, for the State.

BLOODWORTH, J. Judgment reversed.

BROYLES, C. J., and LUKE, J., concur.

(24 Ga. App. 805)

BRACEY v. STATE. (No. 11065.)

(Court of Appeals of Georgia, Division No. 1, March 2, 1920.)

(Syllabus by the Court.)

1. CRIMINAL LAW § 824(9)—FAILURE TO INSTRUCT AS TO CIRCUMSTANTIAL EVIDENCE NOT ERROR IN ABSENCE OF REQUEST.

The conviction of the defendant in this case not depending solely upon circumstantial evidence, the court did not err in failing to charge the jury the law of circumstantial evidence; there being no request for such a charge.

2. SUFFICIENCY OF EVIDENCE.

There was no error in the charge of the court excepted to, and the evidence as shown by the answer to the petition for certiorari authorized the conviction of the defendant. For no reason assigned was it error to overrule the certiorari.

Error from Superior Court, Morgan County; J. B. Park, Judge.

Major Bracey was convicted of an offense, and he brings error. Affirmed.

M. O. Few, of Madison, for plaintiff in error.

Doyle Campbell, Sol. Gen., of Monticello, and A. G. Foster, Sol., of Madison, for the State.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(25 Ga. App. 33)

**LOYD v. STATE.** (No. 11290.)(Court of Appeals of Georgia, Division No. 1.  
March 3, 1920.)*(Syllabus by the Court.)*

1. CRIMINAL LAW §1150—WHERE EVIDENCE IS CONFLICTING DISCRETION OF TRIAL JUDGE IN OVERRULING A MOTION FOR A CHANGE OF VENUE WILL NOT BE CONTROLLED UNLESS ABUSED.

It has been repeatedly held by this court and the Supreme Court that where the evidence is conflicting upon the hearing of a motion to change the venue in a criminal case, the discretion of the trial judge in overruling the motion will not be controlled, unless it is made to appear that there has been an abuse of his discretion. In this case no abuse of the court's discretion is manifest.

2. CONSTITUTIONAL QUESTION NOT PROPERLY RAISED.

No constitutional question is properly raised by the fifth ground of the motion to change the venue.

Error from Superior Court, Bleckley County; E. D. Graham, Judge.

Proceeding by the State against Tom Loyd, in which a motion for the change of venue was overruled, and Loyd brings error. Affirmed.

John R. Cooper, of Macon, and O. A. Weddington, of Cochran, for plaintiff in error.

W. A. Wooten, Sol. Gen., of Eastman, for the State.

LUKE, J. Judgment affirmed.

BROYLES, O. J., and BLOODWORTH, J., concur.

(26 Ga. App. 18)

**ROBERSON v. STATE.** (No. 11075.)(Court of Appeals of Georgia, Division No. 1.  
March 3, 1920.)*(Syllabus by the Court.)*

CRIMINAL LAW §511(2), 935(1)—CORROBORATION OF ACCOMPLICE TESTIMONY MUST DIRECTLY CONNECT DEFENDANT WITH THE CRIME OR LEAD TO THE INFERENCE OF HIS GUILT.

"To sustain a conviction upon the testimony of an accomplice, there must be corroborating circumstances which, in themselves and independently of the testimony of the accomplice, directly connect the defendant with the crime, or lead to the inference that he is guilty." The evidence in this case, which was given by an accomplice is without corroboration directly connecting the defendant with the crime or leading to the inference that he is guilty. See *Stokes v. State*, 19 Ga. App. 235, 91 S. E. 271, and cases cited. There being no other evidence

of guilt, it was error to overrule the motion for a new trial.

Error from Superior Court, Fulton County; John D. Humphries, Judge.

Rufus Roberson was convicted of an offense, his motion for a new trial was denied, and he brings error. Reversed.

Albert Kemper, of Atlanta, for plaintiff in error.

John A. Boykin, Sol. Gen., and E. A. Stephens, both of Atlanta, for the State.

LUKE, J. Judgment reversed.

BROYLES, O. J., and BLOODWORTH, J., concur.

(24 Ga. App. 776)

**DAVIS v. STATE.** (No. 10480.)(Court of Appeals of Georgia, Division No. 1.  
Feb. 24, 1920.)*(Syllabus by the Court.)*

1. CRIMINAL LAW §956(8)—WHERE NEWLY DISCOVERED EVIDENCE AS TO RELATIONSHIP OF JUROR TO PROSECUTOR IS THAT OF WITNESSES, STATUTE AS TO SUPPORTING AFFIDAVITS DOES NOT APPLY; ON HEARING OF MOTION FOR NEW TRIAL, JUDGE MAY REQUIRE AFFIDAVITS AS TO CREDIBILITY OF AFFIANTS.

In a criminal case where a ground of the defendant's motion for a new trial is that one of the jurors was related within the prohibited degree to the prosecutor in the case, and the newly discovered evidence as to the alleged relationship is that of witnesses, the provisions of section 6086 of the Civil Code of 1910, as to supporting affidavits, do not apply. However, independently of that section, the trial judge, upon the hearing of such a motion, has the authority, in his discretion, to require the production of affidavits as to the residence, associates, means of knowledge, character, and credibility, of the affiants who depose as to the relationship of the juror to the prosecutor.

2. CRIMINAL LAW §956(10) — FACTS NOT SHOWING RELATIONSHIP OF A JUROR TO PROSECUTOR SO CLEARLY THAT DENIAL OF NEW TRIAL WAS ERROR.

In such a case as is above referred to, where the affidavits of the witnesses relied on to sustain the allegations as to the relationship do not meet any of the requirements of section 5764 of the Civil Code of 1910, and it is not shown that the affiants were related by blood or marriage to the persons in question, or that they were testifying from any personal knowledge, or from what source they obtained their information, this court cannot hold, as a matter of law, that the alleged relationship was so clearly established that the trial judge erred in overruling the ground of the motion for a new trial based upon the alleged relationship.

## 3. REFUSAL OF NEW TRIAL.

The verdict was authorized by the evidence, and the court did not err in refusing to grant a new trial.

Error from Superior Court, Warren County; B. F. Walker, Judge.

Proceeding by the State against J. V. Davis, and from the judgment and the denial of his motion for a new trial Davis brings error. Affirmed.

L. D. McGregor, of Warrenton, for plaintiff in error.

R. C. Norman, Sol. Gen., of Washington, Ga., and M. L. Felts, of Warrenton, for the State.

BROYLES, C. J. The first two headnotes above are, in substance, the rulings of the Supreme Court in answer to questions certified by this court. For elaboration thereof, see the full opinion rendered by the Supreme Court in this case on February 14, 1920 (102 S. E. 445).

Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(24 Ga. App. 799)

HODGES et al. v. THOMPSON et al.  
(No. 10947.)

(Court of Appeals of Georgia, Division No. 1.  
March 2, 1920.)

(Syllabus by the Court.)

1. APPEAL AND ERROR  $\S$ 216(7), 230—EXCEPTION TO REFUSAL OF REQUESTED CHARGE WILL NOT BE CONSIDERED UNLESS IT WAS IN WRITING AND TENDERED BEFORE JURY RETIRED.

The only special ground of the motion for a new trial complains of the refusal of the court to give to the jury a certain requested charge. "In order that this court may consider an exception to the judge's refusal to give a request to charge, it must appear not only that it was in writing, but also that it was tendered to the court before the jury retired 'to consider their verdict.'" Shirley v. State, 5 Ga. App. 611, 63 S. E. 583 (2); Pen. Code 1910, § 1087. It does not so appear in this ground.

2. APPEAL AND ERROR  $\S$ 1005(2)—VERDICT SUPPORTED BY EVIDENCE AND APPROVED BY TRIAL JUDGE WILL NOT BE DISTURBED WHERE NO ERROR OF LAW APPEARS.

No error of law appearing, this court will not disturb a verdict where there is evidence to support it, as there is in this case, and where it is approved by the trial judge.

Error from City Court of Monroe; A. O. Stone, Judge.

Action between D. Y. Hodges and others and John Thompson and others. Judgment

for the latter, and the former bring error. Affirmed.

R. L. & H. O. Cox, of Monroe, for plaintiffs in error.

E. W. Roberts, of Monroe, for defendants in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(25 Ga. App. 24)

LONG v. HARTFORD FIRE INS. CO.  
(No. 11109.)

(Court of Appeals of Georgia, Division No. 1.  
March 8, 1920.)

(Syllabus by the Court.)

1. GROUNDS FOR NEW TRIAL.

There is no substantial merit in any of the special grounds of the motion for a new trial.

2. DIRECTION OF VERDICT.

Under the rulings in Athens Mutual Insurance Co. v. Evans, 132 Ga. 708, 64 S. E. 998, the evidence in the instant case demanded a verdict in favor of the insurance company, and the court did not err in so directing. See, also, in this connection, Lippman v. Aetna Insurance Co., 108 Ga. 391, 33 S. E. 897, 75 Am. St. Rep. 62; McAfee v. Dixie Fire Insurance Co., 18 Ga. App. 192, 89 S. E. 181.

Error from Superior Court, Liberty County; W. W. Sheppard, Judge.

Proceedings between J. C. Long and the Hartford Fire Insurance Company. Judgment for the latter, and the former brings error. Affirmed.

Oliver & Oliver, of Savannah, for plaintiff in error.

Seabrook & Kennedy, of Savannah, and King & Spalding, of Atlanta, for defendant in error.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(25 Ga. A.

ATLANTIC COAST LINE R. CO. v. GRANTHAM. (No. 11106.)

(Court of Appeals of Georgia, Division No. 1.  
March 4, 1920.)

(Syllabus by the Court.)

- APPEAL AND ERROR  $\S$ 977(4)—GRANT OF FIRST NEW TRIAL WHERE VERDICT WAS NOT DEMANDED WILL NOT BE DISTURBED.

This is the first grant of a new trial to the plaintiff in error, and the verdict not being demanded, under the unbroken precedent of the

Supreme Court and of this court, the judgment granting the new trial cannot be disturbed. See *Central of Georgia Ry. Co. v. Macon Ry. & Light Co.*, 20 Ga. App. 548, 93 S. E. 170, and citations.

Error from Superior Court, Chatham County; P. W. Meldrim, Judge.

Action between the Atlantic Coast Line Railroad Company and J. T. Grantham. From the first grant of a new trial after verdict, the Atlantic Coast Line Railroad Company brings error. Affirmed.

Osborne, Lawrence & Abrahams and F. R. Youngblood, all of Savannah, for plaintiff in error.

H. P. Cobb, of Savannah, for defendant in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(25 Ga. App. 14)

**FRIEDMAN v. ICE DELIVERY CO.**  
(No. 10929.)

(Court of Appeals of Georgia, Division No. 1.  
March 8, 1920.)

*(Syllabus by the Court.)*

#### 1. SUFFICIENCY OF DEMURRER TO ANSWER.

The court properly overruled the first and third grounds of the plaintiff's demurrer to the defendant's answer. If the court erred in overruling the other grounds of the demurrer, the error was rendered harmless by the subsequent ruling of the court, and the specific amount of the verdict returned, by direction of the court, in favor of the defendant. See, in this connection, *Central of Georgia Ry. Co. v. Butler Marble & Granite Co.*, 8 Ga. App. 1 (6), 8 (6), 68 S. E. 775.

#### 2. MOTION FOR NEW TRIAL.

Under the pleadings and the evidence, the special grounds of the motion for a new trial are without substantial merit.

#### 3. VALIDITY OF CONTRACTS.

In this case there was no material issue of fact to be submitted to the jury, but the controlling question was one of law, to wit, the construction of the contract, the breach of which by the plaintiff formed the basis of the defendant's counterclaim for damages. Under all the particular facts of the case, the court did not err in holding that the contract was valid and enforceable, or in directing a verdict in favor of the defendant for the specific amount stated therein.

Error from Superior Court, Chatham County; P. W. Meldrim, Judge.

Proceedings between Sam Friedman and the Ice Delivery Company. Judgment for the latter, and the former brings error. Affirmed.

Osborne, Lawrence & Abrahams, of Savannah, for plaintiff in error.

Oliver & Oliver and Saussy & Saussy, all of Savannah, for defendant in error.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(25 Ga. App. 19)

**GRIFFIN et al. v. HINES**, Director General.  
(No. 11087.)

(Court of Appeals of Georgia, Division No. 1.  
March 8, 1920.)

*(Syllabus by the Court.)*

**RAILROADS** ~~§~~446(3)—**REBUTTAL OF PRESUMPTION OF NEGLIGENT KILLING OF STOCK QUESTION FOR JURY.**

In this case the evidence of the railroad employes (the engineer and fireman of the train that struck and killed the plaintiff's mule), which showed that they exercised all ordinary and reasonable care and diligence to avoid injuring the mule, was contradicted in several material respects by evidence introduced by the plaintiff. It was therefore a question for the jury to decide whether the presumption of negligence against the defendant, which arose when it was shown that the animal had been killed by the running of one of the defendant's trains, was rebutted by the evidence adduced, and the court erred in directing a verdict for the defendant.

Error from City Court of Americus; W. M. Harper, Judge.

Action by F. W. Griffin and others against W. D. Hines, Director General. Directed verdict for defendant, and plaintiffs bring error. Reversed.

Wallis & Fort, of Americus, for plaintiffs in error.

Yeomans & Wilkinson, of Dawson, and R. T. Hawkins, of Americus, for defendant in error.

BROYLES, C. J. Judgment reversed.

LUKE and BLOODWORTH, JJ., concur.

For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes



(25 Ga. App. 33)

**STANFORD v. STATE.** (No. 11186.)(Court of Appeals of Georgia, Division No. 1.  
March 8, 1920.)*(Syllabus by the Court.)***1. SUFFICIENCY OF INSTRUCTIONS.**

The excerpts from the charge of the court, complained of, when considered in the light of the entire charge, and of the facts of the case, contain no reversible error.

**2. CRIMINAL LAW §1069(2)—GENERAL EXCEPTION TO ENTIRE CHARGE TOO BROAD UNLESS WHOLE CHARGE ERRONEOUS.**

Under repeated rulings of the Supreme Court and of this court, a general exception to the entire charge of the court is too broad to be considered, unless the whole charge was erroneous.

**3. SUFFICIENCY OF EVIDENCE.**

The verdict was amply authorized by the evidence, and the court did not err in overruling the motion for a new trial.

Error from Superior Court, Warren County; B. F. Walker, Judge.

Proceedings between Carter Stanford and the State. A decision adverse to Stanford was rendered, and he brings error. Affirmed.

M. L. Felts, of Warrenton, for plaintiff in error.

R. C. Norman, Sol. Gen., of Washington, Ga., for the State.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(25 Ga. App. 16)

**RUSSELL v. CITY OF COLUMBUS.**  
(No. 10903.)(Court of Appeals of Georgia, Division No. 1.  
March 8, 1920.)*(Syllabus by the Court.)*

**CERTIORARI §42(1)—PROPERLY OVERRULED WHERE NO CERTIFIED COPY OF BOND IS ATTACHED TO PETITION AND PETITION DOES NOT ENABLE DECISION AS TO WHETHER A PROPER BOND WAS GIVEN.**

In this case no certified copy of the bond is attached to the petition for certiorari, nor does the petition set forth the essential facts that would enable the superior court judge to decide whether a proper bond was given, and therefore the case falls squarely within the rule laid down in *Gillespie v. Macon*, 19 Ga. App. 1, 90 S. E. 970, and authorities cited. The judge of the superior court did not err in overruling the certiorari.

Error from Superior Court, Muscogee County; G. H. Howard, Judge.

Action between E. A. Russell and the City of Columbus. Judgment from the latter, certiorari overruled and the former brings error. Affirmed.

S. M. Davis, of Columbus, for plaintiff in error.

H. C. McCutchen, of Columbus, for defendant in error.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(25 Ga. App. 31)

**PITTS v. STATE.** (No. 11174.)(Court of Appeals of Georgia, Division No. 1.  
March 3, 1920.)*(Syllabus by the Court.)*

**CRIMINAL LAW §1160—VERDICT SUPPORTED BY EVIDENCE AND APPROVED BY TRIAL JUDGE WILL NOT BE DISTURBED.**

The evidence in this case was sufficient to authorize the conviction of the accused, and, the verdict having been approved by the trial judge, this court will not interfere.

Error from Superior Court, Floyd County; Moses Wright, Judge.

Tony Pitts was prosecuted for an offense, and from the judgment he brings error. Affirmed.

W. B. Mebane, of Rome, for plaintiff in error.

C. H. Porter, Sol. Gen., of Rome, for the State.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(25 Ga. App. 17)

**BROYLES v. STATE.** (No. 11060.)(Court of Appeals of Georgia, Division No. 1.  
March 8, 1920.)*(Syllabus by the Court.)***1. CHARGE OF COURT.**

The charge of the court in this case was full and fair, and when the excerpts complained of are read in connection with the remainder of the charge and in the light of all the facts of the case, they contain no error that would require the grant of a new trial.

**2. CRIMINAL LAW §829(1)—REFUSAL OF REQUESTED CHARGE NOT ERROR WHERE COVERED BY CHARGE GIVEN.**

As far as pertinent and legal, each request to charge was sufficiently covered by the charge given.

**3. SUFFICIENCY OF EVIDENCE.**

Ground 1 of the amendment to the motion for a new trial is but an amplification of the general grounds; the evidence authorized the verdict; the judge approved it; and the judgment is affirmed.

Luke, J., dissenting.

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

Cella Broyles was prosecuted for an offense, her motion for a new trial after verdict was denied, and she brings error. Affirmed.

J. F. Urquhart and W. A. McClellan, both of Macon, for plaintiff in error.

John P. Ross and Chas. H. Garrett, Sol. Gens., both of Macon, for the State.

**BLOODWORTH, J.** Affirmed.

**BROYLES, C. J.,** concurs.

**LUKE, J.** (dissenting). I cannot concur with my colleagues in the holding that the charge in this case was fair. The court instructed the jury, among other things, that they would be authorized to find her (defendant) guilty of murder, unless they believed "upon her other defense she was justified in believing that it was necessary to kill her (deceased), if she did kill her, in order to prevent adulterous intercourse or the resumption of adulterous relation about to be resumed, and that it was necessary, and that the danger of such adulterous conduct between her husband and the deceased was imminent at the time." It will be seen from this excerpt that the judge so qualified and limited his instruction as to make the justification of the accused for the alleged homicide depend upon whether or not "the danger of such adulterous conduct between her husband and the deceased was imminent at the time." This, in my opinion, was reversible error. In fact, this court so held in the case of *Miller v. State*, 9 Ga. App. 599, 71 S. E. 1021, wherein it is said:

"While a father cannot lawfully kill one merely because he has had unlawful sexual intercourse with his daughter, still he may justify the homicide by showing that it was necessary in order to prevent further acts of fornication. In a prosecution for homicide, where there is evidence such as to authorize the jury to find that the deceased had been maintaining illicit sexual relations with the defendant's minor unmarried daughter, and had threatened to kill the father if he interfered, and that even after the father had become apprised of what had taken place, and was taking guard to prevent the further debauching of his child, the defendant, in company with the daughter, came upon the deceased under such circumstances as to indicate that he was endeavoring to continue the illicit relationship, and would likely seek to do so notwithstanding the father's protest, an instruction of the court to the jury in the follow-

ing language was erroneous: 'The killing, if necessary, or apparently so to a reasonable mind, in order to protect the daughter at the time of the killing, would be justifiable. The killing must be necessary, or apparently so, to prevent the deceased from accomplishing his purpose then and there.' The qualification contained in the words 'then and there' rendered the instruction erroneous."

(25 Ga. App. 15)

**McELVEEN v. HANDSHAW.** (No. 10970.)

(Court of Appeals of Georgia, Division No. 1. March 3, 1920.)

(Syllabus by the Court.)

**SUFFICIENCY OF EVIDENCE.**

The evidence in this case, a trover suit, demanded a verdict in favor of the plaintiff as to title, and it was not error for the court so to instruct the jury. The only remaining issue was as to the proved value of the property sued for. The charge of the court upon this question was appropriate and full. The evidence authorized the verdict for the plaintiff, and, the judge of the superior court having approved that finding, it was proper to overrule the motion for a new trial.

Error from Superior Court, Bulloch County; R. N. Hardeman, Judge.

Proceedings between Aaron McElveen and H. D. Handshaw. Judgment for the latter, and the former brings error. Affirmed.

Fred T. Lanier, of Statesboro, for plaintiff in error.

Francis Hunter, of Statesboro, for defendant in error.

**LUKE, J.** Judgment affirmed.

**BROYLES, C. J.,** and **BLOODWORTH, J.,** concur.

(25 Ga. App. 25)

**MONK v. JACKSON.** (No. 11112.)

(Court of Appeals of Georgia, Division No. 1. March 3, 1920.)

(Syllabus by the Court.)

**1. REPLEVIN §—58—PETITION SHOWING TITLE IN ANOTHER AND NOT SHOWING RIGHT OF POSSESSION IN PLAINTIFF WAS DEFECTIVE.**

The petition in trover, when legally construed, and as admitted by counsel for the plaintiff in error, was brought by the plaintiff in his own name, and yet it showed the title to the property sued for in another person, and failed to show any right of possession in the plaintiff. The petition was therefore fatally defective, and the court did not err in dismissing it on an oral motion by the defendant.

**2. APPEAL AND ERROR ¶863—WHERE PETITION WAS DISMISSED FOR DEFECTS THEREIN APPELLATE COURT COULD NOT REVIEW EVIDENCE INTRODUCED BEFORE THE DISMISSAL.**

Although the bill of exceptions shows that before the motion to dismiss was made the plaintiff introduced testimony tending to show a right of possession in him, and, further, that he had a special property right in the property sued for, the bill of exceptions and the record clearly show that no nonsuit was granted, but that the motion to dismiss the petition was made "on account of fatal defects therein," and that this motion was granted and the petition dismissed. It follows that this court cannot consider the evidence introduced.

Error from City Court of Tifton; Jas. H. Price, Judge.

Trover by S. S. Monk, agent, against D. E. Jackson. Petition dismissed on defendant's oral motion, and plaintiff brings error. Affirmed.

Ridgill & Mitchell, of Tifton, for plaintiff in error.

Fulwood & Hargrett, of Tifton, for defendant in error.

BROYLES, O. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(25 Ga. App. 1)

**STRICKLAND v. STATE. (No. 11185.)**

(Court of Appeals of Georgia, Division No. 1.  
March 2, 1920.)

*(Syllabus by the Court.)*

**1. INTOXICATING LIQUORS ¶236(19)—COPPER STILL AND WORM WITHOUT CAP IS "APPARATUS" WITHIN STATUTE.**

Error is assigned upon the following charge of the court: "If you believe beyond a reasonable doubt that this defendant did have in his possession a copper still and worm, and that was an apparatus—have in his possession on his premises, as charged in the indictment, and that was an apparatus for the distilling and manufacturing of liquor, intoxicating liquor or beverages, why he would be guilty under the law, even though that wasn't a complete outfit for the manufacture of liquor. If he had a still and worm, and that was a part of an apparatus used for the manufacture of liquor, as I have already charged you, and as set out in the indictment—and that still and worm—they were an apparatus used for the distilling or manufacturing of intoxicating liquor, why he would be guilty under the law, even though he didn't have the cap, if he didn't have a cap, as insisted on the part of the defense, which would be necessary, as they contend, for the making of a complete apparatus for the manufacturing of liquor. As I have charged you, if he had a part of an apparatus for the distilling or manufacturing of intoxicating liquors—if he had it as

charged in the indictment and as I have already explained, under the rules given you, why he would be guilty under the law, even though he didn't have a complete apparatus necessary for the manufacture of liquor." Movant contends, in substance, that this charge was erroneous and prejudicial to the defendant, because the term "apparatus," as used in the act under which defendant was indicted, means a "complete apparatus," and all the apparatus necessary for the making of whisky; and cites as authority for this contention the case of Davis v. State, 100 S. E. 782. That case is not in point. In that case the indictment charged possession of an apparatus "consisting of a complete still," and, having charged that the apparatus constituted a complete still, the state was required to prove the allegation. See South. Express Co. v. State, 23 Ga. App. 71, 97 S. E. 550 (2), and cases cited. In the instant case the indictment described the apparatus as "a certain apparatus for the distilling and manufacturing of intoxicating liquors," and the state proved that the apparatus found on the defendant's premises was for use in the manufacture and distilling of intoxicating liquors. The indictment did not charge that all the apparatus for the manufacturing of liquor was there, nor did it charge that the defendant was in possession of a "complete still," as did the indictment in the Davis Case. We interpret the word "apparatus," as used in this act, to mean any apparatus used to make intoxicating liquors. If it were necessary for the state to prove that the apparatus was complete in every detail, it would defeat the real purpose and intent of this law; for the distiller could make liquor to his heart's content, then take off a cap, or some small but essential part of the apparatus, until he was ready to resume his work, and if the officers found the still in the meantime he could easily evade the law by proving that the apparatus was not all there. We see no error in the charge as complained of above. See Williams v. State, 61 Ga. 417, 418, 34 Am. Rep. 102. This disposes of the first, second and third grounds of the amendment to the motion for a new trial, which were argued together in the brief of counsel for the plaintiff in error.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Apparatus.]

**2. CRIMINAL LAW ¶829(1)—REFUSAL TO CHARGE IS NOT ERROR WHERE SUBSTANTIALLY COVERED.**

There is no merit in the fourth ground of the amendment to the motion; the judge having substantially covered in his charge the charge requested.

**3. INSUFFICIENCY OF EVIDENCE.**

The evidence amply supports the verdict, which has the approval of the trial judge, no error of law appears, and the judgment is affirmed.

Error from Superior Court, Cobb County; N. A. Morris, Judge.

Perry Strickland was convicted of possessing and having on his premises apparatus for the distilling and manufacturing of intoxi-

cating liquors, his motion for a new trial was overruled, and he brings error. Affirmed.

The indictment charged that the defendant did "knowingly have in his possession \* \* \* a certain apparatus for the distilling and manufacturing of intoxicating liquors and beverages." Upon the trial of the case the sheriff testified:

"I received information that Perry Strickland was running a still, and I went to his home in Cobb county along about the first of the year. \* \* \* I searched the home of the defendant and I found a still in the bedroom. In the basement I found 25 or 30 gallons of beer and 3 pecks, something like 3 pecks, of meal. It was a copper still. There was a pot and worm. The pot that they boil in was sitting behind the bed in the bedroom, and the worm was on the bed under the cover. I never measured the still, but it would hold, I guess, 20 or 25 gallons. What I found was an apparatus used for the manufacture and distilling of intoxicating liquors.

"Cross-examination: To constitute a complete still it takes what is called a pot or body part of a still to boil in, that is, what they do the boiling in is the pot; then it takes a cap, which is the top that goes over the boiler; then it takes a worm that leads through a condenser. There wasn't any cap there; I couldn't say it was a complete outfit. I stated what I found there; a man has to have a cap to make liquor. The apparatus found there was only a boiler and worm. I didn't find any cap. The meal I found was sprouted corn. Wasn't any sign that the still was running. Perry told me that he found this apparatus in the cane brake on the creek.

"Examination by court: The material I found is used for making whisky. I found 25 or 30 gallons of beer in a 50-gallon barrel. It was half full; possibly a little over. The beer is used for making whisky—intoxicating whisky.

"Cross: You would have to have a cap to make liquor with the apparatus I found in Perry's place, and I didn't find a cap there; therefore you couldn't make intoxicating liquors with that apparatus.

"Redirect: In the basement there was a place fixed for the smoke to go from down in the basement up into the chimney of the kitchen, but there wasn't any furnace built—there was a place for the smoke to go from the basement. I examined the branch and the land around where the house was located, but I don't think I found anything. There is a branch on this place, but not right near the house. There are three rooms and a hall, and I went into all the rooms, but I did not find the cap.

"Cross: I stated a while ago that this still had a boiler and worm but no cap. I don't think you could make liquor with [without] a

cap. Perry couldn't have manufactured or distilled any intoxicating liquor or beverages on the outfit I found without a cap, and the cap wasn't there. What I found was just part of an apparatus to distill, manufacture, and make liquor. It takes a cap to make a complete outfit, and I found no cap there.

"Direct: The apparatus I found there was used for making whisky. It wasn't a complete outfit, on account of the absence of the cap. The cap is the part that fits over the top of the boiler, and a long spout runs out and goes into the worm. The boiler and worm were both copper and [in] the apparatus I found."

The defendant introduced no evidence, and in his statement denied his guilt, and contended that he found the apparatus in a cane brake while hunting, and did not know what it was. The jury returned a verdict of guilty. The defendant made a motion for new trial, which was overruled by the court, and the defendant excepted.

C. M. Dobbs and Clay & Giles, all of Marietta, for plaintiff in error.

Jno. T. Dorsey, Sol. Gen., of Marietta, and Wm. Butt, of Blue Ridge, for the State.

BLOODWORTH, J. Affirmed.

BROYLES, C. J., and LUKE, J., concur.

(25 Ga. App. 33)

GREEN v. STATE. (No. 11205.)

(Court of Appeals of Georgia, Division No. 1.  
March 3, 1920.)

(Syllabus by the Court.)

#### SUFFICIENCY OF EVIDENCE.

The evidence authorized the defendant's conviction under both counts of the indictment, and the court did not err in refusing to grant a new trial.

Error from City Court of Macon; Du Pont Guerry, Judge.

Will Green was convicted of an offense, and he brings error. Affirmed.

Olin J. Wimberly and Gillon & Churchwell, all of Macon, for plaintiff in error.

Will Gunn, Sol., of Macon, for the State.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(179 N. C. 328)

(102 S.E.)

UNION TRUST CO. v. McKINNE. (No. 263.)

(Supreme Court of North Carolina. March 17, 1920.)

**1. ABATEMENT AND REVIVAL §8(8)—ACTION ON SEPARATE GUARANTY OF NOTE BY SURETY IS NOT BARRED BY A PENDING ACTION TO AVOID LIABILITY OF SURETY.**

Where one of three makers of a note, who was surety for the other two, gave payee a separate guaranty of payment for not joining him in the suit against other makers, an action by the payee on the guaranty may be maintained notwithstanding a prior action by the surety against the payee to cancel his obligation as surety, since payee was not obligated to counterclaim on the guaranty in the prior action.

**2. SET-OFF AND COUNTERCLAIM §60—DEFENDANT FAILING TO SET UP COUNTERCLAIM MAY BRING INDEPENDENT ACTION.**

The defendant in an action is not obliged to set up his counterclaim, but may omit to do so, and thereafter bring another and independent action thereon.

Appeal from Superior Court, Wake County; Guion, Judge.

Action by the Union Trust Company against D. F. McKinne. On appeal from the city court, the superior court rendered judgment for plaintiff, and defendant appeals. Affirmed.

Civil action commenced in the city court of the city of Raleigh and carried by appeal to the superior court of Wake county and tried upon these issues:

"(1) Was the judgment obtained against J. B. Yarborough and J. A. Turner paid within ten days upon its rendition? Answer: No.

"(2) If not, in what amount is the defendant indebted to the plaintiff? Answer: \$413.80, interest from March 1, 1915, on \$400."

Appeal to Supreme Court by defendant.

Wm. H. & Thos. W. Ruffin, of Lounsburg, for appellant.

Willis Smith, of Raleigh, for appellee.

**BROWN, J.** The only assignment of error relates to the denial of the motion to remove the cause to the county of Franklin or dismiss the same because of another action between the same parties pending in the superior court of Franklin county and commenced shortly prior to the present action. The motion was denied, and the defendant excepted.

It appears in the complaint in this case that J. B. Yarborough, J. A. Turner, and D. F. McKinne executed two notes for \$200 each to the Union Trust Company; that the defendant was surety; that the notes were not paid at maturity, and that suit was commenced and judgment obtained against Yarborough and Turner; that the defendant Mc-

Kinne was not included in the suit and no judgment obtained against him at his request. Whereupon McKinne executed the following paper writing:

"The Union Trust Company, of Raleigh, N. C., having agreed at my request to refrain from joining me as a party defendant in the suit about to be brought by said company against J. B. Yarborough and J. A. Turner on two notes to which I am also a party, I hereby, in consideration of the Union Trust Company forbearing to sue me on said notes, guarantee the payment of the said notes in the event that the Union Trust Company secures a judgment against J. B. Yarborough and J. A. Turner, and said judgment is not paid within ten days from its rendition thereof."

It is to recover on this paper writing that this action was brought.

[1] Shortly prior to the commencement of this action McKinne commenced an action against the Union Trust Company in the county of Franklin in which he asked that he be declared to be discharged by reason of his liability on said note by indorsement thereon. He alleges that he is discharged from liability on the notes because the Union Trust Company received from J. A. Turner money for indulgence on said debt sufficient to have discharged the said debt and interest, and that he (McKinne) was informed by the makers of said note that the same had been paid in full. McKinne alleges also that he is discharged by reason of unwarranted extension of the time of payment of said notes without his consent. It is contended by the learned counsel for the defendant that the pendency of the action in Franklin bars a recovery in this action, relying upon our recent opinion in *Allen v. Salley*, 101 S. E. 545. In our opinion the cases are not at all similar. In *Allen v. Salley* it was held that, where the owner of an automobile which collided with an automobile truck brought action against the truck owners in one county, they cannot, while such action is pending, bring a separate and distinct action in another county against the owner of the automobile for damages accruing to the truck owner by reason of the same collision. There the transaction grew out of one tort, and the question was: Who was guilty of the negligence that caused it?

[2] In the action in Franklin county the Union Trust Company could answer if they saw fit and deny the allegations of the complaint, but they were not obliged to set up as a counterclaim McKinne's guaranty sued on in this action. It is well settled that the defendant is not obliged to set up his counterclaim, but he may omit it, and, if he chooses to do so thereafter, he may bring another and independent action. He has his election. The Union Trust Company had the right to file an answer to the complaint filed in the

superior court of Franklin county denying the allegations of the complaint if in its opinion it stated a cause of action. At the same time it had the right to withhold setting up its cause of action against McKinne.

This question is fully discussed by Bynum, J., in *Francis v. Edwards*, 77 N. C. 275. We think a distinction between the present case and *Allen v. Salley* is apparent upon reading the opinion in that case.

No error.

(179 N. C. 262)

**HOLLOWELL v. MANLEY. (No. 112.)**

(Supreme Court of North Carolina. March 8, 1920.)

**1. DEEDS  $\S$ 124(2)—CONVEYANCE WITHOUT WORDS OF INHERITANCE HELD TO CONVEY A FEE.**

Where land was conveyed prior to 1879 to a trustee and his heirs to hold for the sole and separate use and benefit of a married woman, exclusive of the contract of her husband, and the land at her death to pass to heirs of her body of such marriage, with provision that in case she should die leaving no issue the property should go to her husband, *held* that, though there were no words of inheritance associated with the beneficiaries of the trust, the grantor conveyed a fee simple to the ultimate beneficiaries.

**2. DEEDS  $\S$ 133(2)—WILLS  $\S$ 7—LIMITATION OVER TO HUSBAND IF LIFE TENANT DIED WITHOUT ISSUE PASSED A CONTINGENT INTEREST WHICH PASSED BY WILL.**

Where land was conveyed in trust for the exclusive benefit of a married woman for life, with directions that the land should go to the husband in event she died without issue, the husband took a contingent interest, which would pass by devise.

**3. WILLS  $\S$ 560(3)—DEVISE OF ALL ESTATE WHICH TESTATOR MAY DIE "POSSESSED" OF HELD TO INCLUDE CONTINGENT INTEREST.**

Where a husband had a contingent interest in lands, in the event of the death of his wife, without issue, his devise to her of all estate which "I shall die possessed of" included the contingent interest, the word "possessed" being used to denote ownership, and not merely personal or corporeal occupation (citing *Words and Phrases, Possession*.)

**4. WILLS  $\S$ 542(4)—DEVISE SUBJECT TO LIMITATION TO ISSUE HELD TO PASS A FEE.**

Where lands were granted to trustees to hold for the separate use of a married woman for life, remainder to the heirs of her body, with direction that in event she died without issue her husband should take, *held* that under *Revisal 1906, § 3140*, the husband's devise to his wife of all the estate of which he might die possessed carried his contingent interest in the land, and where the wife was 85 years of age and without issue, she could convey a fee simple.

Appeal from Superior Court, Wayne County; Bond, Judge.

Action by Martha J. Hollowell against James H. Manley. Judgment for plaintiff, and defendant appeals. Affirmed.

This is an action to recover the purchase money of a certain lot which the plaintiff contracted to sell to the defendant, and which the defendant agreed to buy, the defendant refusing to accept the deed of the plaintiff and pay the money upon the ground that she could not convey the land in fee.

The lot of land formerly belonged to William T. Griffin, who on December 8, 1876, conveyed the same to A. B. Chestnut and his heirs upon the following trust:

"To have and to hold the within conveyed town lot upon the following conditions, and for the following uses and purposes, for the sale and separate use and benefit of Martha J. Hollowell, wife of James Hollowell, exclusive of the contract of her husband, or of any contract or liability that he may at this time be bound, or for any future contract or liability, but to be held for her sole and separate use and benefit during her life, and, at her death, to such children as she may leave surviving her, begotten of her present marriage, and to the issue of such as may be dead, such issue to take such share as the parent would have taken if living; and in case the said Martha J. Hollowell should die leaving no child surviving her, then in that case the property in this deed conveyed shall be held and owned by her husband, James M. Hollowell."

The plaintiff is the Martha J. Hollowell named in said deed, and she is now 85 years of age, and no children have ever been born of her marriage with James M. Hollowell, who died in 1912 leaving the following will:

"I give to my beloved wife, Mattie J. Hollowell, all the property of every description, both real and personal, that I may die possessed of.

"I desire that my wife shall pay my burial expenses and all other just debts that I may die owing as soon as convenient, out of any moneys or other property that I may own at my death."

The plaintiff has tendered to the defendant a deed conveying said lot which he has refused to accept upon the ground that her title was defective.

His honor held that the plaintiff was the owner in fee of said lot, and rendered judgment against the defendant for the purchase price thereof, and the defendant excepted and appealed.

Hood & Hood, of Goldsboro, for appellant. Langston, Allen & Taylor, of Goldsboro, for appellee.

ALLEN, J. [1, 2] The deed under which the plaintiff claims conveys the fee-simple estate to the cestui que trust, although executed prior to 1879, and there are no words of inheritance associated with the beneficiaries, because it purports to convey the whole

estate and interest of the grantor in trust for the cestui que trust.

A similar deed was construed in *Holmes v. Holmes*, 86 N. C. 207, in which the court, although recognizing the principle that the word "heirs" was ordinarily necessary to convey a fee simple in an equitable as well as a legal estate, says:

"The language of the instrument is, 'To W. C. Bettencourt, etc., and their heirs, or the survivor of them, in trust for Sarah Moore.' The whole estate and interest of the bargainor passed to the trustees, and everything they took was charged with the trust in favor of the plaintiff. The trust was certainly intended to be coextensive with the legal estate, and as the one is in fee, so was the other intended to be, and so must we consider it to be."

It is also clear that the grantor in the Griffin deed had in mind Martha H. Hollowell, the children born of her marriage with James M. Hollowell, and James M. Hollowell, and that he intended to make provision for them and for no other person or class, and, if so, it conveyed an equitable estate to Martha J. Hollowell for life, and in the event she died leaving children born of her present marriage, to them in fee, and if she left no such children, to James M. Hollowell in fee.

[3, 4] This construction of the deed gives James M. Hollowell a contingent interest in the land which would pass by devise. Revisal, § 3140, provides that any testator may "dispose of all real or personal estate, which he shall be entitled to at the time of his death \* \* \* and the power hereby given shall extend to all contingent, \* \* \* or other future interest in any real or personal estate, whether the testator may or may not be the person or one of the persons, in whom the same may become vested, or whether he may be entitled thereto under the instrument by which the same was created, or under any disposition thereof by deed or will," and it was held in *Kornegay v. Miller*, 137 N. C. 659, 50 S. E. 815, 107 Am. St. Rep. 505, that a conveyance of a contingent interest for a nominal consideration vested an equitable title.

This last case is approved in *Beacom v. Amos*, 161 N. C. 867, 77 S. E. 407, *Hobgood v. Hobgood*, 169 N. C. 490, 86 S. E. 189, *Smith v. Witter*, 174 N. C. 618, 94 S. E. 403, and in other cases, the court saying in the last case, "It is also established that contingent interests, such as those before us, will pass by deed," and if by a deed certainly by a devise under the statute we have quoted.

Does, then, the will of James M. Hollowell pass this interest to his wife? It purports to devise all of the property of J. M. Hollowell, real and personal, of which he was possessed, and in *Brantly v. Kee*, 58 N. C. 337, the court, speaking of similar words in a devise says:

"The words are, 'all the estate or property which she now possesses.' 'Possess' is frequently used in the sense of 'own,' 'entitled to'; and, although the word 'now,' in connection with the fact that Mrs. Brantly's title was subject to a life estate, raises a doubt whether it was not intended to exclude the property to which she was only entitled in remainder, still the fact that there was no motive for not including in the settlement all the property or estate which she owned inclines us to the conclusion that she did intend to convey all that she owned, in which sense 'possesses' was used"

—and in *Pate v. Lumber Co.*, 165 N. C. 187, 81 S. E. 133:

"A conveyance of 'all the property I possess,' where there is no apparent motive for making an exception, conveys all property the party owned."

These two authorities seem to be conclusive, but others which sustain the position are *Hurdle v. Outlaw*, 55 N. C. 79; *Page v. Atkins*, 60 N. C. 270; *Mayor of Detroit v. Moran*, 44 Mich. 602, 7 N. W. 180; *Whitehead v. Gibbons*, 10 N. J. Eq. 230; *Hemingway v. Hemingway*, 22 Conn. 462.

The result of the last case as reported in 6 Words and Phrases, 5464, is as follows:

"A devise of 'all my estate which I shall die possessed of' includes all the property of which he died the owner, the word 'possessed' being used to denote ownership, and not merely personal or corporeal occupation. *Hemingway v. Hemingway*, 22 Conn. 462, 472."

The case of *Church v. Young*, 130 N. C. 9, 40 S. E. 691, which is relied on by the defendant, is not in point, because there the court was dealing with a possibility of reverter, which is not assignable, and not with a contingent interest as in this case, which can be transferred by deed or devise.

"§2 Henry VIII.—No person could, at common law, take advantage of a condition except such as were parties or privies thereto. But this was remedied by a statute which gave the same rights to the grantees of a reversion as the grantor or lessor had. But note that this statute was confined to reversions strictly, and did not extend to a mere possibility of reverter, which arises where there is a conveyance in fee with the condition subsequent that the estate shall be void upon a certain event, no beneficial interest being reserved to the grantor or divisor or his heirs. Thus an estate to a railroad corporation in fee, to be void unless the road be completed by a certain time, leaves no reversion in the grantor, but a mere possibility of reverter which is not assignable, and the condition can be enforced by the grantor and his heirs, but not by his devisee or assignee." 1 Mord. Lectures, 559.

"While it is true that contingent interests and choses in action are assignable in equity, and under our Code actions may be brought in the name of the assignee, we find no case holding that a bare possibility of reverter comes within this principle." *Helms v. Helms*, 137 N. C. 209, 49 S. E. 111.

We are therefore of opinion that, no children having been born of the marriage, the plaintiff was entitled to an equitable life estate under the will, and her husband, James M. Hollowell to a contingent interest in fee, which passed to the plaintiff under his will, and that she is now the owner in fee of both the legal and equitable estate, as the trust has become passive and there are no longer any duties for the trustee to perform.

Affirmed.

(179 N. C. 733)

**STATE v. HICKS. (No. 211.)**

(Supreme Court of North Carolina. March 10, 1920.)

**1. INTOXICATING LIQUORS — 219, 222 — INDICTMENT NEED NOT STATE NAME OF PURCHASER OR NEGATIVE DEFENSES.**

An indictment which simply charges the unlawful and willful sale of vinous liquors, without naming the person to whom sold, or without negating the conditions under which it may be lawfully sold, is sufficient, under Laws 1913, c. 44, § 6.

**2. INTOXICATING LIQUORS — 215 — INDICTMENT CHARGING UNLAWFUL SALE OF WINE HELD SUFFICIENT.**

Indictment held sufficient to charge the offense of the unlawful sale of wine.

**3. INTOXICATING LIQUORS — 222 — LEGALITY OF SALE OF WINE UNDER EXCEPTIONS SPECIFIED BY STATUTES NEED NOT BE NEGATED.**

In prosecution for unlawful sale of wine, the fact that the wine was a domestic wine, sold in a quantity of not less than 2½ gallons in sealed packages, or crated on the premises where manufactured, as permitted by Laws 1911, c. 35, § 3, is a matter of defense, which need not be negated in the indictment, and must be shown in proof by the defendant as a matter of defense.

**4. INDICTMENT AND INFORMATION — 133(7) — INTOXICATING LIQUORS — 207 — ALLEGATION AS TO COUNTY IN WHICH SALE TOOK PLACE NOT OF ESSENCE.**

In prosecution for unlawful sale of wine, allegation as to county in which the sale was made was not of the essence of the offense, and if it had not appeared that the sale took place in the county in which it was charged to have taken place, objection could only be taken by plea in abatement.

**5. INTOXICATING LIQUORS — 238(5) — GUILT OF DEFENDANT CHARGED WITH UNLAWFUL SALE OF WINE FOR JURY.**

In prosecution for unlawful sale of wine, held, under the evidence, that court properly refused to give judgment of nonsuit.

Appeal from Superior Court, Sampson County; Daniels, Judge.

Robert Hicks was convicted of unlawful sale of liquor, and he appeals. No error.

The defendant was indicted on a charge that he did—

“willfully and unlawfully sell, or dispose of for gain, to Mat Watson and other persons to the jurors unknown, in quantities less than 2½ gallons, certain spirituous, vinous, or malt liquors, or a certain mixture containing alcohol or cocaine, or morphine, or other opium derivative.”

Verdict of guilty and judgment. Appeal by defendant.

Kerr & Herring, Fowler & Crumpler, and Butler & Herring, all of Clinton, for appellant.

James S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

CLARK, C. J. [1-3] An indictment is sufficient which simply charges the unlawful and willful sale of vinous liquors without naming the person to whom sold (Laws 1913, c. 44, § 6; State v. Brown, 170 N. C. 714, 86 S. E. 1042), or without negating the conditions under which it may be lawfully sold (State v. Moore, 166 N. C. 284, 81 S. E. 294). The indictment in this case, therefore, omitting surplusage, charges the offense of the unlawful sale of wine. The proviso, in section 3, c. 35, Laws 1911:

“This act shall not apply to the sale of domestic wines when sold in a quantity of not less than 2½ gallons, in sealed packages or crated, on the premises where manufactured”

—is a matter of defense, which need not be set out in the indictment, and must be shown in proof by the defendant as a matter of defense. State v. Wainscott, 169 N. C. 379, 85 S. E. 380, citing State v. Moore, supra, where the matter is fully discussed; State v. Hicks, 174 N. C. 802, 93 S. E. 964.

[4] The indictment charges that the sale was in Sampson county and that it was made in August, 1919, but time was not of the essence of the offense. State v. Jones, 80 N. C. 415. And if it had not appeared that the sale took place in Sampson, objection could only be taken by plea in abatement. State v. Holder, 133 N. C. 709, 45 S. E. 862, both cases cited in State v. Burton, 138 N. C. 576, 50 S. E. 214, which quotes many authorities and states that they are uniform.

Leon Pigford testified:

“Some time in September, 1919, I went to the defendant's house and paid him at the rate of \$4 per gallon for what he called wine. He measured out two gallons and put it in my jug, and then he put something else in there amounting to about a half gallon, and I don't know what this was. He then stopped the jug up and handed it to me, and I carried it away from his house, and the jug was not sealed or crated.”

He stated that he did not open or drink any of the contents of the jug on defendant's



premises; that he really did not know what the stuff was; that he saw some vessels, while at defendant's house, that were stained and appeared to witness as though blackberries or dewberries had been mashed in these vessels.

[5] The defendant introduced no evidence. There was no evidence that the wine was of the defendant's own manufacture, which it was incumbent upon the defendant to prove. The uncontradicted testimony was that the jug "was not sealed or crated." The judge, therefore, properly refused to give judgment of nonsuit.

No error.

(179 N. C. 683)

PIGFORD et ux. v. GOLDSBORO LUMBER CO. (No. 219.)

(Supreme Court of North Carolina. March 10, 1920.)

NEGLIGENCE  $\S$  136(17)—CAUSE OF FIRE HELD QUESTION FOR JURY.

Evidence, though largely circumstantial, tending to prove that plaintiff's property was burned as a result of defendant's negligence, held sufficient to go to the jury.

Appeal from Superior Court, Onslow County; Daniels, Judge.

Action by D. E. Pigford and wife against the Goldsboro Lumber Company. Judgment for plaintiffs, and defendant appeals. No error.

Civil action tried December term, 1919, upon these issues:

(1) Was the property of plaintiffs injured by fire on account of the negligence of the defendant as alleged? Answer: Yes.

(2) If so, what damages have plaintiffs sustained? Answer: \$1,000.00.

Defendant appealed.

Thos. D. Warren and Ward & Ward, all of Newbern, for appellant.

Cowper, Whitaker & Allen, of Kinston, and Frank Thompson, of Jacksonville, L. R. Varner, of Lumberton, and Duffy & Day, of Jacksonville, for appellees.

PER CURIAM. The defendant moved to nonsuit in apt time, upon the ground that the evidence was not sufficient to go to the jury tending to prove that plaintiffs' property was burned as result of defendant's negligence. That is the only assignment of error. It is unnecessary to set out the evidence. It is largely circumstantial, but it is, in our opinion, amply sufficient in probabation for us to warrant the judge in submitting the issues to the jury. Circumstantial evidence, as stated in *Ashford v. Pittman*, 160 N. C. 47,

75 S. E. 943, has often been allowed to determine more serious issues than those submitted in this case.

No error.

(179 N. C. 298)

MORRIS v. BASNIGHT et al. (No. 182.)

(Supreme Court of North Carolina. March 10, 1920.)

1. CORPORATIONS  $\S$  432(12)—CONTRACT ENTERED INTO BY GENERAL MANAGER PRIMA FACIE BINDING.

Contract executed by general manager of corporation apparently within the course and scope of his powers and in the line of the corporation's business is prima facie binding on the corporation.

2. CORPORATIONS  $\S$  426(10)—CANNOT ACCEPT BENEFITS OF CONTRACT AND DENY AUTHORITY OF OFFICER.

Corporation, having accepted the benefits of contract entered into by its secretary and general manager, cannot avoid the contract upon the ground that secretary and general manager had no authority to enter into such contract.

3. SPECIFIC PERFORMANCE  $\S$  10(1)—PARTIAL PERFORMANCE MAY BE DECREED WHERE CONTRACT DIVISIBLE.

Where the contract to convey land is divisible, and full performance cannot be had, purchaser may insist on partial performance, particularly where it is made to appear that he is ready and willing to perform the full obligation of the contract on his own part.

4. SPECIFIC PERFORMANCE  $\S$  13—NOT DECREED WHERE TITLE HAS PASSED TO BONA FIDE PURCHASER.

Equity will not do a vain thing and decree the making of a title when the defendant has no longer any title to convey where title has passed to a bona fide purchaser free from any and all equities arising to the plaintiff by reason of his claim and the suit brought by him to enforce it.

5. SPECIFIC PERFORMANCE  $\S$  13—WILL BE DECREED AGAINST CORPORATION VENDOR CONVEYING LAND TO ITS PRESIDENT.

Where corporation, having contracted to convey land, conveyed to its president and substantial owner, pending purchaser's specific performance action, but before filing of complaint therein, specific performance will be decreed notwithstanding president's title, since the president took the land with notice of purchaser's rights, and was not a bona fide purchaser, and his purchase will be held ineffective and fraudulent as to such specific performance decree and rights thereby established.

6. LIS PENDENS  $\S$  13—AFFECTS ONLY PERSONS TAKING TITLE WITH CONSTRUCTIVE NOTICE.

Ordinarily the doctrine of lis pendens affects only third persons who obtain title after the nature of the claim and the property affected are pointed out with reasonable precision by

complaint filed or notice given under Revisal 1905, § 462, but this limitation only prevails as it may affect the purchaser with constructive as distinguished from actual notice.

**7. LIS PENDENS — FAILURE TO GIVE STATUTORY NOTICE NO EFFECT UPON RIGHTS OF PURCHASER WITH ACTUAL NOTICE.**

Where purchaser buys from a litigant with full notice or knowledge of the suit and of its nature and purpose and the specific property to be affected, he is concluded or his purchase will be held ineffective and fraudulent as to the decree rendered in the cause and rights thereby established, though the statutory notice of lis pendens has not been given under Revisal 1905, § 462.

Appeal from Superior Court, Craven County; Kerr, Judge.

Action by S. L. Morris against J. S. Basnight and others. Judgment for plaintiff, and defendant Newbern Lumber Company appeals. Affirmed.

The action was to enforce performance of a written contract to convey land; the same being in terms as follows:

"We, the undersigned, Newbern L. Company, hereby promise and agree with S. L. Morris that in the event we should bid off at the Adams sale the W. B. Morris (decedent) lands and become the sole owners of same according to the terms of such sale that we will sell or cause to be sold to the said S. L. Morris for the sum of (\$100) the tract of land where he now resides, the same lands intended for him by his late father, W. B. Morris, containing about 14 acres, more or less.

"In witness whereof we hereunto set our hands and seals this, the 22d day of November, 1904. Newbern Lumber Co. [Seal] by J. S. Basnight, Secretary."

The facts in evidence chiefly relevant to the controversy appear to be as follows:

"On or about November 21, 1904, the plaintiff, Southy L. Morris, was living on the small tract of land now in controversy and which his father had laid off for him and on which he had been living about 38 years. Plaintiff was tenant in common with his brothers and sisters in the lands of their father, W. B. Morris, deceased, which the administrator had begun a proceeding to sell. The defendant Newbern Lumber Company, was anxious to buy the lands on account of the timber growing thereon, and J. S. Basnight, director, secretary, and general manager, of said Newbern Lumber Company, and Geo. Anderson, its superintendent of lands, were seeking to buy the interests of the several heirs before the administrator's sale. The secretary and general manager of the Newbern Lumber Company testified that Southy L. Morris at and before the execution of the deed for his interest required said secretary and general manager to give him the contract by which the Newbern Lumber Company agreed to reconvey to Southy L. Morris for the sum of \$100 the 14 acres of land on which he was then living.

"The administrator conveyed the Morris lands to Herbert C. Turner and W. B. Blades, March 22, 1905, and Herbert C. Turner, president of the Newbern Lumber Company, paid the purchase money. The company was then owned by H. C. Turner, J. S. Basnight, and D. W. Basnight. On April 5, 1905, J. S. and D. W. Basnight sold their stock in said company, and at the meeting of the stockholders on the 4th day of April, 1905, J. S. Basnight resigned as director, secretary, and general manager, and D. W. Basnight resigned as director and vice president. H. C. Turner resigned as president, and was elected vice president, and Charles H. Turner was elected director and president of said company.

"Some time after April 5, 1905, H. A. Marshall, surveyor, was employed by the Newbern Lumber Company to survey the land which it had agreed to reconvey to plaintiff, Morris, and sent Geo. Anderson, its agent who looked after its lands, to show the surveyor the little piece which was to be cut off for Morris, so it could make a deed to Morris, and the company paid the surveyor for doing the work. The surveyor made the survey, marked the land off, and sent the description of the land to the company and to the plaintiff. The plaintiff tried to get his deed. He went to Basnight and to Anderson and told them he had his \$100 ready to pay for it. Basnight told him not to be in a hurry. Finally Basnight told him to go to Geo. Anderson; that Basnight and the company were at outs and not to come to him any more.

"The plaintiff continued in possession of his little piece of land after it was surveyed and marked off for him by the defendant company's surveyor, built stables, outhouses, kept up the fences, and paid the taxes. Neither the Newbern Lumber Company nor Mr. Turner ever demanded rent or possession of the land.

"October 25, 1908, Charles H. Turner, Mabel S. Turner, his wife, and Herbert C. Turner, his brother, owned the Newbern Lumber Company, and they continued to own all the stock until February 1, 1913, when Charles H. Turner was president, his son, R. G. Turner, was vice president, and C. H. Hall, an employé, was secretary. April 27, 1912, Herbert C. Turner for \$10 executed a quitclaim deed to the Newbern Lumber Company for all of his right, title, and interest in the Morris lands.

"The summons in this action was issued November 4, 1913, served November 6, 1913, and on November 28, 1913, the Newbern Lumber Company, by deed executed by Charles H. Turner, president, purported to convey to Charles H. Turner all of its real and personal property of whatever kind, consisting in part of the lands, timber rights, and privileges, conveyed to said company by 28 deeds, conveyances, and contracts, from various and sundry grantors, including the quitclaim deed of Herbert C. Turner for his interest in the Morris lands. At the time of making this deed to himself Charles H. Turner was president, his son, R. G. Turner, vice president, and C. H. Hall, employé, were the only stockholders in said company. Said R. G. Turner thinks he had one share of stock, and does not know how much Hall had then, but he has not any now. The complaint was filed on February 3, 1914, as of November term, 1913. The company has never been dis-

solved, and Charles H. Turner is now president and sole owner."

On issues raised by the pleadings the jury rendered the following verdict:

"(1) Did the Newbern Lumber Company, by its authorized agent, J. S. Basnight, contract and agree to convey the lands described in the complaint to the plaintiff, S. D. Morris? Answer: Yes.

"(2) Did H. C. Turner purchase this land for the Newbern Lumber Company and take title to himself in fraud of plaintiff's rights? Answer: Yes.

"(3) Did the Newbern Lumber Company convey this land to C. H. Turner in good faith and for value? Answer: No.

"(4) Did the plaintiff demand a deed for said land and offer to comply with the contract to convey the same to him? Answer: Yes."

Judgment on the verdict for plaintiff against defendant the Newbern Lumber Company, and said defendant, having duly excepted, appealed.

Gulon & Gulon and Moore & Dunn, all of Newbern, for appellant.

E. M. Green, R. E. Whitehurst, and R. A. Nunn, all of Newbern, for appellee.

HOKE, J. [1, 2] The contract to convey is sufficient in form, and, having been executed by the general manager of the company, apparently within the course and scope of his powers and in the line of the company's business, is prima facie binding on the company. *Bank v. Oil Mill*, 157 N. C. 302, 73 S. E. 93; *Clowe v. Imperial Pine Product Co.*, 114 N. C. 304, 19 S. E. 153. And, if it were otherwise, the company, having acquired the plaintiff's interest in his father's land and the timber thereon under and by virtue of the act of the secretary and general manager, is concluded on this question. They will not be allowed to accept and hold the benefits of the agreement and repudiate the authority of the agent by whom it was made. *McCracken v. Railroad*, 168 N. C. 62-67, 84 S. E. 30; *Sprunt v. May*, 156 N. C. 388, 72 S. E. 821; *Watson, Trustee, v. Manufacturing Co.*, 147 N. C. 469, 61 S. E. 273, 10 Cyc. p. 1073. The objection of defendant, therefore, that no proper authority had been shown for making the contract, must be disallowed.

Recovery is resisted further by defendant on the ground that W. B. Blades, a third person, and not a party, is the owner of one-half interest in the property. It is true the facts show that at the time the property was acquired in pursuance of the agreement said Blades joined Herbert C. Turner in the transaction, and that the deed was made to the two, but it also appears that the entire purchase price was paid by Turner, then president of the company, and evidently with the company's funds. Not only is it found by the verdict that said Turner bought the land and took title to himself in fraud of plaintiff's

rights, but, in recognition of the company's interest, prior to the institution of the suit, and for a nominal consideration of \$10, he executed a quitclaim deed conveying to the company all his right, title, and interest in the property. From these facts, therefore, it would seem that W. B. Blades has no such interest in the property as would prevent a conveyance of the entire title by a deed of defendant company. *Kuhn v. Eppstein et al.*, 219 Ill. 154, 76 N. E. 145, 2 L. R. A. (N. S.) 984.

[3] Without present decision on this question, however, it is the recognized principle in actions of this character that in a divisible contract of the kind presented here partial performance may be insisted on by the vendee, and assuredly so when it is made to appear that he is ready and willing to perform the full obligations of the contract on his own part. *Timber Co. v. Wilson*, 151 N. C. 154-157, 65 S. E. 932, 134 Am. St. Rep. 982; *Kares v. Covell*, 180 Mass. 206, 62 N. E. 244, 91 Am. St. Rep. 271; 25 R. C. L. title "Specific Performance," § 51.

[4-7] Again, it is contended that specific performance may not be awarded in the present instance, because it appears that the defendant company has conveyed its entire interest to C. H. Turner, and is no longer able to convey any part of the title to the property. It is undoubtedly a correct position that equity will not do a vain thing and decree the making of a title when the defendant has no longer any title to convey, but the principle only applies when it is clearly established that the title has been passed to a bona fide purchaser, free from any and all equities arising to the plaintiff by reason of his claim and the suit brought by him to enforce it, and is not available to defendant on the facts of this record. Not only is Charles H. Turner the president and substantial owner of the company and its assets and presumably cognizant of plaintiff's rights under his contract, but he bought pending this suit brought by plaintiff to enforce these rights. True, he purchased and took his deed before complaint filed, and the doctrine of lis pendens as it ordinarily prevails only affects third persons who may take title after the nature of the claim and the property affected are pointed out with reasonable precision by complaint filed or notice given pursuant to the statutory regulations, but this limitation only prevails as it may affect the purchaser with constructive notice. Our statute on the subject (*Revisal*, § 462) only purports to deal with constructive notice and its effect on subsequent purchasers, but, where one buys from a litigant with full notice or knowledge of the suit and of its nature and purpose and the specific property to be affected, he is concluded or his purchase will be held ineffective and fraudulent as to decree rendered in the cause and the rights thereby established. *Griswold v. Miller*, 15

Barb. (N. Y.) 520; Corwin v. Bensley, 43 Cal. 253-262; Wick v. Dawson, 48 W. Va. 469-475, 37 S. E. 639; 25 Cyc. p. 1452; Bennett on Ls Pendens, p. 319.

On careful consideration, we find no reason for interfering with the disposition made of the case, and the judgment in plaintiff's favor is affirmed.

Affirmed.

(179 N. C. 310)

AMAN v. DOVER & SOUTHBOND R. CO.  
(No. 220.)

(Supreme Court of North Carolina. March 10, 1920.)

1. JUSTICES OF THE PEACE §91(5) — COMPLAINT SUFFICIENT TO COVER FREIGHT PAID ON GOODS LOST BY CARRIER, AS WELL AS THE GOODS.

In view of Revisal 1905, § 1463, as to sufficiency of pleading in justice court, section 1467 as to disregard of form and right to amend in such court, and sections 495, 505, 507, 509, 512, abolishing refinements of pleading and requiring liberal construction, complaint in justice court for a certain amount "due by goods lost on the company's road" is sufficient to cover the freight paid, as well as the goods, especially where defendant had long had plaintiff's itemized statement, filed with claim, and never asked for bills of particulars or an amendment of complaint to make it more certain, as authorized by sections 494, 496.

2. CARRIERS §51—"BILL OF LADING" DEFINED.

An instrument issued by carrier to consignee, consisting of a receipt for the goods and an agreement to carry them from the place of shipment to destination, is a "bill of lading."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Bill of Lading.]

3. CARRIERS §53—BILL OF LADING UNNECESSARY TO CREATE RIGHTS AND DUTIES.

Bill of lading is not required to create relationship of carrier and shipper and the rights and duties, measured by the common law, incident thereto.

4. CARRIERS §46½—INTERSTATE CARRIER'S LIABILITY FIXED BY FEDERAL LAWS IN ABSENCE OF BILL OF LADING.

In the absence of a bill of lading in case of an interstate shipment, the requisite stipulations of bill or contract, as prescribed by federal statutes or valid regulations of the Interstate Commerce Commission, will attach and govern the rights of the parties.

5. CARRIERS §136 — QUESTION OF RECEIPT AND LOSS OF GOODS FOR THE JURY.

Evidence of receipt of goods by carrier for transportation and loss thereof held sufficient to take the case to the jury.

Appeal from Superior Court, Onslow County; Daniels, Judge.

Action by J. H. Aman against the Dover & Southbound Railroad Company. From judgment for defendant on appeal from a justice of the peace, plaintiff appeals. Reversed.

Plaintiff sued before a justice of the peace for the value of goods shipped by the defendant's line to him at Richlands, N. C., from Charleston, S. C., which were lost in transit, and for the freight paid by him on the same. He stated in his complaint the total sum due, and did not separate the items; that is, goods and freight charges which were paid. Judgment was given against him in the justice's court, and he appealed. In the superior court he testified that he ordered the goods from C. D. Francke & Co., of Charleston, S. C., and all were received but the steel tires, described as "a bundle of rods"; that he had demanded the rods several times, when he filed his claim for loss, which included, in the total, the amount paid by him as freight. In what is called in the case the receipted "freight bill," these goods are stated as "astray" or lost. The claim he filed with the defendant consisted of the statement of loss, the freight bill, and a bill of lading, signed by C. D. Francke & Co., but not by the railroad company. These papers were delivered to the defendant and kept by it for many months without any objection, so far as appears, to its form or substance, or any dispute of the claim that only a part of the goods arrived at Richlands, and were delivered to him.

The court ordered a nonsuit as to both items of the claim for loss, because presumably the bill of lading was not signed by the railroad company at Charleston, S. C., and the claim for freight charges paid by him was not distinctly pleaded, but was included with the loss of the goods without any separate designation, the form of the complaint being "for the nonpayment of so many dollars," with interest, "due by goods lost on said company's road and demanded by him." Plaintiff excepted and appealed from the judgment.

Duffy & Day, of Jacksonville, for appellant.  
T. D. Warren and Ward & Ward, all of Newbern, for appellee.

WALKER, J. (after stating the facts as above). [1] The pleadings in a justice's court are not expected to be in any particular form or to be drawn with technical accuracy. They are required only to "be such as to enable a person of common understanding to know what is meant" (Revisal, § 1463); and "no process or other proceeding \* \* \* shall be quashed or set aside, for the want of form, if the essential matters are set forth therein," and ample powers are given to amend either in the form or substance, at

any time before or after judgment, in furtherance of justice. Revisal, § 1467. The ancient refinements of pleading, which more often defeated justice than promoted it, have long since been abolished (Revisal, §§ 505, 507, 509, 512), and it is now the law that pleadings, for the purpose of determining their effect, must be liberally construed, disregarding mere form (Revisal, § 495; Blackmore v. Winders, 144 N. C. 212, 56 S. E. 874; Brewer v. Wynne, 154 N. C. 467, 70 S. E. 947). Examined in the light of these statutes, we do not see why the item of freight charges paid by the plaintiff was not sufficiently set up in the summons. It was included in the amount stated to be due and in the prayer for judgment, but was not distinctly called by its name, though it was embraced by the words "due by goods lost on the company's road." It was paid as freight on these goods, and, if not paid back to plaintiff, would be as much lost as the goods themselves, and it was the loss of the goods that entailed the loss of the freight money. It would be requiring too much if we should hold otherwise, and especially so when it appears that the defendant had the itemized statement of plaintiff, which was filed with his claim, many months before the trial and even before suit was brought. Besides, the defendant never asked for a more certain and definite statement of the claim, or for a bill of particulars, as he could have done. Revisal, §§ 494, 496; Allen v. Jackson, 86 N. C. 321; Conley v. Railroad Co., 109 N. C. 692, 14 S. E. 303; Blackmore v. Winders, *supra*.

[2-4] As to the other question: An instrument issued by the carrier to the consignor, consisting of a receipt for the goods and an agreement to carry them from the place of shipment to the place of destination, is a bill of lading. Of course it is not essential that a bill of lading be issued, for in the absence of any such instrument the rights of the shipper and the duty of the carrier are to be determined by the common law. 6 Cyc. 417. It may therefore, for the sake of discussion, be conceded that the paper signed only by Francke & Co. was not a bill of lading. 6 Cyc. 417, note 80, and cases cited. Such a bill was not required to charge the defendant as carrier, as we have seen, and as will also appear by reference to the following authorities: 1 Hutchinson on Carriers (Math. & D.) § 152; 10 Corpus Juris, § 251, p. 192, and especially page 193; Berry v. Railroad Co., 122 N. C. 1002, 30 S. E. 14; Wells v. Railroad Co., 51 N. C. 47, 72 Am. Dec. 556; McRary v. Railroad Co., 174 N. C. 563, 94 S. E. 107. 1 Hutchinson on Carriers, *supra*, says:

"No receipt, bill of lading or writing of any kind is required to subject the carrier to the duties and responsibilities of an insurer of the goods. As soon as they are delivered to him for present carriage and nothing necessary to

their being forwarded remains to be done by the owner, the law imposes upon him all the risk of their safe custody as well as the duty to carry as directed. He is regarded as exercising in some sort the functions of a public office, and the law is said to impose upon him his duties and obligations upon this ground as well as upon the ground of contract, and as soon as the delivery to him and his acceptance are shown, the law imposes the duty and responsibility in virtue of his public employment. In other words, his liability does not rest exclusively upon contract, however much it may be qualified or limited by express agreement."

We have held it to be settled law that the relationship of carrier and shipper may be created without any written bill of lading. Davis v. N. S. Railroad Co., 172 N. C. 209, 90 S. E. 123; Smith v. Railroad Co., 163 N. C. 143, 79 S. E. 433. And it is also held with us that in case of an interstate shipment, while a written bill of lading should always be issued, as evidence of the contract between the parties, yet, if the same is omitted, the requisite stipulations of bill or contract, as prescribed by the federal statutes, or valid regulations of the Interstate Commerce Commission, will attach and govern the rights of the parties concerning it. Railroad v. Muggs, 202 U. S. 242, 26 Sup. Ct. 628, 50 L. Ed. 1011; Peanut Co. v. Railroad Co., 166 N. C. 62, 82 S. E. 1; Bryan v. Railroad Co., 174 N. C. 177, 93 S. E. 750; McRary v. Railroad Co., 174 N. C. 563, 94 S. E. 107. This court has held in the Bryan Case, *supra*, as stated in the second headnote:

"In order to obtain uniformity of carriage contracts for interstate commerce, the Carmack Amendment to the Interstate Commerce Act requires the carrier to issue a bill of lading upon terms fixed by the Interstate Commerce Commission; and while a parol contract of shipment is upheld as binding, the uniform contract yet fixes its terms."

[5] The only question then is whether the package of goods was shipped, or, in other words, accepted by the carrier for transportation from Charleston to Richlands, and was it lost. There were facts and circumstances which constituted some evidence in support of this allegation, and which should have been submitted to the jury with proper instructions from the court. That plaintiff paid the freight charges on his entire order of goods, and that the carrier accepted the same were circumstances tending to show receipt of the goods by the railroad company, for the company had no right to charge for more than it actually received for shipment, and it is not at all probable that it did so, and it offered no evidence itself to the effect that it did so charge. The retention of the claim filed with it for so long a time, without objection to it or denial of it, when it exhibited a detailed statement of the whole transaction, and substantially charged it with

having accepted the goods for shipment, was another circumstance to be considered, and there may be others, but it is unnecessary to pursue this discussion further. It must not be inferred that we are even intimating any opinion upon the weight of the evidence, but only stating that there is some evidence upon the issues in the case. Its weight is for the jury to pass upon.

The judgment of nonsuit was erroneous, and will be set aside. The case must be submitted to a jury.

Error.

(179 N. C. 307)

PUGH v. ALLEN. (No. 218.)

(Supreme Court of North Carolina. March 10, 1920.)

1. DEEDS  $\S$  93—TO BE CONSTRUED ACCORDING TO INTENTION OF PARTIES.

Except when affected by some arbitrary principle of law like the rule in Shelley's Case, a deed must be construed so as to effect the intention of the parties as expressed in the entire instrument.

2. DEEDS  $\S$  125—PROVISION FOR REVERSION TO GRANTOR'S SON UPON GRANTEE'S DEATH WITHOUT AN "HEIR" HELD TO CONVEY A DEFESIBLE FEE.

Where deed conveyed the estate in fee and recited as part of the consideration that in case grantee "should die without an heir" the title should revert to the sole use and benefit of the grantor's son, the limitation was not repugnant to the granting clause, but was a mere qualification thereof, and the fee conveyed was a fee defeasible and not a fee simple absolute, since the word "heir," as used, means issue and not heirs generally, so that upon grantee's death without children the estate would pass to the son's children, not under grantee, but as heirs of the son under the deed from the grantor.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Heir.]

Appeal from Superior Court, Sampson County; Kerr, Judge.

Controversy without action by James H. Pugh against Frank Allen. Judgment for defendant, and plaintiff excepts and appeals. No error.

From the facts submitted, it appears that plaintiff has contracted to sell and convey to defendant a tract of land in said county, and defendant has refused compliance, alleging that plaintiff cannot make a good title; that the land belonged to Francis Pugh, who conveyed same to plaintiff, one of his sons; that Francis Pugh died, leaving four children, James H., Thomas K., Mary M., and Carrie M. Pugh. Mary M. Pugh intermarried with A. J. Fordham, and she and her husband are both dead without children; that Carrie M. intermarried with J. F. Wooten, and is now a

widow with two living children; that Thomas K. has died without children and without having married; that James H., the grantor in the deed, is a very old man and has never married. The court, being of opinion that, under the deed from his father and the attendant facts, plaintiff only had a defeasible fee in the land, entered judgment for defendant, and plaintiff excepted and appealed.

Kerr & Herring, of Clinton, for appellant.  
Butler & Herring, of Clinton, for appellee.

HOKE, J. The validity of the title offered depends upon the proper interpretation of the deed from Francis Pugh to his son James H., the plaintiff, in terms as follows, omitting irrelevant matter:

"That the said Francis Pugh for and in consideration of the natural love and affection which he has unto the said James H. Pugh, and for the further consideration of the sum of one dollar to me in hand paid, the receipt whereof is hereby acknowledged, and for the further consideration that the said James H. Pugh does at or before the signing and delivery of these presents release unto my son Thomas K. Pugh all of his interest in the place whereon I now reside, given by Wm. Kirby, deceased, in his last will and testament to my wife, Mary Ann Pugh and to the heirs of her body, and for the further consideration that in case it shall become necessary I reserve the right to draw from said lands such portion of the crops as I the said Francis Pugh shall deem sufficient for my sustenance. And for the further consideration that in case the said James H. Pugh, should die without an heir the following gift shall revert to the sole use and benefit of my son, Thomas K. Pugh, his heirs and assigns. I the said Francis Pugh have given, granted, aliened, released and confirmed and by these presents do give, grant, alien, release and confirm unto the said James H. Pugh, his heirs and assigns, all of that tract or parcel of land situated on the west side of the Six Runs, known as the Needham Stevens place and bounded as follows. \* \* \* Together with all the privileges and all things appurtenant thereto and all the estate, rights, title, interest, except the above named reservations, of him the said Francis Pugh in and thereto.

"To have and to hold the said messuage and all the appurtenances thereof (on the conditions prescribed) to him, the said James H. Pugh, his heirs and assigns, to his and their proper use and behoof forever."

[1] It is the recognized position in this state that, except when modified by some arbitrary principle of law like the rule in Shelley's Case, this perhaps being the only exception now prevailing, a deed must be construed so as to effect the intention of the parties as expressed in the entire instrument. *Brown v. Brown*, 168 N. C. 4, 84 S. E. 25; *Gilbert v. Shingle Co.*, 167 N. C. 286, 83 S. E. 337; *Jones v. Wichard*, 163 N. C. 241, 79 S. E. 508; *Triplett v. Williams*, 149 N. C. 394, 63 S. E. 79, 24 L. R. A. (N. S.) 514.

Applying the principle, it has been held in several of our decisions construing deeds of similar import that, in case of a limitation over on the death of a grantee or first taker without heir or heirs and the second or ultimate taker is presumptively or potentially one of the heirs general of the first, the term "dying without heir or heirs" on the part of the grantee will be construed to mean, not his heirs general, but his issue in the sense of children and grandchildren, etc., living at his death. *Sain v. Baker*, 128 N. C. 256, 38 S. E. 858; *Francks v. Whitaker*, 116 N. C. 518, 21 S. E. 175; *Rollins v. Keel*, 115 N. C. 68, 20 S. E. 209. In *Sain v. Baker*, supra, the testator devised the property to his son and, on the son's death without heirs, to his daughters; the word "heirs" in this limitation was held to mean children, and the present Chief Justice delivering the opinion, said:

"From the context it is clear that the words 'without any lawful heir or heirs' \* \* \* are used in the sense of dying without issue or children, otherwise the limitation over to \* \* \* the daughters would have been in vain."

And in *Francks v. Whitaker* a similar ruling was made, as follows:

"Where a testatrix devised land to her son for life and after his death to his lawful heir or heirs, if any, and, if none, to the children of another son, the words 'heir or heirs' will be construed to mean his issue and not his heirs generally, and upon his death without issue the land goes to the children of the other son, all of whom were living at the date of the will."

[2] This then being the correct interpretation of the present deed, on the death of the plaintiff and grantee, James H. Pugh, without issue, which now appears to be altogether probable, the estate would go over to the heirs of Thomas K. Pugh, deceased, of the blood of the first purchaser, and these would take and hold, not under the proposed vendor, but as heirs of Thos. K. under the deed from Francis, the grantor, and, on the death of James H. without issue living at his death, his deed would be of none effect. *Sessoms v. Sessoms*, 144 N. C. 121, 56 S. E. 687; *Smith v. Ellington Guy Lumber Co.*, 155 N. C. 389, 71 S. E. 445.

We are not inadvertent to the position argued for plaintiff that the limitation over is void as being repugnant to the portion of the deed carrying to plaintiff an estate in fee; but, putting aside this fact that the limitation is stated as a part of the consideration of the deed and expressed in the form of a condition, the two clauses are not repugnant in the sense that one is destructive of the other, but, under the rule of interpretation heretofore stated, the limitation should be properly held as a qualification of the granting clause and showing that the intent of the

grantor is, not to convey a fee simple absolute, but a fee defeasible as his honor ruled. *Jones v. Wilchard*, supra.

We find no error in the record, and the judgment of the superior court is affirmed.

No error.

(179 N. C. 303)

NELSON v. RHEM et al. (No. 184.)

(Supreme Court of North Carolina. March 10, 1920.)

VENDOR AND PURCHASER  $\S$  180—AGREEMENT TO PAY IN LIBERTY BONDS HAS REFERENCE TO FACE VALUE, AND NOT TO MARKET VALUE.

Under agreement to pay specified amount "in Liberty Bonds," buyer was required merely to deliver Liberty Bonds of the face value of such amount and not of the market value thereof.

Appeal from Superior Court, Craven County; Kerr, Judge.

Action by Margaret D. Nelson against Dr. J. F. Rhem and others. Judgment adverse to plaintiff, and she excepts and appeals. Affirmed.

This is an action to recover balance due on a contract for the purchase of a house and lot, tried on the following agreed facts:

"(1) The plaintiff agreed to convey to the defendants a certain lot in the city of Newbern upon the payment of \$42,500, payable one-half in cash and one-half in Liberty Bonds.

"(2) The plaintiff contends that she was to receive enough bonds at the market price to cover the \$21,250, and the defendants contend the plaintiff was to receive bonds of the par value of \$21,250.

"(3) The defendants at the time of said contract had on hand bonds of the various issues that they had bought while the drives were on by the government for the sales of the bonds and tendered the par value in said bonds.

"(4) The difference between the par value and the market value of said bonds on the 17th day of November, 1919, is considerably above \$500, and the parties by agreement decided that the deed should be delivered, and that the cash part of the payment should be made, and that the \$21,250 par value of bonds so tendered should be delivered, and that the question as to whether the test should be the par value or the market value should be submitted to the court, and, if the court was of opinion that the market value was the test, it should render judgment for \$500 and the costs in favor of the plaintiff, and that the defendants should pay to the plaintiff the actual difference with the interest thereon from the 17th day of November, 1919, which is much in excess of the \$500, regardless of the fact that the judgment was only \$500.

"(5) The deed and the cash payment and the delivery of the par value of bonds have been complied with, and the parties submit to the court in this action the question as to the liability of the defendants to the plaintiff for the

excess of the par value above the market value on the 17th day of November, A. D. 1919, and agree that the rights of the parties depend upon the foregoing agreed facts."

His honor held that the contract to pay \$42,500, one-half in cash and one-half in Liberty Bonds, meant Liberty Bonds of the face value of one-half of the purchase price, and rendered judgment against the plaintiff, who excepted and appealed.

R. A. Nunn and Ward & Ward, all of Newbern, for appellant.

Moore & Dunn, of Newbern, for appellees.

ALLEN, J. The contract of the defendant is to pay \$42,500, "payable one-half in cash and one-half in Liberty Bonds," and, if we were to adopt the construction of the plaintiff, we would strike out of the agreement of the parties the terms of payment, leaving an unqualified promise to pay \$42,500, as this would be the effect if "one-half in Liberty Bonds" means the market value of the bonds.

The phrase "one-half in Liberty Bonds" means nothing, if not bonds on their face promising to pay \$21,250, one-half the purchase money, and we have no right to change the contract, in the absence of allegation or proof of fraud or mistake, nor can we assume that the parties have inserted meaningless terms in their agreement.

In *Smith v. Dunlap*, 12 Ill. 189, the contract was to pay \$131,480.52 in the indebtedness of the state of Illinois, and the court says of the construction of the contract:

"Where the promisor undertakes to pay a certain number of dollars in specific articles, such as grain, cattle, or other commodities, he must deliver the property on the day named in the contract, or he becomes absolutely bound to pay the sum stated in money. The sum expressed in the obligation indicates the true amount of the debt; and the other provision is inserted for the benefit of the debtor, and relates exclusively to the mode of payment. If he does not avail himself of the privilege of discharging the debt in property, the obligation becomes a naked promise to pay the amount in money. But where the promisor agrees to pay a certain sum in bank notes, or other evidences of indebtedness, which purport on their face to represent dollars, and can be counted as such, the sum is expressed to indicate the number of dollars of the notes or evidence to be paid, and not the amount of the debt or consideration. The obligation is in fact but a promise to deliver so many dollars, numerically, of the securities described. If the debtor fails to deliver them according to the terms of the contract, he is responsible only for their real, not their nominal, value. Their cash value is the true amount of the debt to be discharged. And beyond the damages directly resulting from the breach of the contract, the creditor is not entitled to recover.

"The contract in question falls directly within the latter definition. It is an undertaking to pay a given number of dollars of the indebtedness of the state of Illinois. This indebted-

ness consists of obligations issued by the state, for the payment of specified sums of money to its creditors. The amount in dollars is expressed on the face of the instruments, and can be at once ascertained by inspection. \* \* \*

"In *Clay v. Houston's Adm'rs*, 1 Bibb. [Ky.] 461, the expression in a note, 'thirty pounds in militia certificates,' was construed to mean that number of pounds in certificates as specified on their face, and not an amount of certificates equal in value to thirty pounds in specie. In *Anderson v. Ewing*, 3 Litt. [Ky.] 245, a note for the payment of 'eight hundred dollars, on or before the first day of September, 1820, in such bank notes as are received in deposit at that time in the Hopkinsville Branch Bank,' was held to be a contract to pay 800 paper dollars of the description mentioned. The court said: 'It is true, an instrument drawn, stipulating the payment of a certain number of dollars in cattle, wheat, or other commodities, is construed to mean so much of these articles as will amount to that sum in specie. But the reason of this is evident. The commodities themselves cannot be counted by dollars, as the name is never applied to them. But this is not the case with bank notes. They engage to pay so many dollars, and are numerically calculated by the numbers they express; so that the expression "eight hundred dollars in bank paper" is universally understood to mean that much money, when the numbers expressed on the face of the note are added together, and not as including so many more, superadded, as will make them equal to eight hundred dollars in specie.' In *Phelps v. Riley*, 3 Conn. 268, a note for 'eighty-eight dollars in current bank notes, such as pass in Norfolk between man and man,' was decided to be a contract to pay bank notes of the kind described, to the nominal amount of \$88. In *Robinson v. Noble's Adm'rs*, 8 Pet. 181 [8 L. Ed. 910], in an action on an agreement to pay freight at the rate of \$1.50 per barrel, 'in paper of the Miami Exporting Company, or its equivalent,' the court held that the specie value of the paper, when the payment should have been made, was the proper measure of damages. In *Hixon v. Hixon*, 7 Humph. [Tenn.] 33, a note for 'one hundred dollars, in Georgia, or Alabama, or Tennessee bank notes, or notes on any good man,' was decided to be an obligation for the payment of that many dollars for the notes specified. In *Gordon v. Parker*, 2 Smedes & M. [Miss.] 485, a note for 'five thousand dollars, payable in Brandon money,' was determined to be a contract to pay that number of dollars of the kind of money described. In *Dillard v. Evans*, 4 Pike [4 Ark.] 175, the court held a note payable in the 'common currency of Arkansas' to be a contract to pay so many dollars of the bank paper then current in the state."

Also in *Easton v. Hyde*, 13 Minn. 90 (Gil. 83), speaking of a similar contract:

"But a dollar is the measure of the value of United States bonds, so that the expression, payable 'in United States bonds,' is as universally and clearly understood as would be the expression payable 'in bank bills,' 'in United States Treasury notes,' or 'in gold coin.' If these parties had intended that the bonds should be received at any other than their



nominal value, they doubtless would have so provided in the contract."

The same principle is declared in *Lackey v. Miller*, 61 N. C. 27, in which the contract was to pay \$71 "in current bank notes," of which Pearson, C. J., says:

"In our case the promise is, not to pay \$71 in United States coin, which may be discharged by paying enough current bank money to make up that amount in good money, but to pay \$71 'in current bank money,' i. e., 71 current bank money dollars; in other words, current bank bills calling on their face for \$71, in the same way as where one promises to pay \$71 in currency, the meaning is to pay current notes calling on their face for \$71, as distinguished from \$71 in United States coin or, as is termed, 'in good money.'

"Any other construction of instruments like these would lead to the absurdity of supposing that the same words amount to a promise to pay in United States coin, i. e., good money, and also to a promise to pay in 'current bank bills' which are not good money; whereas, it is perfectly clear that the party intends to admit a debt of a given amount, not in United States coin, as in the case of *Hamilton v. Eller*, but only in current bank bills, e. g., 71 current bank money dollars, or current bank bills, calling on their face for \$71."

We are therefore of opinion, on reason and authority, that his honor properly held that the plaintiff could not recover, as the defendant has paid to the plaintiff \$21,250 in cash, and delivered Liberty Bonds of the face value of \$21,250, which is all the defendants agreed to do.

**Affirmed.**

(179 N. C. 293)

**JONES v. D. L. TAYLOR & CO., Inc.**  
(No. 179.)

(Supreme Court of North Carolina. March 10, 1920.)

**1. MASTER AND SERVANT §284(1)—NEGLECT QUESTION FOR JURY.**

Conflicting evidence upon the issues as to negligence causing injury to an employé carries the case to the jury.

**2. MASTER AND SERVANT §149(1)—ORDER TO PERFORM WORK IN UNSAFE MANNER ACTIONABLE.**

If an employé doing work in a safe way is ordered to do it in an unsafe way with a threat of discharge if he refuses, and by reason of the order he enters upon the work and is injured without his fault, he can recover damages.

**3. MASTER AND SERVANT §101, 102(8)—ORDINARY CARE REQUIRED TO FURNISH SAFE WORKING PLACE AND APPLIANCES.**

It is the master's duty to use ordinary care to furnish his servant with a reasonably safe place in which to work, and with reasonably safe tools and implements, and his failure, if it proximately results in injury, constitutes an actionable wrong.

**4. APPEAL AND ERROR §927(3)—EVIDENCE TO BE VIEWED IN FAVOR OF PLAINTIFF ON MOTION FOR NONSUIT.**

Appellate court in passing on motion to nonsuit will examine all the evidence, and place the most favorable construction upon that which tends to establish plaintiff's cause of action.

**5. TRIAL §267(1)—COURT NOT REQUIRED TO ADOPT WORDS OF REQUESTED INSTRUCTION.**

Court in giving instruction in response to prayer therefor was not required to adopt words of prayer, though prayer was in itself correct, but could use its own form of expression, provided its instruction was substantially responsive to the prayer.

Appeal from Superior Court, Carteret County; Kerr, Judge.

Action by Henry Jones against D. L. Taylor & Co., Incorporated. Judgment for plaintiff, and defendant appeals. No error.

Plaintiff alleged that in March, 1917, he was employed by the defendant as a laborer, and was assigned to the work of "hooking stone" by using grabirons to fasten to the stone so as to move them or lift them up. The work was being done at pier No. 1, Morehead City, where the stone was unloaded from the cars and placed on barges to be taken to Cape Lookout, where defendants were engaged in constructing a breakwater for the government. Plaintiff was placed under the authority of Mr. Armstrong, who was the superintendent or "boss" of the work, and who ordered him to break certain stone with a hammer. Plaintiff objected to breaking stone in that way, because it was not the usual way, and also was dangerous, but the superintendent insisted that he do so, or, if he refused, he would have "to quit the job." The plaintiff while breaking stone under the said orders was seriously injured; his face being hit by flying stone and his eye knocked out. He alleged that the tools and implements used for handling the rock under Mr. Armstrong's orders were not of the proper and usual kind, or in general and common use for such work, and that by the negligent acts and conduct of the defendants, represented by their superintendent, his injuries resulted.

The defendants deny that plaintiff's injury was caused by any negligence on their part, but, on the contrary, by the plaintiff's own negligence. They alleged that the stones to be moved and loaded on the barges, for the purpose of being carried to Cape Lookout, were of different sizes, and some of them were not to be broken. The plaintiff, they allege, knew what was the manner of doing the work, and that there was no risk to him if he performed his work properly.

The small stones were not broken. The plaintiff had been engaged in this work be-

fore, breaking stone with a sledge hammer where it was thin and flat. Mr. Wheatley was employed by the government as an inspector, and would indicate by a X mark on the stone whether it was to be drilled or broken, and thereupon, following this marking by the government inspector, a stone of 5 feet long, 12 inches wide, and 8 inches thick would be broken by a sledge hammer. This was the usual and customary way of breaking stone of this character. These facts were all well known to plaintiff, and he had been engaged in this work for two years or more. The hammer in use was in good condition and the piece of stone on which the plaintiff was working was 8 feet long and 12 inches wide. Before that time it was broken by tapping it with a hammer, when it would break, and there was danger in that, because it cracked just like a piece of ice and would fly all about. They allege that plaintiff said, "I knew it was dangerous to work with a sledge hammer, but I worked at it for two years then I quit." Mr. Wheatley indicated with a X the stones that were to be broken. All plaintiff had to see was that the stone was of certain size. There was evidence to support each of the two contentions. The plaintiff, among other things, testified:

"The stone was marked to be drilled, and the fellows worked so much of it until they could not get it broken up, and had to put it out on a sidetrack, and they had to pay 'murrage' on it. Mr. Armstrong said: 'Now the stone that comes in flat don't put it out there, take the hammer out here and break it.' They could not keep up with it. I was afraid to use the hammer, and threw it away, and one day there were three pieces left in the car. He called me, and said: 'What are you doing sending that stone out there, take the hammer up there on the platform and don't you ever send a car out with one or two pieces.' Of course I was under him, and I got the hammer, and at half past 8 I was breaking that stone, and a piece flew out where the stone ought to have been drilled, and struck me in the eye and knocked it right out in my hand. I don't know whether Mr. Armstrong was on the job at that time or not; I am not sure, but he worked there most all of the time. I objected to breaking up the stone with the hammer. I told him it was dangerous; one boy had already got hurt with one; but I kept right on like he told me; if I did not I would have to get off the job. He told me if I did not I would have to get off the job. The piece of stone I was working on was about 12 inches wide and about 8 feet long. Mr. Wheatley, the government man, would mark the stone, where they were to drill it, with an X, and it was against the law not to break a marked piece."

The judge charged the jury upon the various phases of the case, to which there was no objection, except in the respects herein-after stated. The defendant asked for a nonsuit and for an instruction that if the jury believed all the evidence the issues should be answered No, which was refused.

The defendant then requested that this instruction be given to the jury:

"If the jury believe from the evidence that the defendant D. L. Taylor & Co. furnished the plaintiff suitable tools to work with, and that the method of breaking the stone was a proper method for stone of this size, and that the plaintiff knew of the danger attendant on the work, and continued on the job for two years, he thereby assumed the risk and danger, and they should answer the second issue Yes."

And also they asked for this instruction:

"That if they found that the plaintiff knew of the danger which was apparent to a prudent man they will answer the second issue Yes."

These prayers, it is stated in the case, were refused, except as given in the general charge.

The jury returned the following verdict:

"(1) Q. Was the plaintiff injured by the negligence of the defendant as alleged in the complaint? A. Yes.

"(2) Q. Was the plaintiff guilty of contributory negligence as alleged in the answer? A. No.

"(3) Q. What, if any, damage is plaintiff entitled to recover? A. \$2,000."

Judgment on the verdict, and the defendant appealed.

Moore & Dunn, of Newbern, for appellant.  
Abernethy & Davis, of Beaufort, for appellee.

WALKER, J. (after stating the facts as above). [1-4] The court properly denied the motion for nonsuit. There was, at least, conflicting evidence upon the issues as to negligence, and this carried the case to the jury. If the plaintiff had been doing his work in a safe way, and defendant ordered him to do it in an unsafe way, with a threat to discharge him if he refused, and by reason of this negligent order he entered upon the work, which was dangerous and was injured without his fault, he can recover his damages. It is the duty of the master not to expose his servant to unnecessary dangers while in the performance of the duty assigned to him, but, on the contrary, he is held to the exercise of ordinary care, and should use such care to furnish him with a reasonably safe place in which to perform his work and with reasonably safe tools and implements with which to do it, and his failure, in this respect, if it proximately results in injury to the servant, constitutes an actionable wrong for which he may recover his damages. *Marks v. Cotton Mills*, 135 N. C. 287, 47 S. E. 432; *Holt v. Manufacturing Co.*, 177 N. C. 170, 98 S. E. 369; *Pressly v. Yarn Mills*, 188 N. C. 410, 51 S. E. 69. It is our duty, in passing upon a motion to nonsuit, to examine all of the evidence and to place the most favorable construction upon that which tends to establish the plaintiff's cause of action. The act of

negligence here was in requiring the plaintiff to do his work in a dangerous manner, and forcing him to obey the negligent order of his superior by a threat to discharge him if he disobeyed it.

[5] The instruction, as to assumption of risk, which was requested by defendant, was substantially given, so far as was proper to give it, in the general charge of the court, which followed the approved precedents in such cases, and those in regard to contributory negligence. The instruction of the court was more complete and accurate than the prayers of the defendants, in the statement of the facts, and of the correct principle of law applicable to the facts; the prayers being somewhat deficient as to one or two of the material elements of assumption of risk and contributory negligence. They omitted all reference to proximate cause. *McNeill v. Railroad Co.*, 167 N. C. 390, 83 S. E. 704; *Brewster v. Elizabeth City*, 137 N. C. 392, 49 S. E. 885. But however this may be, the court charged properly and adequately upon this subject, although its language was different from that of the prayer. It was not required to adopt the words of the defendant's request, but could use its own form of expression, provided its instruction to the jury was substantially responsive to the prayer, even assuming that the latter was correct in itself. *Rencher v. Wynne*, 86 N. C. 268; *Graves v. Jackson*, 150 N. C. 383, 64 S. E. 128. It was held in *Pressly v. Yarn Mills*, supra (138 N. C., at page 414, 51 S. E. at page 71):

"While the employé assumes all the ordinary risks incident to his employment, he does not assume the risk of defective machinery and appliances due to the employer's negligence. These are usually considered as extraordinary risks which the employé does not assume, unless the defect attributable to the employer's negligence is obvious and so immediately dangerous that no prudent man would continue to work on and incur the attendant risks."

The court stated and explained this rule, and left it with the jury to find the facts and apply the rule to them. See, also, *Hicks v. Manufacturing Co.*, 138 N. C. 319, 50 S. E. 703.

On the remaining question, the judge promptly interposed and sufficiently cautioned the jury as to the improper remarks of counsel, and thus rendered them harmless. *Greenlee v. Greenlee*, 93 N. C. 278; *McLamb v. Railroad*, 122 N. C. 862, 29 S. E. 894; *State v. Hill*, 114 N. C. 780, 18 S. E. 971.

The request for an instruction to the effect that, if the jury believed the evidence, the verdict should be for the defendant was substantially the equivalent of the motion to nonsuit, and is covered by what we have said upon that part of the case.

No error.

CLEMENTS v. SOUTHERN RY. CO. et al.  
(No. 105.)

(Supreme Court of North Carolina. Feb. 25, 1920.)

1. APPEAL AND ERROR  $\S$  78(4)—REFUSAL OF MOTION TO DISMISS AN ACTION IS NOT APPEALABLE.

The refusal of a motion to dismiss an action is not appealable, but the defendant should enter his exceptions and appeal from the final judgment if it should be against him.

2. APPEAL AND ERROR  $\S$  78(4)—ALLOWANCE OF MOTION TO DISMISS IS FINAL AND APPEALABLE.

The allowance of a motion to dismiss an action is final and appealable.

3. RAILROADS  $\S$  5½, New, vol. 6A Key-No. Series—SERVICE OF PROCESS ON LOCAL AGENT SERVICE ON COMPANY AND ON DIRECTOR GENERAL ACTING UNDER FEDERAL CONTROL ACTS.

A railroad company, though in the hands of the Director General of Railroads acting by appointment and official proclamation of the President acting under Act Aug. 29, 1916, § 1 (U. S. Comp. St. § 1974a), and Act March 21, 1918 (U. S. Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½), section 10 of which makes the carrier subject to all laws and liabilities, is a proper party to an employé's suit against it and the Director General, and service of process on a local agent as provided in Revisal 1905, § 440, is service on the Director General, and also on the company.

Appeal from Superior Court, Wayne County; Connor, Judge.

Action by F. O. Clements against the Southern Railway Company and W. D. Hines, Director General of Railroads. From an order dismissing the Railway Company as a party defendant, plaintiff appeals. Reversed.

This action was brought by plaintiff against the Southern Railroad Company and W. D. Hines, Director General of Railroads, for personal injuries sustained December 20, 1918. The summons was served by reading and delivering a copy to W. B. Devlin, "the local agent" of the Southern Railroad Company at Goldsboro, N. C. That company entered a special appearance before the clerk of the superior court and moved for the dismissal of the action as to that company on the ground that W. B. Devlin was not agent of said company because its property was under the control and management of the Director General, Hines. The clerk denied the motion, and the company appealed. At the August term, 1919, of Wayne, Connor J., overruling the action of the clerk, dismissed the Southern Railroad Company as a party defendant, and the plaintiff appealed.

Hood & Hood, of Goldsboro, for appellant.  
J. L. Barham, of Goldsboro, for Southern Ry. Co.

CLARK, C. J. [1, 2] The refusal of a motion to dismiss an action is not appealable, but the defendant should enter his exceptions and appeal from the final judgment, should it be against him. *Johnson v. Reformers*, 135 N. C. 387, 47 S. E. 463, and numerous other cases cited; 1 Pell's Rev. p. 313. But the allowance of a motion to dismiss is final, and of course appealable.

The plaintiff, while operating, as locomotive fireman, a switching engine of the defendant company and in obeying the orders of the engineer in charge thereof, and by reason of defective appliances, was severely injured, losing his left leg at the kneejoint and his right leg five inches above the ankle, incurring great expense and intense mental anguish and physical pain and being hopelessly injured for life.

[3] Whether the defendant company was then being operated by the Director General as the representative of the lessee or as a statutory receiver, in either event the defendant company was under the control and management of the Director General by authority of law and was a proper party. *Logan v. Railroad*, 116 N. C. 940, 21 S. E. 959, and *Harden v. Railroad*, 129 N. C. 354, 40 S. E. 184, 55 L. R. A. 784, 85 Am. St. Rep. 747. Service upon the local agent was service upon the Director General, and also upon the company as represented by him. *Hollowell v. Railroad*, 153 N. C. 19, 68 S. E. 894; *Grady v. Railroad*, 116 N. C. 952, 21 S. E. 304.

The plaintiff could not be deprived of his right of action against the company whose engine he was operating because the road was temporarily, but by lawful authority, in the control and management of a lessee, or a receiver. The plaintiff had nothing to do with that matter. The receipts and expenses of the operations will be adjusted between the company and lessee or receiver when the accounts are settled, and the road will now soon be returned to the company in all probability.

Congress by chapter 418, § 1, ratified August 29, 1916 (U. S. Comp. St. § 1974a), provided:

"The President, in time of war, is empowered \* \* \* to take possession, and assume control of, any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic \* \* \* for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable."

Pursuant to said act, on December 20, 1917 (U. S. Comp. St. § 1974a, note), the President issued a proclamation wherein he recited:

"And whereas it has now become necessary in the national defense to take possession and assume control of certain systems of transportation and to utilize the same, to the exclusion as far as may be necessary, of other traffic thereon, for the transportation of troops, war material and equipment therefor, and for other needful and desirable purposes connected with the prosecution of the war."

He then authorizes the War Department to take possession and assume control of them. The President further provides in said proclamation:

"Except with the prior written assent of said Director, no attachment by mesne process or on execution shall be levied on or against any of the property used by any of said transportation systems in the conduct of their business as common carriers; but suits may be brought by and against said carriers and judgments rendered as hitherto until and except so far as said Director may, by general or special orders, otherwise determine."

This was to prevent plaintiffs in such cases being barred by the lapse of time or the death of witnesses.

On March 21, 1918, Congress passed an act for the operation of transportation systems while under federal control, section 10 of which provides that—

"Carriers while under federal control, shall be subject to all laws and liabilities as common carriers whether arising under state or federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law and in any action at law or suit in equity against the carrier, no defense shall be made thereto, upon the ground that the carrier is an instrumentality or agency of the federal government. Nor shall any such carrier be entitled to have transferred to a federal court any action heretofore or hereafter instituted by or against it, which action was not so transferable prior to the federal control of such carrier; and any action which has heretofore been so transferred because of such federal control, or of any act of Congress or official order or proclamation relating thereto, shall, upon motion of either party be transferred to the court in which it was originally instituted. But no process, mesne or final, shall be levied against any property under such federal control. \* \* \* U. S. Comp. Stat. 1918, Comp. St. Ann. Supp. 1919, § 3115½."

In *Hill v. Director General*, at last term, 178 N. C. 609, 101 S. E. 376, Hoke, J., said:

"The defendant the Director General must be considered a party only as being in the management and control of the defendant railroad."

This being so, he is simply in effect a statutory receiver, appointed by the President under authority of the act of Congress.

When a receiver is appointed by authority of a state statute, he is simply, in like man-

ner, "to be considered a party only as being in the management and control of the defendant railroad." To the extent and in the cases authorized by the statute the judge places him in the charge of the property of the defendant. In what cases and to what extent the judge shall appoint receivers and the scope of their powers varies in different states, and in the same state according to the statute at different times. There is no magic or peculiar power in his being styled "receiver." The substantial fact is that either by decree of a judge acting by authority of law, or in this case by appointment of the President acting by authority of an act of Congress, some one is placed "in the management and control of the defendant railroad" in the cases and for the reasons and purposes prescribed in the statute.

The person so acting, whether he is called a receiver or a Director General, is a party not individually, but in that representative capacity, and the corporation is sufficiently served with process whether it is served upon a "local agent" or upon the receiver himself, for the "local agent," under our statute (Revisal, § 440), is designated as a proper party upon whom to make the service.

In the statute above quoted it is provided:

"Carriers, while under federal control shall be subject to all laws and liabilities as common carriers, whether under state or federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such federal control or with any order of the President."

It would seem, therefore, that the Southern Railroad Company is liable to be sued for the personal injuries sustained by the plaintiff; for under the statute ratified August 29, 1916, the President issued his proclamation which provides that no attachment by mesne process or an execution shall be levied against any property of a railroad, "except with the prior written assent of the Director; \* \* \* but suits may be brought by and against said carriers and judgments rendered as hitherto until and except so far as said Director may, by general and special orders, otherwise determine." As such suits may be brought by and against said carriers and judgments rendered as hitherto, it would seem to follow that service can be made as heretofore upon W. B. Devlin, "local agent," who was and still is "local agent" of the Southern Railway Company at Goldsboro. He is not the less, either in law or fact, filling that position because under the authority of the act of Congress the President has appointed the Director General as a statutory receiver with the most complete powers to "take possession, use, control, or operation of" the Southern Railroad, among others.

There is no question here arising as to the enforcement of the judgment when it shall

be obtained, but the Southern Railroad Company is merely served with summons which will give notice to it as well as to the Director General that such claim is being prosecuted against the defendant company, which is thus afforded opportunity to contest the claim, and it has appeared in this case by its counsel.

The sole question presented is whether service can be made upon the Southern Railroad Company while in the hands of the statutory receiver, as could have been done if he had been a receiver appointed by a judge in such cases as are provided by a federal or a state statute. If service upon the Director General himself would have been sufficient service upon the corporation, as it would be in the case of a receiver, then service upon the station agent under him would be sufficient service under the provision that "suits may be brought by and against said carriers \* \* \* as hitherto." This evidently means in such manner and in such cases as heretofore.

"It was proper to sue the receivers of a railway company alone, or to join them as defendants with the company in an action for injuries, though the cause of action arose before their appointment." *Hollowell v. Railroad*, 153 N. C. 19, 68 S. E. 894.

"Service of a summons upon the receivers of a corporation is service upon the corporation itself as fully as if made upon the president and superintendent. A service \* \* \* upon the local agents of the receivers \* \* \* has the same legal effect as if made upon the receivers personally." *Grady v. Railroad*, 116 N. C. 952, 21 S. E. 304.

In *Owens v. Hines*, Director General, 178 N. C. 325, 100 S. E. 617, it was held that in an action to recover from the carrier on any liability (except for fines, forfeitures, and penalties, which must be brought against the carrier alone) the summons must be served upon the Director General, and service on him was sufficiently made by serving the summons upon W. B. Devlin, the "local agent" of the company, but serving under his orders.

While the judgment, if obtained, cannot be collected out of the property of the defendant company without the prior consent of the Director General, it would be a great hardship upon the plaintiff, suing for grave personal injuries, if he was debarred of an action against the company until it should become out of date or his witnesses should die or remove. It is no hardship upon the defendant company, but to its advantage, that it should be joined as a party defendant and have opportunity to be represented by its own counsel, more conversant probably with the facts than the counsel of the Director General.

The subject has been much illuminated by the following cases in the federal courts:

In *Johnson v. McAdoo*, Director General (D. C.) 257 Fed. 757, it is held:

"Under Act March 21, 1918, \* \* \* litigants can sue railroad companies under federal direction, just as they were previously able to do, and in such courts as had jurisdiction under the general law."

And further:

"It is incumbent on the Director General to defend a suit against a road and make payment in the event of recovery out of his receipts; the question of adjustment as between government and the railroad being for settlement when the roads shall be returned to their owners or otherwise disposed of."

This is exactly in point in this litigation.

In *Jensen v. Railroad* (D. C.) 255 Fed. 795, it is held that—

"The provision in General Order No. 50 \* \* \* that pleadings in pending actions for injuries against a railroad company 'may' be amended by substituting the Director General and dismissing the company as defendant must be construed as permissive only, in view of the Federal Control Act, \* \* \* providing that carriers, while under federal control shall be subject to all laws and liabilities as common carriers, and that 'actions may be brought against them and judgments rendered as now provided by law.'"

In that opinion the court says:

"Congress clearly meant, by the term 'carriers,' the corporations themselves, and that the right to sue them must remain certainly until it is changed by some valid provision."

In *Rutherford v. Railroad* (D. C.) 254 Fed. 880, the court holds that under Act March 21, 1918, c. 25, § 10, the Director General is a carrier; his position being analogous to a receiver. There are other decisions all of them along the above lines.

The above act of 1918 (chapter 25), "to provide for the operation of transportation systems while under federal control, for the just compensation of their owners and for other purposes," authorizes the President "to agree with and to guarantee to any such carrier making operating returns to the Interstate Commerce Commission that during the period of such federal control it shall receive as just compensation an annual sum, payable from time to time, in reasonable installments for each year and pro rata for any fractional year of such federal control not exceeding a sum equivalent as nearly as may be to its average annual railway operating income for the three years ending June 30, 1917." There are also other provisions for maintenance, repairs, etc., and for other compensation and a provision by which the carrier shall accept the terms and conditions of this act, which this defendant company, and it is believed that all other railroad companies, did.

There are other provisions very much in detail making a most complete lease between the government and the carriers, including a revolving fund of \$500,000,000 placed in the President's hands to provide for deficiencies in receipts. Therefore the attitude of the parties is that of lessor and lessee, and the defendant company is liable to be sued jointly with the Director General, representing the lessee, as laid down in *Logan v. Railroad*, 116 N. C. 940, 21 S. E. 959, and *Harden v. Railroad*, 129 N. C. 354, 40 S. E. 184, 55 L. R. A. 784, 85 Am. St. Rep. 747, and citations to those cases in *Anno. Ed.*

But if the position of the parties was that the Director General is a statutory receiver, as said in *Rutherford v. Railroad*, supra, service upon the local agent was equally service upon the corporations and on the Director General under the authorities herein cited.

The order setting aside the service, therefore, because the summons was read to and a copy left with W. B. Devlin, the "local agent" at Goldsboro, instead of upon the Director General himself, must be reversed.

(179 N. C. 318)

JARMAN v. DAY. (No. 221.)

(Supreme Court of North Carolina. March 17, 1920.)

1. WILLS  $\Rightarrow$  466—"LEND" MEANS GIVE OR DEVISE IN ABSENCE OF SHOWING OF DIFFERENT INTENT.

The word "lend" used in a will passes the property to which it applies in the same manner as if the word "give" or "devise" had been used, in the absence of anything in the will having a tendency to show that it was not used in that sense.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Lend.]

2. WILLS  $\Rightarrow$  608(3)—DEVISE TO DAUGHTER AND HEIRS OF BODY RENDERED DEFEASIBLE BY DEVISE TO ANOTHER IF SHE DIED WITHOUT SUCH HEIRS.

Where a will devised land to the testator's daughter for her natural life and at her death to her lawfully begotten heirs of her body and their heirs of their bodies, the fee thereby given the daughter under the rule in *Shalley's Case* was rendered defeasible by a devise to third parties in case she died without lawful issue of her body.

Appeal from Superior Court, Onslow County; Daniels, Judge.

Action by R. B. Jarman against N. E. Day. Judgment for defendant, and plaintiff appeals. Affirmed.

This is an action to recover the purchase price of a tract of land; the defendant hav-

ing refused to accept the deed tendered by the plaintiff and to pay the purchase money, according to his agreement, on the ground that the title of the plaintiff is not an absolute fee-simple estate.

The plaintiff derives title under the will of Gardner Shepard, the material parts of which are as follows:

"I lend to my daughter, Rachel Foy, all of the land, etc. [description omitted], during her natural life, and at her death I lend all the above-mentioned land to the lawful begotten heirs of her body, and to the lawful begotten heirs of their bodies if any, and in case my daughter Rachel Foy dies leaving no lawful issue of her body then I give all of the above-mentioned land to my son John Shepard, and his lawful heirs."

The plaintiff, Rachal Jarman, is the Rachel Foy mentioned in said will, and she has living children and grandchildren.

John Shepard died in 1896, leaving children and grandchildren, and he has never conveyed his interest in said land.

His honor held that the plaintiff did not have an absolute estate in fee, but that it was defeasible on her dying leaving no issue, and plaintiff excepted.

Judgment in favor of the defendant, and plaintiff appealed.

E. M. Koonce, of Jacksonville, for appellant.

Rodolph Duffy, of Jacksonville, for appellee.

ALLEN, J. [1] There is nothing in this will having a tendency to show that the testator did not use the word "lend" in the sense of "give" or "devise," and "the general rule is that, unless it is manifest that the testator did not intend an estate to pass, the word 'lend' will pass the property to which it applies, in the same manner as if the word 'give' or 'devise' had been used." *Sessoms v. Sessoms*, 144 N. C. 123, 56 S. E. 688.

[2] The testator has then devised the land in controversy to the plaintiff, Rachal Jarman, then Foy, for life and to the heirs of her body, which standing alone would be a fee simple under the rule in *Shelley's Case*, but with a limitation over to "John Shepard and his lawful heirs" in the event the plaintiff "dies leaving no lawful issue of her body," which clearly makes the estate defeasible. *Dawson v. Ennett*, 151 N. C. 543, 66 S. E. 566; *Smith v. Lumber Co.*, 155 N. C. 391, 71 S. E. 445; *Rees v. Williams*, 165 N. C. 203, 81 S. E. 286.

In the *Smith Case* the devise was to six children in fee with the limitation that—

"If any of my said children mentioned in this item of my said will should die without leaving lawful issue of his or her body surviving, or to be born within the period of gestation after his death, then it is my will and de-

sire that the part therein given and devised to said child shall descend to and upon the survivors of my said children mentioned in this item of this my will, or upon the lawful heirs who may be surviving any of my said children mentioned in this item."

And the court said in construing the will:

"Under several recent decisions of the court, the children, under the third item of this will, took an estate in fee simple, defeasible as to each on an uncertain event—in this case 'a dying without leaving lawful issue of his or her body surviving or to be born within the period of gestation after death.' *Perrett v. Byrd*, 152 N. C. 220 [67 S. E. 507]; *Dawson v. Ennett*, 151 N. C. 543 [66 S. E. 566]; *Harrell v. Hagan*, 147 N. C. 111 [60 S. E. 909, 125 Am. St. Rep. 539]; *Sessoms v. Sessoms*, 144 N. C. 121 [56 S. E. 687]; *Whitfield v. Garriis*, 134 N. C. 24 [45 S. E. 904]; *Smith v. Brisson*, 90 N. C. 284. And we have held also in these and other cases that, when a devise is limited over on a contingency of this kind, unless a contrary intent clearly appears in the will, the event by which each interest is to be determined must be referred, not to the death of the deviser, but to that of the several holders respectively."

Many other authorities could be cited to the same effect, but it is not necessary to do so.

Affirmed.

(179 N. C. 320)

WYNNE et al. v. GREENLEAF JOHNSON LUMBER CO. (No. 259.)

(Supreme Court of North Carolina. March 17, 1920.)

1. APPEAL AND ERROR  $\S$  1022(1)—REFEREE'S FINDINGS AFTER APPROVAL ARE CONCLUSIVE.

The referee's findings of fact on the testimony after approval by the trial judge are conclusive on appeal.

2. ARBITRATION AND AWARD  $\S$  16(1), 22—ARBITRATION AGREEMENT MAY BE REVOKED FOR CONDUCT OF ADVERSE PARTY IN GETTING MATERIAL WITNESS DRUNK.

Where the owners of timber lands and a lumber company which they were suing agreed for arbitration, and the superintendent of the company made a witness for the timber owners drunk on his way to hearing before the arbitrators, the company breached the contract of arbitration by such conduct of its superintendent, and the timber owners, though they might have insisted on recovery of specified liquidated damages, therefore had a right to revoke the arbitration agreement and assert their original rights by action.

Appeal from Superior Court, Franklin County; Guion, Judge.

Action by J. S. Wynne and wife and Mrs. R. T. Gray against the Greenleaf Johnson Lumber Company. From judgment for plaintiffs, defendant appeals. Affirmed.

This was an action for damages for cutting timber under contract size and negligent burning of lands of plaintiffs, submitted to R. B. White, referee. No exceptions were taken to his findings of fact or conclusions of law, with the single exception of his findings and conclusions as to the breach of the agreement to arbitrate by plaintiffs and consequent damage to the defendant. The judgment of the referee was confirmed, and the defendant appealed.

Wm. H. & Thos. W. Ruffin and W. H. Yarrow, all of Louisburg, for appellant.

Jones & Bailey, of Raleigh, and Ben T. Holden, of Louisburg, for appellees.

CLARK, C. J. The only question presented is as to the right of the plaintiffs to revoke the contract of arbitration.

[1] The referee found as facts upon the testimony, which, being approved by the judge, are conclusive on appeal, that:

"On October 3, 1916, the parties entered into written agreement to arbitrate, arbitrators were selected, and a hearing set at Vaughn. Witnesses from Wood came to Vaughn on defendant's train. As the train was leaving Wood, defendant's superintendent, Hayes, caused inquiry to be made for whisky, giving as his reason that he wished to get one Denton, a witness for plaintiffs and a passenger on the train, drunk so that he could not testify. Upon learning that another passenger had a pint of whisky in his bag back at the station, he had the train stopped and backed half a mile to the station. The whisky was procured. Most of it was given to Denton, who became drunk. Denton was a material witness for the plaintiffs."

The plaintiffs not long after gave notice of their revocation of the arbitration and brought this action.

[2] The defendant breached the contract of arbitration by this action of its superintendent, and we agree with the counsel for the plaintiffs that they might well have insisted upon the recovery of \$500 liquidated damages on account thereof. They chose rather to proceed to assert their original rights in this action. Mr. R. B. White, the referee, we think stated the law tersely and correctly as follows, in his report, which the judge approved:

"An agreement to submit a controversy to arbitration by necessary implication carries with it the condition that neither party will attempt by any unfair or fraudulent means to affect the award which is to be made. The condition is concurrent and vital. A breach of such condition by one party to the agreement justifies a revocation by the other. Intentionally getting a material witness drunk for the purpose of keeping him from testifying in behalf of the other party is such a breach, and your referee is of the opinion that the defendant should recover nothing on his counterclaim."

In 2 Ruling Case Law, p. 93, it is said:

"It has been held that where a party takes a fraudulent advantage of the other party, the award will be set aside. *Chambers v. Crook*, 42 Ala. 171 [94 Am. Dec. 637]; *Emerson v. Udall*, 13 Vt. 477 [37 Am. Dec. 604]."

In 5 Corpus Juris, 61, it is said, in summing up the authorities cited:

"If the party revoking the submission has sufficient cause to do so, he, of course, incurs no liability for damages."

The conduct of the defendant's superintendent, for which the defendant company is responsible, was so clearly reprehensible and contrary to good faith and public policy that the action of the referee, and of the court needs no citation of authorities in approval.

It may be proper to add in the language of Lord Erskine, when at the bar:

"Morality may come in the cold abstract from the pulpit, but men smart practically under its lessons when we lawyers are the teachers."

Affirmed.

(179 N. C. 730)

STATE v. WALKER. (No. 209.)

(Supreme Court of North Carolina. March 17, 1920.)

1. VAGRANCY §5 — IMPRISONMENT FOR TWELVE MONTHS IN PROSECUTION IN SUPERIOR COURT ON COMPLAINT ISSUED BY MAYOR IMPROPER.

A sentence of imprisonment for 12 months for vagrancy cannot be sustained under Laws 1919, c. 215, an act passed for the repression of prostitution, where the prosecution was heard in the superior court on a warrant issued by the mayor, and not on appeal from the recorder's court, nor under an indictment found by a grand jury; the punishment for all offenses condemned in such act exceeding imprisonment for 30 days, or a fine of \$50.

2. CRIMINAL LAW §218(1)—SECOND CONVICTION IMPROPER WHERE WARRANT DOES NOT RECITE FIRST CONVICTION.

A judgment as for a second conviction for the same offense cannot be sustained, where the first conviction was not alleged in the warrant; prosecution being heard in the superior court on a warrant issued by the mayor.

3. CRIMINAL LAW §220—COURT MAY ALLOW AMENDMENT OF WARRANT AFTER VERDICT.

The superior court, in a prosecution under a warrant issued by a mayor, could in its discretion allow an amendment to the warrant after verdict, when defendant moved in arrest of judgment, and the solicitor for the state asked to be allowed to amend.

4. CRIMINAL LAW §218(5) — WARRANT REFERRING TO ACT DEFINING VAGRANCY SUFFICIENT.

A warrant in a prosecution for vagrancy pointing to Revisal 1908, § 3740, subsec. 7, de-



fining vagrancy, which the defendant was alleged to have violated, was sufficient; the courts dealing more liberally with warrants than with indictments.

**5. CRIMINAL LAW §220—FAILURE TO REDUCE TO WRITING AMENDMENT TO WARRANT DID NOT DESTROY LEGAL EFFECT.**

The fact that an amendment to a warrant was not reduced to writing at the time it was allowed did not destroy its legal effect.

Appeal from Superior Court, Lenoir County; Daniels, Judge.

Louise Walker was convicted of vagrancy, and appeals. Remanded for proper judgment.

The defendant was convicted before the mayor of Kinston on a warrant charging that she "did unlawfully and wilfully violate a law of the state of North Carolina (No. —, section —), by being a vagrant," and appealed to the superior court, where she was again convicted. After verdict the defendant moved in arrest of judgment, and the solicitor for the state asked to be allowed to amend the warrant. The motion to amend was allowed, but the amendment, which added to the warrant subsection 7 of section 3740 of Pell's Revisal, defining vagrancy, was not reduced to writing until after the term of court expired. The defendant excepted. The motion in arrest of judgment was overruled, and defendant excepted. His honor then sentenced the defendant to 12 months in jail, finding in the judgment that this was a second conviction for the same offense, and the defendant excepted and appealed.

Joe Dawson, of Kinston, for appellant.

James S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

**ALLEN, J.** [1] The sentence of imprisonment for 12 months cannot be sustained under chapter 215, Laws of 1919, an act passed for the repression of prostitution, because the punishment for all the offenses condemned in that act exceeds imprisonment for 30 days or a fine of \$50, and this prosecution was heard in the superior court on a warrant issued by the mayor, and not on appeal from the recorder's court, nor was any indictment found by a grand jury.

It is also clear from the amendment allowed that the court was not proceeding under the act of 1919, as it is in the language of section 3740, subsec. 7, of Pell's Revisal, which defines vagrancy and limits the punishment to a fine of \$50 or imprisonment for 30 days.

[2] Nor can the judgment be approved on the ground that this is a second conviction for the same offense because the first conviction is not alleged in the warrant. This was the precise question decided in *State v. Davidson*, 124 N. C. 839, 32 S. E. 957, and it is in accord with the authorities elsewhere.

"Where, in case of repeated convictions for similar offenses, the statute imposes an additional penalty, an indictment for a subsequent offense must allege the prior convictions, since such convictions, although they merely affect the punishment, are regarded as a portion of the description of the offense." 22 Cyc. 356.

The judgment must therefore be set aside, and the question remaining for decision is whether the warrant is sufficient to sustain any judgment.

[3, 4] It charged vagrancy before amendment, which seemingly is as specific and definite as the warrant which was held to be valid in *State v. Moore*, 166 N. C. 284, 81 S. E. 294, but, however this may be, the court, exercising its discretion, allowed an amendment, which it had the power to do (*State v. Cauble*, 70 N. C. 64), and the amendment points to the subsection of the act defining vagrancy, which the defendant is alleged to have violated, which is sufficient in a warrant, with which the courts deal more liberally than with indictments.

[5] The fact that the amendment was not reduced to writing at the time it was allowed does not destroy its legal effect, but it is the better practice to require this to be done.

In *State v. Yellowday*, 152 N. C. 793, 67 S. E. 480, there was a motion in arrest of judgment by the defendant, and one to amend by the state, as in this case, and the amendment allowed, a material one, and it was held that the order of amendment was self-executing, although the amendment was not reduced to writing. The court says:

"It appears from the record that the court ordered an amendment of the warrant by the insertion therein of the words, 'without a license so to do,' but the words were not actually inserted in the complaint or the warrant by the solicitor. The order of the court, as has been decided by this court several times, was self-executing. In the case of *Holland v. Crow*, 34 N. C. 280, Chief Justice Ruffin, for the court, says: 'The variance between the relators in the petition and the scire facias is cured by the order for amendment. It is true the amendment was not actually made. But the scire facias was issued upon the assumption of the amendment, and all the subsequent proceedings were based upon the supposition that one was as properly a relator as the other, and in such cases the course is to consider the order as standing for the amendment itself.' He cited the case of *Ufford v. Lucas*, 9 N. C. 214, in which it is held, as it was in the case just cited, that where, during the pendency of the suit, leave is obtained to amend the writ and change the form of action, if such amendment be not made on the record, and the suit be tried in its amended form or as if the amendment had been actually made, this court will consider the case as if the amendment had been properly

inserted in the writ, warrant, or complaint at the time the order was made by the court. This is a most just and reasonable rule, and is essential to the due administration of the law."

In this case no objection was made at the time to proceeding as if the amendment had been drawn out, nor is there any claim that the amendment appearing in the record is not the one ordered by the court.

We are therefore of opinion that judgment may be pronounced on the warrant as amended, and, following the precedent in *State v. Taylor*, 124 N. C. 803, 32 S. E. 548, and in other cases, the cause is remanded, in order that judgment may be entered upon the verdict under the Vagrancy Act.

Remanded.

(179 N. C. 724)

STATE v. BAILEY et al. (No. 90.)

(Supreme Court of North Carolina. March 17, 1920.)

**1. CRIMINAL LAW §1158(3)—FINDING THAT JURORS WERE INDIFFERENT IS NOT REVIEWABLE.**

The trial court's findings in a criminal case, after hearing evidence, that the jurors challenged were indifferent, is not reviewable on appeal.

**2. JURY §108(11)—OPINION WHICH JUROR COULD DISREGARD DOES NOT DISQUALIFY.**

Where jurors on their examination stated that they had formed an opinion as to the guilt of the defendants or some of them from talking with neighbors and reading newspapers, but that they could render a fair and impartial verdict on the evidence and the charge of the court, it was not error to overrule challenges to such jurors.

**3. JURY §135—ACCUSED CANNOT COMPLAIN OF REJECTION OF JURORS ON CHALLENGE OF CODEFENDANT.**

One of the accused cannot complain of the rejection of a juror accepted by him on the peremptory challenge of a codefendant; his right being a right to reject but not to select jurors.

**4. WITNESSES §244—RIGHT TO ASK LEADING QUESTION OF ALLEGED ACCOMPLICE IS DISCRETIONARY.**

Where the prosecution called as a witness one indicted by another bill for the same offense, and he proved unwilling, it was within the court's discretion to permit the state to ask a leading question considering his testimony in habeas corpus proceedings.

**5. CRIMINAL LAW §413(1)—WITNESS CANNOT BE CROSS-EXAMINED TO SHOW SELF-SERVING DECLARATION BY ACCUSED.**

It was not error to refuse to permit a witness for the state to be cross-examined by the defense as to a statement made by one of the defendants to witness which was a self-serving declaration.

**6. WITNESSES §349 — ACCUSED MAY BE CROSS-EXAMINED TO IMPEACH CHARACTER.'**

When accused takes the stand as a witness, he puts his character in evidence, and may be cross-examined to impeach his character as to matters not brought out upon direct examination.

**7. CRIMINAL LAW §1169(1)—ADMISSION OF IMPEACHING TESTIMONY AS TO IMMATERIAL CONVERSATION NOT REVERSIBLE.**

The admission of testimony of a conversation by witness, where proper foundation for impeachment was laid, is not reversible, though the conversation was irrelevant, if there is nothing to show it was prejudicial.

**8. CRIMINAL LAW §834(2)—REFUSAL OF REQUEST SUBSTANTIALLY CHARGED IS NOT ERROR.**

The refusal of requests by accused which were substantially given in the charge as far as they were correct is not error; it not being necessary to give them in the words of the request.

**9. CRIMINAL LAW §830—REFUSAL OF REQUEST CONTAINING ERRONEOUS STATEMENTS OF FACT IS PROPER.**

Where the request made some statements or inferences of fact which it would have been improper for the judge to give, the entire request was properly refused.

**10. CRIMINAL LAW §829(10)—CHARGE AS TO CREDIBILITY OF INTERESTED WITNESS HELD TO COVER REQUEST AS TO TESTIMONY OF AN ACCOMPLICE.**

A request that the jury should be careful about accepting testimony of accomplice and should acquit unless it, with the other evidence, satisfied beyond a reasonable doubt, is sufficiently covered by instruction to scrutinize carefully the evidence of an interested witness, but, if they believe such witness told the truth, they should give his testimony same weight as a disinterested witness.

**11. CRIMINAL LAW §510—UNCORROBORATED TESTIMONY OF ACCOMPLICE IS SUFFICIENT.**

The uncorroborated testimony of an accomplice, if it produces entire conviction of the prisoner's guilt, is sufficient to warrant conviction.

**12. CRIMINAL LAW §825(1)—ACCUSED CANNOT COMPLAIN OF CHARGE AS TO CONTENTION OF PROSECUTION WITHOUT ASKING CORRECTIONS.**

Exception to the charge which related to the court's statement of contentions of the prosecution does not show error where it does not appear that the statements were incorrect, and the defendant did not at the time ask corrections therein.

**13. CRIMINAL LAW §822(1) — CONVICTION WILL NOT BE REVERSED ON OBJECTION TO SINGLE PARAGRAPH OF CORRECT INSTRUCTION.**

An exception to a single paragraph of the instruction on reasonable doubt does not require reversal where the whole instruction was correct and full.

**14. HOMICIDE ~~C~~151(1)—ACCUSED HAS BURDEN TO SHOW MITIGATION FOR KILLING WITH DEADLY WEAPON.**

Where the killing by accused with a deadly weapon is proved or admitted, the burden shifts to defendant to show mitigation to the satisfaction of the jury.

Appeal from Superior Court, Johnston County; Kerr, Judge.

Spain Bailey and others were convicted of murder in the second degree, and they appeal. Affirmed.

Appeal by prisoners. They were tried upon an indictment charging conspiracy to murder, and also the murder of, J. A. Wall, deputy sheriff of Johnston county. They were all convicted of murder in the second degree, and each was sentenced to 20 years in the state's prison and appealed.

J. H. Pou, of Raleigh, Wellons & Wellons, of Smithfield, John E. Woodard, of Nashville, W. S. O'B. Robinson, of Goldsboro, W. A. Finch, of Wilson, Charles U. Harris, of Raleigh, and W. J. Hooks, of Kenly, for appellants.

The Attorney General and Frank Nash, Asst. Atty. Gen., for the State.

CLARK, C. J. The evidence for the state tended to show that the prisoners and three other men were operating an illicit distillery in Johnston county; that they had gone to the distillery fully armed with the expressed determination to kill any officer who might interfere with them. The deceased, J. A. Wall, was one of a posse who went to the still and attempted to arrest the prisoners. In such an attempt he was killed by one of them, the state's evidence tending to show that the prisoner Spain Bailey was the man who actually committed the homicide, the weapon used being a shotgun. It is not contended that the evidence was not sufficient to justify the verdict.

[1] Assignments of error 1 to 11 are to the judge overruling challenges for cause. In each case, after hearing the evidence, Judge Kerr held that the juror in question was indifferent. Such finding is not reviewable on appeal. *State v. De Graff*, 113 N. C. 688, 18 S. E. 507, and *State v. Register*, 133 N. C. 751, 46 S. E. 21, and the cases therein cited and citations to those cases in the Anno. Ed.

[2] W. F. Morris on his voir dire stated that he had formed and expressed the opinion that the prisoners were guilty, but that his opinion was based upon talking with the neighbors and reading the newspaper accounts. The court then asked him if he were chosen as a juror and sworn could he go into the jury box, hear the evidence and the charge of the court, and render a fair and impartial verdict. He replied that he

could. The court then held that he was an impartial juror. He was then challenged peremptorily, and the prisoners exhausted their challenges. The ruling of the court is sustained by the authorities. *State v. Banner*, 149 N. C. 522, 63 S. E. 84; *State v. Foster*, 172 N. C. 960, 90 S. E. 785; *State v. Terry*, 173 N. C. 763, 92 S. E. 154, and cases there cited.

J. A. Morgan was asked the same questions and made the same reply, and the same was substantially the case as to A. B. Hollowell. J. W. Goodrich stated that he had formed and expressed the opinion that some of the seven in these indictments had killed Wall (there were three of them not on trial). He said:

"My opinion is from what I have talked and read in the papers that some of that bunch killed him."

He was then asked, as was asked Hollowell above:

"Notwithstanding the opinion which you may have formed and expressed that somebody is guilty or some of these defendants is guilty of having shot the deceased, Wall, if you are chosen as a juror, etc., could you go into the jury box, hear the evidence and charge of the court, and render a fair and impartial verdict?"

Upon his answering "Yes," the court found him indifferent and overruled the challenge for cause, and he was then challenged peremptorily. Substantially the same challenge and examination took place as to several other jurors when tendered, and upon the juror replying as above that, if sworn and accepted as a juror, he could hear the evidence and the charge of court and would render a fair and impartial verdict, the court found the juror indifferent, and thereupon overruled the challenge for cause, and the juror was challenged peremptorily, except one or more, who after the peremptory challenges were exhausted, were accepted and served on the jury.

[3] One juror, W. H. Etheridge was accepted by one of the prisoners, Hales, but on the peremptory challenge of one of the other prisoners was rejected and Hales excepted. There was no error in this, else not more than one defendant could be tried at a time. The right of a defendant is to challenge and reject (on sufficient ground), but not to select, jurors.

The matters above set forth have been so fully discussed that there is no need of repeating what has been recently said in a very clear and forcible opinion by Brown, J., in *State v. Terry*, 173 N. C. 763, 92 S. E. 154.

In *State v. Foster*, 172 N. C. 960, 90 S. E. 785, the printed record on file in this court shows that the proposed juror had formed

and expressed an opinion and stated that it would take evidence to remove the impression. Walker, J., in passing upon the exception to his reception as a juror, says:

"The challenge to a juror because he had formed and expressed an opinion was fully met by the ruling of the court, \* \* \* that he was fair and impartial. He stated that, notwithstanding the opinion he had formed, he could hear the case and render a verdict according to the law and the evidence."

Three jurors on this occasion used that expression, but were peremptorily challenged and did not sit.

When a case is one of importance and has attracted much notice, there are few intelligent men in the county who have not heard the matter discussed or have not read the accounts in the newspapers. But when the juror states that this is the source of his information, and that notwithstanding he can sit as a juror and after hearing the evidence and the charge of the court he can render a fair and impartial verdict and the court finds that this statement is true, and the juror indifferent, he is properly accepted. Otherwise only the most ignorant, unintelligent, and uninformed men in the county would be competent as jurors. This would require every case to be removed which is of sufficient importance to be much talked about.

[4] Exception 12 is because Barden Pierce who is indicted in another bill for this same offense, appearing to be an unwilling witness, the court in the exercise of its discretion permitted the counsel for the state to ask him if he had not testified in the habeas corpus hearing in this case, and upon his saying that he did the court permitted him to be asked the question if he had not replied that Jim Evans, John Stancil, and Spain Bailey were at Evans' Store, to which he replied that he had.

This was simply permission to ask a leading question which is entirely in the discretion of the court. The witness did not object that his reply would tend to incriminate himself, and it would not; for his examination in the habeas corpus proceeding was taken down, and it was not an impeaching question, and seems to have been asked for the purpose of refreshing the witness' memory as to his testimony voluntarily rendered at the former examination.

[5] Exception 13 was to a question asked on cross-examination for the prisoners of Walter Stancil with reference to an interview with Jim Evans, one of the prisoners, who had set up an alibi that he was at home sick in bed at the time of the tragedy, and therefore could not have been at the still. He was asked as to some statement made to him by Evans; the object being to bring out a statement by Evans to the witness on that occasion that the doctor had been attending

him and that Evans said he had been confined to his bed for several days. This was an attempt to get out a declaration made by the prisoner in his own interest, and besides was irrelevant. It was not offered as corroboration of any testimony that prisoner had given on the stand, nor does it appear that the physician had been a witness in the cause. The evidence was properly excluded. *State v. Hildreth*, 31 N. C. 440, 51 Am. Dec. 369; *State v. Howard*, 82 N. C. 623; *Ratliff v. Ratliff*, 131 N. C. 425, 42 S. E. 887, 63 L. R. A. 963.

[6] Exceptions 14 and 15 are to questions to the prisoner Hales upon the stand under the cross-examination by the state to impeach his character. When the prisoner went upon the stand as a witness in his own behalf, he put his character in evidence, and was subject to impeachment. In *State v. Cloninger*, 149 N. C. 572, 63 S. E. 154, the court said:

"The accused, by becoming a witness in his own behalf, is liable to cross-examination to impair his credit, like any other witness, and the cross-examination is not restricted to matters brought out on the direct examination."

[7] Exception 16: Harvey Stancil, witness for prisoners, had denied on cross-examination that he had had a certain conversation with Jarvis Edgerton. Harvey was placed on notice that it was proposed to contradict him. Edgerton was permitted to testify that Stancil went to him and had such conversation. This conversation may or may not have been irrelevant, as prisoners contend, but there was nothing that tends to show that it was prejudicial.

[8] The exceptions to the refusal of the judge to give special request cannot be sustained. They were all substantially given in the charge so far as they were correct, and it was not incumbent upon the judge to give them in the identical words of the prayer.

[9] The exception most pressed was the alleged failure to give the prayer set out in exception 22. This extended to a page and a half of printed record and contains some statements or inferences of fact which it would have been improper for the judge to give and therefore it was properly refused.

[10, 11] Besides, if the prisoners could have selected out of this long prayer the sentence they rely upon, which is as follows:

"The laws of this state impose upon you the duty to be careful about accepting the testimony of an accomplice in crime, and unless it, with the other evidence in the case, satisfies you beyond a reasonable doubt of the defendant's guilt, you should find the defendants not guilty"

—the exception could not be sustained for two other reasons, because the judge did substantially charge it, when he instructed

the jury that, while they should "carefully and cautiously scrutinize the evidence of an interested witness, still, if after doing so the jury should believe such witness told the truth about the matter, they should give his testimony just as much weight as they would that of a disinterested witness." State v. Boynton, 155 N. C. 464, 71 S. E. 341, and cases there cited, and besides the judge was not required to so charge, for "the unsupported testimony of an accomplice, if it produces entire belief of the prisoner's guilt, is sufficient to warrant conviction." State v. Haney, 19 N. C. 390; State v. Jones, 178 N. C. 703, 97 S. E. 32; State v. Palmer, 178 N. C. 822, 101 S. E. 506.

[12] The exceptions to the charge as given are all to his statement of the contentions of the prosecution, and there is nothing to show that they were incorrect, and the defendant did not at the time ask any corrections therein.

[13] Exception 30 is to a single paragraph taken out of the judge's instruction on the doctrine of reasonable doubt, but the whole instruction from which this is an excerpt is correct and full. Exception 31 is because the judge charged:

"If you find that one of the defendants did the shooting which killed, and that the others or any one of them were present aiding and abetting, then those who aided and abetted would be guilty."

[14] Exception 32 is because the judge, in full and appropriate language, laid down the established principle as applicable to this case that, if the killing with a deadly weapon, is proved or admitted, the burden shifts to the defendant to show matter in mitigation to the satisfaction of the jury.

The charge is a full, fair, and careful presentation of the law applicable, and we find in his conduct of the trial no error.

(179 N. C. 269)

STEVENS LUMBER CO. v. ARNOLD et al.  
(No. 114.)

(Supreme Court of North Carolina. March 3, 1920.)

1. VENUE  $\S$  77—RIGHT TO CHANGE NOT WAIVED BY EXTENSION OF TIME TO ANSWER.

In view of Laws 1919, c. 304, § 3, where summons was returnable on October 20, 1919, and defendant applied to the clerk for an extra two weeks, from October 20th, to file answer, and the clerk, instead of complying with this specific request, extended the time to November 20, 1919, or about 17 days beyond the time requested, without defendant's knowledge, defendant's motion for removal, filed October 29th, was in time, the complaint having been filed on the 23d; for the clerk had no power

to extend the time for answering contrary to defendant's request without his consent, and in any event defendant's request was a nullity, as the law allowed him all the time asked for in his request.

2. VENUE  $\S$  81, 72—MOTION FOR REMOVAL TO BE DECIDED BY JUDGE ON TRANSFER OF CAUSE.

Under Laws 1919, c. 304, as to filing pleadings, defendant must file his motion for removal with the clerk before answering, and, after filing answer, the case will then be transferred to the superior court for a hearing of the motion before the court at term; there being no provision in the statute giving the clerk jurisdiction to pass on a motion.

3. VENUE  $\S$  77—RIGHT TO MOVE FOR REMOVAL LOST BY ANSWER.

Under Laws 1919, c. 304, as well as prior thereto, defendant, by filing his answer, without first making his motion to remove, loses his right to remove, as his motion for that purpose is due before answer is actually filed or before the time for filing it has expired.

4. ATTORNEY AND CLIENT  $\S$  86—RIGHT TO REMOVAL NOT FORFEITED BY DEFENDANTS' FAILURE TO DENY STATEMENT OF OPPOSING COUNSEL THAT EXTENSION OF TIME TO ANSWER WAS GRANTED ON DEFENDANTS' APPLICATION.

That defendants did not controvert the statement made in argument before the trial court by plaintiff's counsel that time for answering had been extended on defendants' application beyond the statutory time, which extension was claimed to have forfeited defendants' right to move for removal, did not affect defendants' rights.

Appeal from Superior Court, Lee County; Connor, Judge.

Action by the Stevens Lumber Company against J. W. Arnold and others, trading as Gough & Arnold Bros. Defendants' motion for change of venue was denied, and they appeal. Reversed.

The motion was heard before the clerk upon a case agreed, as follows:

The above-entitled matter coming on to be heard before the clerk of the superior court of Lee county, upon demand for change of venue and removal to Surry county for trial, plaintiff and defendants agree on the facts as follows:

That summons in this action was duly issued on or about the 4th day of October, 1919, and duly served upon the defendants; that the plaintiff is a corporation under the laws of Virginia, and the defendants S. M. Arnold and W. S. Gough are residents of Surry county, and J. W. Arnold resident of Yadkin county, N. C.; said summons was returnable before the clerk of the superior court for Lee county, N. C., on 20th day of October, 1919, pursuant to provisions of chapter 304 of Public Laws of North Carolina 1919; that on or about October 14, 1919, the clerk of said court received from Henry H. Barker, Esq., attorney for defendants, request for extension of time in which

to file answer, by letter, copy of which is hereto attached; that the undersigned clerk of this court brought to the attention of counsel for plaintiff the said request, and counsel for plaintiff consented and agreed that such extension of time be granted as was desired, and stated that an extension of a few days was desired to file complaint; that orders were made in said cause by said clerk granting such extensions as appear of record; that, pursuant thereto, complaint was duly filed October 23, 1919; that thereafter the defendants, on October 29, 1919, made motion before the clerk for change of venue and removal of said cause to Surry county for trial; that such motion was first made of said date before the judge presiding at the October-November term of court for Lee county, and by him declined for want of jurisdiction in that said cause was not then at issue and before said court at term.

Upon the foregoing facts, the said motion for removal of this cause and change of the venue to Surry county, N. C., for trial, is refused and declined, and such removal denied.

T. N. Campbell,  
Clerk Superior Court, Lee County.

The judge denied the motion to remove the place of trial, and settled the following case on appeal, which is necessary to be set forth for an understanding of the facts:

This cause came on for hearing upon appeal from an order of the clerk denying the motion of the defendants to remove this cause from Lee to Surry county, the motion was heard by T. N. Campbell, clerk superior court of Lee county, on the 29th day of October, 1919, upon a statement of agreed facts set out in the record as follows: That summons in this action was duly issued on or about the 4th day of October, 1919, and duly served upon the defendants; the plaintiff is a corporation under the laws of Virginia, and the defendants S. M. Arnold and W. S. Gough are residents of Surry county, and J. M. Arnold resident of Yadkin county, N. C.; said summons was returnable before the clerk of the superior court for Lee county, N. C., on the 20th day of October, 1919, pursuant to provisions of chapter 304 of Public Laws of North Carolina of 1919; that on or about October 14, 1919, the clerk of said court received from Harry H. Barker, Esq., attorney for the defendants, a request for extension of time in which to file answer, by letter, a copy of which is hereto attached; that the undersigned clerk of this court brought to the attention of counsel for plaintiff the said request, and counsel for plaintiff consented and agreed that such extension of time be granted as was desired, and stated that an extension of a few days was desired to file complaint; that orders were made in said cause by said clerk granting such extensions as appear of record; that, pursuant thereto, complaint was duly filed October 23, 1919; that thereafter defendants, on October 29, 1919, made motion before said clerk for change of venue and removal of said cause to Surry county for trial; that such motion was made on said date before the judge presiding at the October-November term of Lee superior court, and by him declined for want of jurisdiction in that said cause was not then at issue and before

said court at term. The letter written by Harry H. Barker, attorney for defendants, to Hon. T. N. Campbell, clerk superior court, dated at Elkin, N. C., October 14, 1919, and referred to in the statement of agreed facts, is as follows:

"Dear Sir: In re Lumber Company v. Gough & Arnold Bros. I note under your favor of October 13th, that complaint has not yet been filed, and that you will send me a copy as soon as same is filed. Inasmuch as the complaint has not been filed and we are some distance from you, and the defendants a part of the time being absent from town, I beg to make application for time to file answer when complaint is filed; that is, I would be glad if you would give me an extra two weeks from Monday, 20th, to file answer. As I understand the new law, this is discretionary with you, and I feel like we are entitled to this length of time owing to the fact that the complaint would not be filed until the 20th instant, and under the law we would be given one week. If you will give me this additional time to file answer, and send me a copy of complaint when it is filed, I will consider it a favor and it will be greatly appreciated."

The orders referred to in the statement of agreed facts, as appear in the record herein, are as follows:

In the above-entitled cause, upon application of H. H. Barker, Esq., attorney for defendants, it is hereby ordered that the defendants be allowed to file answer to the complaint herein at any time on or before the twentieth day of November, A. D. 1919.

This October 20, 1919.

T. N. Campbell,  
Clerk Superior Court, Lee County

The original order, filed in the record, and signed by the clerk, is typewritten, and the date on or before which answer may be filed is "twentieth day of November, 1919." An inspection of the order discloses that a line has been drawn with a pen through the word "twentieth" and the word "third" is written over the word "twentieth." A line has also been drawn with pen through the word "third" and the figures "20th" written before the word "third" between the lines. As the order now appears the figures "20th" are not canceled.

At the hearing of the appeal from the clerk the original order was not exhibited to the judge; the judge did not understand that there was any controversy that the defendants had been allowed until the 20th of November to file answer. The attorneys having failed to agree upon the case on appeal, the judge was requested to settle same, pursuant to the statute. The defendants then contended that the order of the clerk gave the leave to file answer on or before 3d of November, and did not extend the time to the 20th. For the purpose of determining the fact in this respect, the judge inspected the original order and considered affidavits and exhibits filed, and therefrom finds the following facts:

(1) That after mailing his letter dated Oc-

(102 S.E.)

tober 14, 1919, addressed to Hon. T. N. Campbell, clerk superior court, hereinbefore set out, Harry H. Barker, attorney for defendants, received through the mail a paper writing, a copy of which is as follows:

I hereby grant an extension of two weeks from the 20th day of October, 1919, to file answer in case of Stevens Lumber Company v. Gough & Arnold Bros.

This 16th day of October, 1919.

T. N. Campbell, Clerk Superior Court.

I have also made note of this extension on my docket.

(2) That the name "T. N. Campbell" signed on the foregoing paper is not in the handwriting of the clerk of the superior court, but is in the handwriting of Miss Fannie S. Campbell, who is the daughter of clerk and is employed as a clerk in his office.

(3) That thereafter the said Harry H. Barker received a letter, copy of which is as follows:

Sanford, N. C., October 24, 1919.

Harry H. Barker, Attorney, Elkins, N. C.—  
Dear Sir: I am herewith inclosing copy of complaint in case of Stevens Lumber Co. v. Gough & Arnold Bros. Yours truly, T. N. Campbell, Clerk Superior Court, by Fannie S. Campbell, Office Clerk.

(4) On the 1st day of November, 1919, T. N. Campbell, clerk superior court, Lee County, at his request, delivered to Harry H. Barker, attorney for defendants, two sheets of paper, certifying under his hand that same "are a true and perfect copy of orders made in the case of Stevens Lumber Co. v. Gough & Arnold Bros.;" that two of said orders set out in said certificate are as follows:

In the above-entitled cause, upon application of H. H. Barker, Esq., attorney for the defendants, it is hereby ordered that the defendants be allowed to file answer to the complaint herein at any time on or before the 3d of November, 1919.

This October 20, 1919. [Signed] T. N. Campbell, Clerk Superior Court, Lee County.

(5) That the order set out in the certificate dated October 16, 1919, copy of which was received by H. H. Barker, attorney for defendants, was not signed by T. N. Campbell, clerk superior court, nor by any one at his special request, nor was same made by him; that said order was signed in the name of T. N. Campbell, by Miss Fannie S. Campbell, who is employed in the office of the clerk of the superior court.

(6) That the only order made by T. N. Campbell, clerk superior court of Lee county, upon the application of H. H. Barker, attorney for defendants is the order dated October 20, 1919; that at the time this order was signed by the said clerk the word "twentieth" between the words "the" and "day," appeared

therein; that Miss Fannie S. Campbell, after the same had been signed by the clerk and while she was employed in said office, at the request of H. H. Barker, Esq., attorney for defendants, and without the knowledge of the clerk of the court, drew a line through the word "twentieth" and wrote over the said word "third"; that subsequently, at the request of the clerk, she drew a line through the word "third" and wrote the figures "20th" as they now appear in said order; that H. H. Barker requested Miss Campbell to make said change in the order because he was of the opinion that there was a clerical error therein; that neither Mr. Barker nor Miss Campbell had any unlawful purpose in making said change in the order; that both were of the opinion that they were correcting a clerical error.

(7) That during the argument of counsel on the appeal of defendants, which was heard on October 29, 1919, in the courthouse at Sanford, N. C., the statement was made and not controverted that defendants had upon request of their attorneys been granted an extension of time to file answer to November 20, 1919.

Upon the foregoing facts the court is of the opinion and so holds that:

(1) That the order dated October 16, 1919, granting an extension of two weeks from October 20, 1919, within which to file answer is not a valid order.

(2) That the order dated October 20, 1919, is the only order made by the clerk upon application of defendant's attorney for an extension of time within which to file answer, and that, pursuant thereto, the defendants had until November 20, 1919, to file answer.

From the judgment of the court denying the motion, the defendants appealed, and assigned error as to certain findings of facts and to the judgment, which will be mentioned later.

H. H. Barker, of Elkins, and Holton & Holton, of Winston-Salem, for appellants.

Williams & Williams, of Sanford, for appellees.

WALKER, J. (after stating the facts as above). [1] If we give to the facts of this case their proper meaning, and consider carefully the documentary proof which is made a part of the case, the legal merits will the more easily be seen. It appears that the summons had been issued and served returnable October 20, 1919, and that defendant's counsel wrote to the clerk of Lee county for "an extra two weeks from Monday, 20th, to file answer." This is the literal form of the request for time. There was no general request for an extension of the time, but a special request, in order to be on the safe side, that he have two weeks from the return day of the summons to file the answer,

which would be until November 3, 1919. The clerk, instead of complying with this specific request, extended the time to November 20, 1919, or about seventeen days beyond the time requested. The letter shows that this was the request, as the attorney states further on, that, under the new law (Acts 1919, c. 304), he had only one week from the filing of the complaint on the 20th, and that he needed two weeks from that date, or until November 3d, and in addition plaintiff's counsel only agreed to "such extension of time as was desired," which was two weeks from October 20th, or, if two from the time of actually filing the complaint, which was October 23d, it would be not later than November 7th. The defendants had, under Acts 1919, c. 304, § 3, twenty days after the return day of the summons, or twenty days after the filing of the complaint, if plaintiff's time for filing the same was extended.

It cannot be that, where the clerk and defendant's counsel resided in different places, widely separated, it was competent for the clerk to extend the time beyond the date requested by the former, without his consent, or even his knowledge, and beyond the time assented to by the plaintiff's counsel, because he granted only the time requested, or "desired," to use his language. The clerk, it may be conceded, has the power under the new act to extend the time for filing an answer, but he cannot do so of his own motion and contrary to a request for a stated time, so as to deprive the defendant of his right of removal, at least without his consent. The defendant's counsel, not having read the last statute in regard to procedure and pleadings, was not entirely sure as to the time for answering allowed him. He did not need any order for an extension of time to file his answer, as the two weeks requested by him were well within the statutory time, as the regular time would have expired about the 4th of November. The defendant did not need any extension, nor did he ask for one, in a technical sense, as he already had the time which is mentioned in his letter under the statute. Compliance with his request would be giving him only the time which he already had by law.

[2, 3] The motion for the removal was filed on October 29th, in the office of the clerk, and before the clerk; the complaint having been filed on the 23d. The defendant was therefore within his legal right when he filed his motion regardless of any action of the clerk as to the time. The statute says that he shall file his motion before the time for answering expires, and this he did. After filing his motion with the clerk, he could then answer, and the case would then be transferred to the superior court, as was done, for a hearing of the motion before the court at term. No other procedure can be adopted since the act of 1919, as there is no

provision in that statute giving the clerk power or jurisdiction to pass upon a motion, and this must necessarily be done, as before and even as now provided in the law, by the judge at term; otherwise by filing his answer, so that the issue may be raised and the case transferred, without first making his motion to remove, the defendant, by the very terms of the statute, would lose his right to remove, as his motion for that purpose is due before the answer is actually filed, or before the time for filing it has expired.

As to the order of extension made by the clerk, we are of the opinion that the judge should either have disregarded it altogether, as being a work of supererogation on the part of the defendants and the clerk, a mere nullity, or he should have himself directed the order to be amended so as to comply with the request made by the defendants' counsel in letter. We do not understand why the time was extended to November 20, 1919, unless by misunderstanding or mistake of the clerk as to the motion and exact scope of the request, but his action, under the circumstances, is not to be taken as binding upon the defendants, nor imputed to them as a waiver of their right. Such a view of it would be entirely inadmissible and would be very unjust to them. They have been diligent in filing their motion for a removal, and, in the further prosecution of the case, they have acted promptly and within the time allotted to them by law, and there is no valid or sufficient reason for any loss of their right to change the venue of this action.

[4] It is said in the case not to have been controverted during the argument that the defendants, upon the request of their attorneys, had been granted an extension of time until November 20, 1919, to file their answer, and further that the order of October 20, 1919, extending the time to file the answer is the only one made on the application of the defendants' counsel. This may all be true: First, because the extension to November 20th was granted "on the application of defendants' counsel," but not in response thereto, as it did not ask for such an extension, and in that sense only was the extension granted on his application; and, second, for the same reason was the order of extension the only one made on his application. Besides, a party is not bound to controvert everything said on an argument on pain of losing his rights.

The fact remains, and clearly and palpably appears, that the clerk's order was made on a misapprehension of the true nature of the request as contained in the letter. The conclusion follows, and as we think logically, that the ruling of the court denying the removal was based upon something done erroneously by the clerk, and cannot be supported by anything authorized or done by the defendants which waives or forfeits their right to remove the case. Any other decision, it



seems to us, would violate the spirit, if not the letter, of the statute. The case therefore does not fall within those cited by the plaintiff where an unequivocal request for an extension of time was made and granted, and where too, in most, if not all, of the cases the request for removal was filed after the statutory period had elapsed. Here it was filed within the time and only a few days after October 20, 1919, when the complaint was filed—that is, on October 29, 1919. We repeat that the judge should have corrected the record by having the order amended so as to express what was actually done and setting right a mere clerical error.

The words of Justice Davis in *Shaver v. Huntley*, 107 N. C. 623, at page 628, 12 S. E. 316, at page 317, are peculiarly appropriate here, as he was treating of a similar question. He said:

"If this be not so, the defendants have lost a right without any fault or neglect of their own, and which they could not have prevented by any reasonable diligence or foresight."

These defendants could not suppose that the clerk, of his own motion, would give an order for which they had not asked. Their counsel recognized the mistake as soon as it came to their knowledge. The right of removal or change of place of trial under our statute is said to be of the same nature as that under the federal law, or analogous to it, and that law is truly and accurately construed in *Bank v. Keator* (C. C.) 52 Fed. 897, as follows:

"A petition for removal filed after the statutory period \* \* \* has expired comes too late, even though filed within the time allowed for answering by order of court, where such order is based on the stipulation" of the parties.

See, also, *Wilcox v. Insurance Co.* (C. C.) 60 Fed. 929; *Schipper v. Cordage Co.* (C. C.) 72 Fed. 803; *Fox v. Railroad Co.* (C. C.) 80 Fed. 945; *Williams v. Telephone Co.*, 116 N. C. 558, 21 S. E. 298; *Howard v. Railroad Co.*, 122 N. C. 944, 29 S. E. 778, where many similar cases are cited; *Riley v. Pelletier*, 134 N. C. 318, 46 S. E. 734; *Garrett v. Bear*, 144 N. C. 25, 56 S. E. 479; *McArthur v. Griffith*, 147 N. C. 545, 61 S. E. 519.

In all these cases, where the right of removal has been denied because the motion came too late, that is, after the time for answering under the law, and not under any special extension, had expired, we believe, so far as we have been able to discover, that the motion for the removal was made during the extended time, after the statutory time had run its course; while here there was no extension requested by the defendants beyond the statutory limit, and the motion was actually made in time—that is, before the

answer had been filed or the time for answering had elapsed.

The defendant has acted promptly within the meaning of the statute, and has done nothing to prejudice his right to remove.

Reversed.

(179 N. C. 277)

ZUCKER et al. v. OETTINGER et al.  
(No. 177.)

(Supreme Court of North Carolina. March 3, 1920.)

1. VENUE ~~60~~46—ACTION BY NONRESIDENT MUST BE BROUGHT IN COUNTY WHERE DEFENDANT RESIDES.

Where plaintiff was a nonresident, he should have commenced the action in the county where defendant resided, and, not having done so, the action was subject to the power of court to remove it to the proper county upon motion made in apt time, under Clark's Code, § 192.

2. VENUE ~~60~~61—MOTION FOR CHANGE TO BE FILED WITH CLERK BEFORE ANSWER.

Since motion to remove to another county cannot be made after answer filed, and since Laws 1919, c. 304, makes the pleadings to be filed before the clerk, defendant desiring to remove the cause can preserve his rights by filing first his motion and then his answer with the clerk, who can transmit all papers, including the motion, to the superior court, whereupon the judge can pass upon the motion.

3. VENUE ~~60~~60—IMMATERIAL WHETHER MOTION FOR CHANGE OF VENUE CAME BEFORE JUDGE BY APPEAL OR TRANSFER FROM THE CLERK.

Where clerk granted order of removal, and plaintiff appealed to the judge, who heard the same at the regular term of the superior court, and ordered the cause to be removed, it was immaterial how the cause got before the judge, whether by appeal or by a transfer; it being sufficient that it was rightfully there, and that the judge had jurisdiction to pass upon the motion.

Appeal from Superior Court, Pitt County; Connor, Judge.

Action by M. Zucker and another, trading as M. & S. Zucker, against Jonas Oettinger and another, trading as J. & D. Oettinger. From an order granting defendants' motion for removal to defendants' county, plaintiffs appeal. Affirmed.

S. J. Everett, of Greenville, for appellants.

BROWN, J. This is an action brought against the defendants to recover the balance due on account of goods sold and delivered.

The plaintiffs are residents of the city of New York, and the defendants are residents of the county of Wilson. Summons was issued by the clerk of the superior court of Pitt county under chapter 304, Acts of 1919. The plaintiffs filed their verified complaint

and the defendants, before filing answer and before return time, appeared before the clerk and demanded removal of the same to the county of the defendants. Thereupon the clerk made an order transferring the same to the superior court of Wilson county. Whereupon the plaintiffs excepted, and clerk transferred the cause to the superior court docket, and at term time his honor affirmed and approved the order of the clerk removing the same.

[1, 2] The plaintiffs, being nonresidents, should have commenced the action in the county of Wilson, where the defendants resided. In such cases the nonresident plaintiff is not permitted to select any county in the state within which to bring his action. If he brings it in the wrong county, it is subject to the power of court to remove the same to the proper county upon motion made in apt time. Clark's Code, § 192; Stevens Lumber Co. v. Arnold, 102 S. E. 409, at this term. Prior to the act of 1919 the motion as a matter of course was made in the superior court, and could not be made before the clerk. Since that statute makes the summons and the pleadings to be filed before the clerk, it necessarily follows that the motion for a change of venue should be lodged with the clerk because such motion to remove an action to another county cannot be made after answer filed. Board of Education v. State Board, 106 N. C. 83, 10 S. E. 1002. The party desiring to move the cause can preserve his rights by filing his motion with the clerk before filing his answer. Such party can then file his answer. The clerk can transmit all the papers, including the motion, to the superior court; whereupon the judge can pass upon the motion for a change of venue.

[3] In this case the clerk granted the order of removal, and the plaintiffs appealed to the judge, who heard the same at the January regular term of the superior court of the county of Pitt. His honor Judge Connor ordered the cause to be removed. It is immaterial how the cause got before the judge in term time, whether by appeal or by a transfer. It is sufficient that it was rightfully there, and the judge had jurisdiction to pass upon the motion.

Affirmed.

(179 N. C. 241)

**ELKS v. BOARD OF COM'RS OF PITT COUNTY.** (No. 181.)

(Supreme Court of North Carolina. March 8, 1920.)

1. EMINENT DOMAIN §262(5)—WITNESSES §268(7)—CROSS-EXAMINATION OF WITNESS HELD PROPER; IRRELEVANT ANSWER OF WITNESS HELD NOT PREJUDICIAL.

Where plaintiff, whose land had been taken for the construction of a county road, intro-

duced as witness to value an adjoining landowner, cross-examination of the adjoining landowner as to whether he had claimed damages because the road went through his premises was competent, and plaintiff cannot complain that the landowner answered he would have, had it been of any use; the answer, at most, being irrelevant.

2. EMINENT DOMAIN §255—ADMISSION OF IRRESPONSIVE EVIDENCE HARMLESS WHERE THERE WAS NO MOTION TO STRIKE.

In proceeding to assess damages for land taken for public road, where a witness, in response to a question as to the value of the land, stated that he did not consider it of much value, unless the landowner could obtain more, such answer, which was irresponsible, does not warrant reversal, where there was no motion to strike.

3. EMINENT DOMAIN §102—NO DAMAGES FOR LOCATION OF PUBLIC ROAD AWAY FROM LANDOWNER'S RESIDENCE.

In a proceeding by a landowner for damages for the taking of land for a public road, where it appeared that the new road as located was not adjacent to the landowner's residence, but that old road was left, and, unless obstructed, the landowner might use the same, no damages can be awarded because the new road was not so convenient to the landowner's residence as the old.

4. EMINENT DOMAIN §136—INSTRUCTION AS TO MEASURE OF DAMAGES HELD NOT IMPROPER IN VIEW OF STATUTE.

In proceeding by landowner for compensation for taking of lands for road, held that, in view of Laws 1905, c. 714, § 8, providing that in assessing damages the jury shall take into consideration benefits to the owner, and, if such benefits shall be considered equal to or greater than the damages, the jury shall so declare, etc., landowner cannot complain of instruction that his measure of damages was the difference between the value of the land before and its value immediately after the taking.

5. EMINENT DOMAIN §262(2)—PARTY NOT APPEALING HAS NO RIGHT TO ALLEGE ERROR.

Where the commissioners of a county did not appeal from an award in favor of a landowner, whose property was taken for a road, they cannot complain that an instruction restricted them to the offset of special benefits.

6. EMINENT DOMAIN §145(4)—SPECIAL BENEFITS MAY BE OFFSET AGAINST A LANDOWNER WHOSE PROPERTY WAS TAKEN FOR PUBLIC ROAD.

Where special benefits resulted from the opening of a public road, such benefits may be offset in a proceeding by the landowner for compensation for the taking of land for the road.

7. EMINENT DOMAIN §71—COMPENSATION IS ACCORDED BY STRIKING A BALANCE BETWEEN DAMAGES AND BENEFITS.

While landowner whose property is taken for public road has a constitutional right to compensation, yet, when the balance is struck between the damages and benefits conferred as authorized by Laws 1905, c. 714, § 8, he has received all to which he is entitled under the Constitution.

8. EMINENT DOMAIN ~~C=~~146—SPECIAL BENEFITS ONLY WILL BE DEDUCTED IN ABSENCE OF STATUTE.

While Legislature, in providing for the assessment of damages in eminent domain cases, may authorize the deduction of general as well as special benefits, yet, unless the statute so provides, only special benefits will be deducted.

Appeal from Superior Court, Pitt County; Kerr, Judge.

Proceeding by C. F. Elks, under Laws 1905, c. 714, § 8, asking that jury be appointed to assess damages caused to his land by the county of Pitt in taking a portion for the construction of a road. Jury was appointed, and without waiting for commissioners to take action on its award, plaintiff appealed to the superior court, and from award there in his favor for \$225, plaintiff again appeals. Affirmed.

This was a proceeding by plaintiff under section 8, c. 714, Laws 1905, asking that a jury be appointed to assess damages caused to his land by the county taking seven-tenths of an acre of land in the construction of a public road. The jury was duly appointed and made its report allowing defendant \$175 damages. Without waiting for the commissioners to take action, the plaintiff appealed to the superior court. At the trial in that court the jury awarded the plaintiff \$225 damages, and he appealed to this court.

Julius Brown, of Greenville, for appellant.

Skinner & Whedbee, of Greenville, for appellee.

CLARK, C. J. [1] The witness Tyson had testified as to the damages to the plaintiff's land, and on cross-examination he was asked if he had claimed any damages for the road going through the witness' land, to which he answered: "I would have done so if I had thought it would have been of any use." The witness owned adjoining land, and the question was competent as tending to shake his testimony as to the damage the plaintiff had sustained. We cannot see that the plaintiff sustained any harm from the answer, which, at most, was merely irrelevant.

[2] Another witness was asked on cross-examination, "What value is the little piece of land?" to which he replied, "I do not consider that little piece of much value to my father unless he could get more." While the answer may not have been very responsive, there was no motion to strike it out, and it does not appear that any harm accrued that would justify a new trial.

[3] Exception 3: The court charged the jury:

"If you find the plaintiff is damaged, you will not take into consideration the fact that his home is off the road because the action was not brought by reason of his house being cut off

of the road, but by reason of the highway commissioners taking this portion of the land through which the road passes."

The plaintiff's evidence discloses that his house was not upon lot No. 4 or lot No. 1, but was on an entirely different tract of land situated on the north side of the old county road as shown on the map. The plaintiff still has the old county road to use as he did previously to laying out this road, except that he himself has built a tobacco barn across it, as shown on the map, and in that respect he can recover no damage by reason of laying out the new road. If he could, then any other person living four or five miles or further from the new road could contend that they were entitled to damages because the new road was not constructed by their home. The county commissioners simply did not see fit to build a new road along the line of the old road by the plaintiff's residence, but the plaintiff still has that old road so far as he sees fit to use it.

[4, 5] The fourth exception is that the court directed the jury to allow the plaintiff "what would be a fair compensation for his land taking into consideration the value of his land immediately before and the value of his land immediately after, and the difference in value would be the damages he has sustained by reason of the road running through his land." Section 8, c. 714, Laws 1905, under which this proceeding was begun, provides:

"Said jury, being duly sworn, in considering the question of damages shall also take into consideration the benefits to the owner of said land, and if such benefits shall be considered equal to or greater than the damages sustained, then the jury shall so declare and report in writing its findings to the Board of County Commissioners for revision or confirmation."

In Lanier v. Greenville, 174 N. C. 317, 93 S. E. 853, the court said:

"We have adhered to the rule \* \* \* that in the assessment of damages for land taken for public improvement the measure of damages is the difference in value before and after the taking. \* \* \* We are less inclined to change the rule since it was held in Miller v. Asheville, 112 N. C. 768 [16 S. E. 762], that it was within the power of the General Assembly to provide by statute that damages should be reduced 'not merely by benefits special to the plaintiff, but by all the benefits accruing to him, either special or in common with others.'"

In Miller v. Asheville the court held constitutional an act providing that all benefits should be considered in reducing damages, notwithstanding the fact that the property had been taken by the city prior to the enactment of the statute, and notwithstanding that proceedings for the assessment of damages had been instituted before this statute was passed.

The counsel for the commissioners contend that under the language of this statute the county was entitled to have set off against the damages assessed not only the special benefits to the owner of the land, but the benefits which actually enhanced the market value of the property, although they are common to other property in the vicinity. We cannot consider this contention, for the defendants are not appealing, and the plaintiff cannot complain that the benefits set off were restricted to the special benefits as laid down in *Lanier v. Greenville*, supra.

[6] Exception 5 is that the court charged the jury:

"The defendants contend that they offered evidence that the plaintiff has not been damaged as much as \$600, and that you should find that the special benefits have accrued to him in that this special piece of property is more valuable now than before the road was built; the defendant contends that it is a nice wide public road and puts his land in contact with the public, for the people who want to get to the county seat, and that this ought to be taken into consideration, and the court charges you that, if you find that a special benefit has accrued to this land by reason of this road being put there, then you might consider that in determining what damages he has sustained, if you find any special benefits have accrued to this land."

Exception 6 is to a charge of like nature. As already stated, these charges are in accordance with the general rule which has obtained in this state in the absence of legislation restricting or enlarging the nature of the benefits to be deducted, and the plaintiff cannot complain.

Exception 7 is to a like charge by the court:

"As I said a moment ago, if you find any special benefit has accrued to the plaintiff by reason of the building of the road through his property, you can consider it in determining the amount of damages you may arrive at, but if no special benefit has accrued to him, and if the benefit he gets is common to adjacent landowners, then you will not consider that."

This charge was correct under the general rule.

The last exception, except those purely formal, is to the following charge:

"The jury will not take into consideration the fact that the plaintiff's house was left off the road and is not now on the road. This proceeding is to procure damages for and on account of the taking of the land, part of those two lots which were necessary to build this road, and the fact that this house and home is left off the public road you will not take into consideration at all, but only take into consideration the damage by reason of the taking of the land from these two lots of land and say what you find the damage to be."

This has already been discussed under the third exception. The county was under no

contract with the plaintiff not to lay out a new public road in order to make a new and shorter route needed for the public convenience. In doing this the county did not cut off the plaintiff from the public road upon which the plaintiff's house stood. The principle of public administration is the "greatest good for the greatest number," and, a new, better, and shorter road being needed for the public convenience, the plaintiff could not complain that it was not built over the old route. The road on which this house stands remains where it was, and if the plaintiff does not use it and has built a tobacco barn across it, as it appears, it is because he finds it more convenient to get to the new road by a different route.

[7, 8] In view of the great increase in the mileage of public roads in construction or in contemplation, and that neither the state nor the federal government will permit any part of their appropriations for roads to be used in payment for any part of damages for rights of way, it follows that all such damages fall upon the county alone, and it is a matter of great moment what method should be adopted in allowing deductions from such damages for benefits accruing to the landowner.

It seems that the general rule prevailing throughout this country is that laid down in *Traction Co. v. Vance*, 9 L. R. A. (N. S.) 781 (225 Ill. 270, 80 N. E. 134):

"In assessing damages for injury to land not taken in a proceeding to secure a railroad right of way, benefits may be set off which actually enhance the market value of the property, although they are common to other property in the vicinity."

In proceedings to condemn land for the use of a railway which is not entirely for public benefit, but in part at least for private emolument, the rule seems to be generally settled either that no benefit shall be deducted, or at least only those that are of special benefit to the owner, not including the enhancement in the value of his land which accrued to him in common with others in that vicinity. But when the condemnation is for a public benefit, as the widening of a street as in *Miller v. Asheville*, supra, or for the construction of a public road or other purposes of a purely public nature solely for the general benefit, the usual rule seems, as in the case above quoted from 9 L. R. A. (N. S.) 781, to reduce the damages by all the benefits accruing to the landowner, whether special or general.

The distinction seems to be that, where the improvement is for private emolument, as a railroad or water power or the like, being only a quasi public corporation, the condemnation is more a matter of grace than of right, and hence either no deductions for benefits are usually allowed or only those which are of special benefit to the owner, but,

where the property is taken solely for a public purpose, the public should be called upon to pay only the actual damages after deducting all benefits either special or general.

In 2 Lewis, Em. Dom. §§ 687-689, the different methods are stated to be five in number, but in fact they can be reduced to three, i. e.:

(1) Condemnations in which there are no deductions allowed at all for benefits.

(2) Where deductions are only allowed for special benefits accruing to the owner.

(3) Where deductions are allowed for benefits, both special and general.

This matter is discussed fully by Connor, J., in *Railroad v. Platt Land*, 133 N. C. 272-274, 45 S. E. 589, where he shows that all three methods have obtained in this state either by amending the general statute or the charters in special cases, citing *Miller v. Asheville*, 112 N. C. 759, 16 S. E. 762, where by the terms of the statute (Pr. Laws 1891, c. 135, § 16) it was made the duty of the jury in assessing damages for opening or widening streets to consider "all benefits special to said land, and also all benefits, whether real or supposed, which the parties may derive from the construction of said improvements, whether it be common to other lands or only special to their own." This latter rule is held in the Illinois case above cited to obtain generally in this country when the assessment for damages is for purely public purposes.

The changes of the statute in this regard in North Carolina stated by Judge Connor in *Railroad v. Platt Land*, supra, is more fully set out in the note to *Traction Co. v. Vance*, 9 L. R. A. (N. S.) at page 806. It appears therefrom that "the early rule [in this state] was that special benefits might be set off against the value of the land taken for public use, and against damages for the remainder." This rule was abrogated by statute, and afterwards restored by statute.

In *Freedle v. Railroad*, 49 N. C. 89, it was held that only such benefits could be deducted as were peculiar to the owner of the land taken, and not general benefits, such as increased facilities for getting to market, the increased prosperity of the country, and the consequent growth in the value of real estate—such benefits as were common to all. The same rule was held in *Asheville v. Johnson*, 71 N. C. 398, *Railroad v. Wicker*, 74 N. C. 220, and *Haislip v. Railroad*, 102 N. C. 376, 8 S. E. 926; but in *Miller v. Asheville* where a statute was passed after the proceeding was begun providing that general benefits as well as special benefits were to be deducted from the assessment of damages in opening or widening streets, the court held that this was a mere change of remedy, and the act was sustained. All the above decisions were reviewed and the

changes of the statute set out in *Railroad v. Platt Land*, 133 N. C. 266, 45 S. E. 589, in which the court sustained *Miller v. Asheville* which held (112 N. C. 768, 16 S. E. 762) that it was a matter resting in the discretion of the Legislature, which "could reduce the damages by all the benefits accruing to the plaintiffs or only by those special to the plaintiffs," since it conferred the right of eminent domain.

Compensation was made when the balance was struck between the damages and the benefits conferred. To that, and to that alone, the owner had a constitutional and vested right. The Legislature, in conferring upon a corporation the exercise of the right of eminent domain, could in its discretion require all benefits, or a specified part of them, or forbid any of them to be assessed as offsets against the damages. This was a matter which rested in its grace, in which neither party had a vested right, and as to which the Legislature could change its mind always before rights were settled and vested by a verdict and judgment.

This decision is followed by Hoke, J., in *Bost v. Cabarrus*, 152 N. C. 536, 67 S. E. 1066, and Allen, J., in *Lanier v. Greenville*, 174 N. C. 317, 93 S. E. 850, affirming *Miller v. Asheville*, supra, as to the power of the Legislature to authorize the deduction of general as well as special benefits from the damages assessed, but holding that, if the statute does not so provide, only the special benefits will be deducted.

Owing to the importance of the subject and its full discussion in this case, we have traced the history of the rule. In the damages assessed we find no error.

(179 N. C. 255)

LUMBERMEN'S MUT. INS. CO. v. SOUTHERN RY. CO. et al. (No. 107.)

(Supreme Court of North Carolina. March 3, 1920.)

1. DISMISSAL AND NONSUIT ⇐78—ORDER OF DISMISSAL SUPERSEDED BY ORDER ALLOWING PLAINTIFF TO AMEND.

Where the trial court, after sustaining a demurrer ore tenus to the complaint with order for dismissal granted plaintiff's motion to amend the complaint by making new parties and to consolidate actions, the subsequent order granting the motion was tantamount to an annulment of the order of dismissal.

2. ACTION ⇐57(2) — CONSOLIDATION OF ACTIONS BY SEVERAL INSURERS AGAINST WRONGDOER.

Where several different insurance companies each paid a part of the loss of a fire claimed to have resulted from the negligence of the defendant railroad company, held that under *Revisal 1905*, §§ 400-414, 460, it was proper to consolidate several actions by the separate insurance companies; the interest of each party

being the same, and the same questions being involved in each case.

**3. PARTIES ¶51(4)—ALLOWANCE OF AMENDMENT, MAKING SEVERAL INSURERS AND OWNER PARTY TO ACTION BY ONE INSURER, PROPER.**

Where several different insurance companies each paid part of the loss from a fire claimed to have been started from the negligence of the defendant railroad companies, held that after a demurrer had been sustained to the complaint of the one insurance company the allowance of an amendment, which made the owners as well as the other insurance companies, which had started separate actions, parties and consolidated the several actions, was proper, the amendment not stating any new cause of action; the same grounds being common to each action, and being calculated to allow a complete determination of the controversy in accordance with Revisal 1905, § 414.

**4. PLEADING ¶246(3)—IN NEGLIGENCE ACTIONS, AMENDMENTS OF FACTS TENDING TO SHOW NEGLIGENCE CHARGED ARE PERMISSIBLE.**

In actions founded on negligence, allegations of facts tending to establish the general acts of negligence may be properly added by amendment, where the amendment does not substantially change the cause of action.

**5. ACTION ¶57(2) — SEVERAL ACTIONS MAY BE CONSOLIDATED FOR THE PURPOSE OF AVOIDING MULTIPLICITY OF SUITS.**

Where consolidation of several separate actions will avoid multiplicity of suits, and will tend to prevent vexation of the parties litigant, such consolidation is proper, the several causes of action being based on the same negligence as in case of several suits by separate insurers against a railroad company, whose negligence insurers asserted had caused the loss for which each had made part payment.

**6. INSURANCE ¶608(1)—WHERE THE NEGLIGENCE OF A THIRD PERSON CAUSES A LOSS, COMPANY IS ENTITLED TO BE SUBROGATED TO THE RIGHT OF THE INSURED AGAINST SUCH THIRD PERSON.**

Where a third person causes a loss, a fire insurance company is, under the principles of equity, entitled to subrogation to the rights of the insured against such third person to the extent that it has paid the loss.

**7. INSURANCE ¶608(1) — SUBROGATION OF FIRE INSURER UNDER GENERAL EQUITY PRINCIPLES.**

The right of an insurer to subrogation arises, not out of a contract, but out of general principles of equity, and the standard form of policy provided by Revisal 1905, § 4760, which makes provision for subrogation, is but declaratory of existing principles of law.

**8. INSURANCE ¶606(1)—OWNER OF INSURED PREMISES A NECESSARY PARTY TO ACTION AGAINST ONE RESPONSIBLE FOR FIRE.**

While a fire insurance company, which pays a loss is proportionately subrogated to the insurer's right of action against a third person, whose negligence caused the loss, the insurer must work out his remedy through the insured, so, where several insurance companies each paid

part of a loss, and it was asserted that the fire was started through the negligence of the defendant railroad companies, it was proper, where separate actions by the several insurance companies were consolidated, to make the insured a party.

**Appeal from Superior Court, Wayne County; Connor, Jr., Judge.**

Action by the Lumbermen's Mutual Insurance Company against the Southern Railway Company and Norfolk Southern Railway Company. From an order sustaining a demurrer ore tenus to the complaint, plaintiff appeals, while defendants appeal from an order granting plaintiff's motion to amend and to make new parties and to consolidate pending actions. Affirmed on defendants' appeal, and plaintiff's appeal dismissed.

This case is one of five separate actions brought by insurance companies to recover the total sum of \$14,339.36, which was paid by them to the Griffin Manufacturing Company for loss of property destroyed, on April 1, 1917, by the negligence of the defendants, with interest from said date. The first case, that of the Lumbermen's Mutual Insurance Company, is for the recovery of \$3,000, a part of the entire loss, the other plaintiffs having paid different amounts, which, together with the amount paid by the plaintiff, make up this total of \$14,339.36. The complaint alleged that the entire total damage amounted to some \$15,000 or \$20,000. None of the cases has ever been tried on its merits, and the first case is in this court upon an objection by the defendant to the court's order of amendment, as to parties and cause of action, which equally affects all the actions.

This case was brought to the October term, 1917, of Wayne superior court, and complaint was filed October 5, 1917. The Southern Railway Company filed answer February 7, 1918 and the Norfolk Southern Railroad Company on April 16, 1918. Both pleadings denied the allegations of the complaint, and otherwise answered to the merits of the case, and neither set up any objection on the ground of defect of parties. The cause was calendared for trial several times, but was continued from time to time for one side or the other. It having been postponed at August term, 1919, for the plaintiff, the defendants insisted that the plaintiff pay the cost amounting to a large sum, which was ordered to be done. At November term, 1919, the case was continued for the defendant Norfolk Southern Railroad Company, no terms being imposed. After the case was continued the defendants entered a demurrer ore tenus to the complaint on the ground that, since the complaint alleged the total value of the property destroyed by them to be over \$15,000, and the plaintiff sought to recover

only \$3,000 as an insurer of the destroyed plant, the plaintiff could not maintain a separate action. The plaintiff replied that the defect was one of parties plaintiff, and had been waived by the defendants when they filed answers to the merits of the case, without filing a written demurrer or setting up the objection in their answer. The court sustained the demurrer, and immediately upon the court's announcement of its opinion the plaintiff submitted a motion in writing to consolidate the five separate suits of the insurance companies, to make the A. T. Griffin Manufacturing Company party, and to allow the plaintiffs in the consolidated litigation leave to file amendments to their complaints, stating the total amount of loss and damage sustained by each plaintiff. In its discretion, the court allowed this motion. All this took place at one time on the same day in the courthouse at Goldsboro, during one and the same term of court. The plaintiff in this case, and the four other insurance companies, and the A. T. Griffin Manufacturing Company, the insured, have all joined in an amended complaint, which was filed January 13, 1920, adopting and consolidating the former complaints. The insured, the A. T. Griffin Manufacturing Company, disclaims any recovery for itself, except that through it the insurance companies be reimbursed.

Both sides having reserved exceptions, the defendants appealed from the order of consolidation, and the plaintiff appealed from the decision of the judge sustaining the demurrer. It was stated on the argument here that, if the defendants do not prosecute their appeal, or if they are not successful therein, the plaintiff will not press its appeal, which was taken only for its protection against a large bill of cost. The court sustained the demurrer *ore tenus*, and dismissed the action, but at the same term allowed the plaintiff's motion to amend and to make new parties, and to consolidate the five pending actions, and from these orders the appeal was taken.

Battle & Winslow, of Rocky Mount, D. C. Humphrey and Kenneth O. Royall, both of Goldsboro, for plaintiff.

J. L. Barham, of Goldsboro, L. I. Moore, of Greenville, and A. C. Davis, of Goldsboro, for defendants.

WALKER, J. (after stating the facts as above). [1] The judge sustained the demurrer and dismissed the action, but immediately allowed a motion by the plaintiff in the action to amend the same in the following particulars: First. To consolidate with this one four other actions, pending in the same court, and brought by the other insurance companies for the several amounts of insurance paid, respectively, by them. Second. To make the A. T. Griffin Manufacturing Company a party plaintiff to the consolidated actions. Third.

To amend the complaint as to the total amount of loss, and the several amounts constituting the same, and to permit the Griffin Manufacturing Company to disclaim any further interest in the matter, it being assignor for value of the insurance companies, and holding the legal title to the fund in the nature of a trustee for them. This motion, embracing all of the proposed amendments, was granted by the court, and the defendant excepted. It was not necessary to dismiss the action under the circumstances, but this is not material, as the judge by allowing the motion of the plaintiff virtually annulled that part of the judgment, or rather his subsequent order granting the motion was tantamount to striking out that part of the former judgment, and left none of it, except that part merely sustaining the demurrer. When the latter was sustained, whether rightly or wrongly, we will not now inquire, as it was proper to allow the amendments, and this overruled the demurrer.

[2, 3] The consolidation of the several actions was proper. One, and the main object, of our present procedure was to have all matters of controversy settled in one action, when this can be done without prejudice to the rights of any of the parties or to a fair and full trial and consideration of the case. Ample provision is made for accomplishing this purpose. Revisal, §§ 409 to 414, both inclusive, and section 469.

The actionable injury done in this case was the destruction of the property of the Griffin Manufacturing Company, which was insured by some of the plaintiffs. They had to pay the loss thereon under their policies, and did so, and they now sue the same defendants to recover back what they had to pay and to the extent they had to pay, the only difference between their several claims being one of form and not of substance, and, as now appears, that difference consists only in the amounts due to each of them, which vary somewhat, leaving the general principle upon which they seek to recover common to all of them.

The rule governing consolidation of actions has been stated by this court in a general way, and it was said in *Hartman v. Spiers*, 87 N. C. 28, that the cases in which, under the practice, consolidation may be ordered seem to arrange themselves into three classes:

(1) Where the plaintiff might have united all his causes of action into one suit, and has brought several, and these causes of action must be in one and the same right, and a common defense is set up to all. *Bule v. Kelly*, 52 N. C. 266.

(2) Where separate suits are instituted by different creditors to subject the same debtor's estate. *Campbell's Case*, 2 Bland (Md.) 200, 20 Am. Dec. 360.

(3) Where the same plaintiff sues different

defendants, each of whom defends on the same ground and the same question is involved in each. *Jackson v. Schaubert*, 4 Cow. (N. Y.) 78.

These may not embrace all the cases, but they serve to illustrate the rule by which the court is governed in ordering such union.

We held in *Blackburn v. Insurance Co.*, 116 N. C. 821, 21 S. E. 922, that the court could consolidate several actions brought on concurrent policies of insurance relating to the same property, and in *Monroe Bros. v. Lewald*, 107 N. C. 655, 12 S. E. 287, that where several proceedings in the nature of judgment creditors' bills are pending against the same defendant, and the same property is sought to be subjected, or where in either of such proceedings a receiver is appointed of property which is the subject of the other proceedings, the court may order that the same be consolidated, preserving the priorities acquired by the superior diligence of the various litigants. It subverts the interest of the defendants that there should be this consolidation. They are subjected to the trial of but one action, and if they fail in their defense and the plaintiff recover judgment, the costs will be greatly reduced. They cannot be embarrassed in their defenses, so far as we can now see, and the issue in this case will be substantially the same in form and substance as the issue in each of the actions pending if they were tried separately. If it turns out, in the development of the case, that the issues are not the same as to each of the plaintiffs, so that the trial in one action may prejudice the defendant, we do not say that the court may not exercise its discretion as to amendments or a division of the actions so as to remedy the objection, but upon the record, as it now appears, no such difficulty seems likely to arise, and we cannot see why the defendants should object to the consolidation. The exception that the amendment essentially changes the original cause of action is not well taken. The gravamen is the same, and the amendment merely broadens the scope of the action so as to take in the whole controversy for the settlement of it in one action according to the spirit and intent of our Code system; and to bring into the controversy all parties having an interest therein and necessary to its final settlement. It is provided by Revisal, § 414, that—

"Where a complete determination of the controversy cannot be had without the presence of other parties, the court may cause them to be brought in."

[4, 5] We have held that a cause of action may be enlarged or amplified by amendment without necessarily altering its essential nature, and thereby bringing the case within the rule allowing an amendment where a really new cause of action is not pleaded or set up.

*Simpson v. Lumber Co.*, 133 N. C. 95, 45 S. E. 469, where we said that—

"Amendments which only amplify or enlarge the statement in the original complaint are not deemed to introduce a new cause of action, and the original statement of the cause of action may be narrowed, enlarged, or fortified in varying forms to meet the different aspects in which the pleader may anticipate its disclosure by the evidence. 1 Enc. Pl. and Pr. 557-562. It has been declared to be a fair test in determining whether a new cause of action is alleged in an amendment to inquire whether a recovery had upon the original complaint would be a bar to any recovery under the amended complaint (Id. 556), or whether the amendment could have been cumulated with the original allegation (*Richardson v. Fenner*, 10 La. Ann. 559). Under either test, if applied to this case, the amendment was properly allowed. In suits founded on negligence, allegations of fact tending to establish the \* \* \* general acts of negligence may properly be added by amendment. 1 Enc. Pl. and Pr. 563; *Railroad v. Kitchin*, 83 Ga. 83 [9 S. E. 827]. An amendment can be allowed under our law when it does not substantially change the claim or defense (The Code, § 273), and the statement of additional grounds of negligence is not" necessarily the allegation of "a new cause of action or a substantial change of the plaintiff's claim."

Many illustrations are given in the books of this distinction between an enlargement and amplification in the statement of the original cause of action and a radical change by amendment of the cause of action itself. But here there is no substantial change in the cause of action, the object being to subject the liability of the defendant for damage to the reimbursement of the plaintiff to the extent that they have paid their insurance on the property; they being subrogated to the right of the manufacturing company whose property was destroyed by fire, and who had been paid the amount of the loss secured by the policies. The amendment merely brings in other parties interested in this fund, and whose presence is necessary to a complete settlement of the controversy. This prevents the trial of numerous actions when the entire matter can be determined in one action. The object of consolidating two or more actions is to avoid a multiplicity of suits, to guard against oppression or abuse, to prevent delay, and especially to save unnecessary cost or expense; in short, the attainment of justice with the least expense and vexation to the parties litigant. Consolidation, however, is improper, where the conduct of the cause will be embarrassed, or complications or prejudice will result which will injuriously affect the rights of a party. 8 Cyc. 591. In this case, there is an identity of interest, as to the plaintiffs and the cause of action, and the subject-matter or questions involved. They are the same, or substantially so. The court, therefore, did not err in granting the motion.



[6-8] The court was also right in joining the manufacturing company as a party. It had the legal title to the claim against the defendants for the destruction of the property, and, when the plaintiffs paid the insurance, they were subrogated equitably, at least, to its right against the defendants to the extent that they had paid the loss on the property destroyed. But the question is settled in *Chicago, St. Louis & New Orleans Railroad Co. v. Pullman Co.*, 139 U. S. 79, 11 Sup. Ct. 490, 35 L. Ed. 97, where it was held that if an insurance company pays a loss to the owner of the property, and such owner brings an action against a party liable for the loss to recover the value of the property, it is no defense to the action that it is brought for the joint benefit of the owner and the insurance company by agreement between them, where the insurance company is entitled, upon the payment of the loss, by the terms of the policy or equitably, to be subrogated to the rights of the insured against the person liable for the loss. The *Propeller Monticello v. Mollison*, 17 How. (U. S.) 153, 15 L. Ed. 68. As appears from the case last cited, the right of subrogation continues to exist until the insured can show that he has made satisfaction to the party justly entitled to recover the damages. *Powell v. Water Co.*, 171 N. C. 290, 88 S. E. 426, Ann. Cas. 1917A, 1302, is to the same effect. It was there held that, where the property upon which there is insurance, is destroyed or damaged by the wrongful act of another, the liability of the wrongdoer is primary, and that of the insurer secondary, not in order of time, but in order of ultimate liability; the right of action is for one indivisible wrong, and this abides in the insured, through whom the insurer must work out his rights upon payment of the insurance; he being subrogated to the rights of the insured upon payment being made. *Hall v. Railroad*, 80 U. S. (13 Wall.) 367, 20 L. Ed. 594; *Railroad v. Jurey*, 111 U. S. 595, 4 Sup. Ct. 566, 28 L. Ed. 527; *Phoenix Ins. Co. v. Erie, etc., Transp. Co.*, 117 U. S. 321, 6 Sup. Ct. 750, 29 L. Ed. 873; *Railroad v. Ins. Co.*, 139 U. S. 235, 11 Sup. Ct. 554, 35 L. Ed. 154. See, also, *Potter v. Lumber Co.*, 179 N. C. —, 101 S. E. 553.

And it is further said that the right of subrogation arises, not out of the contract between the insured and the insurer, but has its origin in general principles of equity (14 Mod. Am. L. 159), and in this respect the standard form of policy, which has been adopted by legislative enactment (Revisal, § 4760), in making provision for subrogation, is but declaratory of principles already existing, citing *Hall v. Railroad Co.*, 80 U. S. (13 Wall.) 367, 20 L. Ed. 594; *Railroad Co. v. Jurey*, 111 U. S. 594, 4 Sup. Ct. 566, 28 L. Ed. 527; *Phoenix Ins. Co. v. Erie, etc.,*

*Transp. Co.*, 117 U. S. 321, 6 Sup. Ct. 750, 29 L. Ed. 873; *Railroad Co. v. Ins. Co.*, 139 U. S. 235, 11 Sup. Ct. 554, 35 L. Ed. 154. It is held in *Phoenix Ins. Co. v. Erie, etc., Transp. Co.*, supra, that when goods insured are totally lost, actually or constructively, by perils insured against, the insurer, upon payment of the loss, doubtless becomes subrogated to all the assured's rights of action against third persons who have caused or are responsible for the loss. No express stipulation in the policy of insurance, or abandonment by the assured, is necessary to perfect the title of the insurer. From the very nature of the contract of insurance as a contract of indemnity, the insurer, when he has paid to the assured the amount of the indemnity agreed on between them, is entitled, by law of salvage, to the benefit of anything that may be received, either from the remnants of the goods or from damages paid by third persons for the same loss. But the insurer stands in no relation of contract or of privity with such person. His title arises out of the contract of insurance, and is derived from the assured alone, and can only be enforced in the right of the latter. In the court of common law, it can only be asserted in his name, and even in a court of equity or of admiralty it can only be asserted in his right. In any form of remedy, the insurer can take nothing by subrogation but the rights of the assured.

Upon consideration of the whole case no error is found.

Defendants' appeal affirmed.

Plaintiff's appeal dismissed.

(149 Ga. 803)

HUNNICUTT v. REED. (No. 1375.)

(Supreme Court of Georgia. Feb. 13, 1920.)

(Syllabus by the Court.)

1. CORPORATIONS §32(1) — NAME "V. M. BARRETT CONSTRUCTION COMPANY" IMPORTS THAT COMPANY IS CORPORATION.

The name "V. M. Barrett Construction Company" imports that such company is a corporation. *Georgia Co-operative Fire Association v. Borchardt*, 123 Ga. 181, 186, 51 S. E. 429, 3 Ann. Cas. 472, and cases cited. Such presumption prevails until the contrary is shown. *Holcomb v. Cable Co.*, 119 Ga. 466, 46 S. E. 671.

2. JUDGMENT §776 — JUDGMENT AGAINST COMPANY NAMED AS DEFENDANT WAS NOT A LIEN ON PROPERTY OF INDIVIDUAL.

The "V. M. Barrett Construction Company" was sued and a judgment was rendered against the defendant, and execution issued thereon against "V. M. Barrett Construction Company." Nowhere in the proceedings was the defendant referred to otherwise than "V. M. Barrett Construction Company." Held, that the judgment, if valid at all, was against the defendant as a

corporation, and was not a lien upon the individual property of V. M. Barrett, although the entry of service was: "Served defendant, V. M. Barrett Construction Company, by serving V. M. Barrett personally with a copy of the within petition and process."

**3. EXECUTION  $\S$  196—ON JUDGMENT AGAINST "V. M. BARRETT CONSTRUCTION COMPANY" EXECUTION LEVIED ON PROPERTY OF V. M. BARRETT IMPROPER.**

The court did not err in directing a verdict for the claimant, where the execution issued on such judgment was levied on individual property of V. M. Barrett, which he sold to the claimant subsequently to the rendition of the judgment and the due record of the execution on the proper docket.

Error from Superior Court, Fulton County; G. L. Bell, Judge.

Proceeding by J. E. Hunnicutt against J. O. Reed. Judgment for the defendant, claimant, and the plaintiff brings error. Affirmed.

Alfred C. Broom, of Atlanta, for plaintiff in error.

Mitchell & Mitchell, of Atlanta, for defendant in error.

FISH, C. J. Judgment affirmed.

All the Justices concur.

(149 Ga. 796)

**BARNARD v. DU PREE. (No. 1306.)**

(Supreme Court of Georgia. Feb. 13, 1920.)

*(Syllabus by the Court.)*

**1. STATUTES  $\S$  76(3)—ACT TO MAKE OPERATIVE IN A CITY CONSTITUTIONAL AMENDMENT HELD NOT A SPECIAL LAW IN CASE WHERE GENERAL LAW IS APPLICABLE.**

Section 28 of the act approved August 20, 1913 (Acts 1913, p. 145), entitled "An act to carry into effect in the city of Atlanta the provisions of the amendment to paragraph 1 of section 7 of article 6 of the Constitution of the state of Georgia, ratified October 2d, 1912," etc., is not unconstitutional on the ground that it is a special law in a case for which provision is made by a general law.

**2. CONSTITUTIONAL LAW  $\S$  80(4) — STATUTE HELD NOT TO CONFER JUDICIAL POWERS ON CLERK OF MUNICIPAL COURT.**

Nor on the ground that it confers upon the clerk of the municipal court of Atlanta powers which are judicial in their character.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by J. O. Du Pree, agent, against J. M. Barnard, with attachment and with garnishment against the Atlanta National Bank. Motion in municipal court of the city of Atlanta to dismiss the garnishment proceedings overruled, and certiorari to the superior

court overruled, and defendant brings error. Affirmed.

The defendant in error sued out an attachment against the plaintiff in error, and also instituted garnishment proceedings; the Atlanta National Bank being the garnishee. The affidavit upon which the attachment was issued was sworn to and subscribed before the deputy clerk of the municipal court of Atlanta. When the case came on for trial in that court a motion to dismiss the garnishment proceedings was made, upon the ground that the affidavit in the proceedings had been sworn to before the deputy clerk of the municipal court, and that the approval of the bond and issuance of the garnishment was by the deputy clerk of that court, and was therefore a mere nullity. The motion was overruled, and the certiorari sued out to have this ruling of the municipal court reviewed in the superior court was there overruled. The plaintiff in certiorari excepted, and raised certain constitutional questions for decision by the Supreme Court.

Claude Brackett, of Atlanta, for plaintiff in error.

R. M. Cook, of Atlanta, for defendant in error.

BECK, P. J. (after stating the facts as above). [1, 2] The constitutionality of section 28 of the act approved August 20, 1913 (Acts 1913, p. 145), entitled "An act to carry into effect in the City of Atlanta the provisions of the amendment to paragraph 1 of section 7 of article 6 of the Constitution of the state of Georgia, ratified October 2d, 1912," etc., was attacked on the grounds that it was a special law with reference to matters which are covered by a general law; and that it conferred powers of a judicial character upon the clerk of the municipal court. Section 28 of the act in question reads as follows:

"Be it further enacted by the authority aforesaid, that affidavits for attachment and garnishment may be made before any officer authorized by law to administer oaths, including commercial notaries public; but all bonds in such proceedings issuing out of said court shall be approved by the clerk of said court, or his deputies, and all attachments and summons of garnishment shall be issued by said clerk or his deputies, and bear test in the name of the chief judge of said court."

It is insisted that the provisions authorizing the clerk to issue attachment and summons of garnishment and to attest the affidavits made before him for the purpose of having such attachment and summons issue confer upon the clerk of the municipal court powers that are judicial in their character. In the case of *McWilliams v. Smith*, 142 Ga. 209, 82 S. E. 569, it was said:

"The act of August 20, 1913 (Acts 1913, p. 145 et seq.), is not violative of article 1, § 4,

par. 1, of the Constitution of 1877 (Civil Code of 1910, § 6391), as being a special law enacted in a case for which provision had previously been made by an existing general law. The constitutional amendment of 1912 (Acts 1912, p. 30), which was adopted by the people, provided for the enactment of a law creating a court or courts or system of courts in cities of twenty thousand or more inhabitants."

In view of the ruling there made and what was said in the course of the opinion, we conclude that the act under review here is not a special law in a case for which provision has been made by a general law.

As to the other ground of the exception to the act, we do not think the contention is sound that the duties imposed upon the clerk of the municipal court and the power there given him as to issuing attachment and summons of garnishment and taking affidavits are judicial in their character. Such duties may have some elements of a judicial nature, but they are more truly ministerial in character.

The court did not err in overruling the certiorari.

Judgment affirmed.

All the Justices concur.

(150 Ga. 53)

SPARKS et al. v. ANDERSON et al.  
(No. 1502.)

(Supreme Court of Georgia. Feb. 28, 1920.)

(Syllabus by the Court.)

**1. WILLS §614(9), 680—CONSTRUED TO CREATE LIFE ESTATE WITH REMAINDER, AND, IN DEFAULT, TRUST FOR OTHERS; TRUSTEE FOR LIFE TENANT HELD TRUSTEE FOR REMAINDERMEN.**

By item 14 of the will of Henry P. Jones, probated in 1854, the testator gave the property in dispute to his "beloved granddaughter, Josephine V. Brazeal, for her sole and separate use for and during the period of her natural life only, free and exempt from the debts, contracts, liabilities, or disposition of any husband she may have, and from and immediately after her death \* \* \* unto such child or children as she may have living at the time of her death, and their heirs forever. But in default of any child or children living at the time of her death, then the said land to return to and

be equally distributed among his children and their lineal representatives per stirpes." By item 20 the testator provided: "I hereby appoint my sons, James V. Jones and Henry W. Jones, trustees of the property herein given to my granddaughter, Josephine Brazeal."

*Held:*

The provisions of the will above quoted created an estate for life in Josephine V. Brazeal, with remainder to such child or children as she might have living at the time of her death; and if she should leave no child or children living at the time of her death, then in trust to be equally distributed among the testator's children and their lineal representatives per stirpes. The trustees appointed in the will were not trustees for the life tenant only, but for the life tenant and the remaindermen, and the trust was executory at least until the death of the life tenant, when the possibility of her having children would become extinct, and it could be ascertained to whom the estate would ultimately go.

**2. ADVERSE POSSESSION §4—PRESCRIPTION HELD TO RUN IN FAVOR OF THIRD PERSON HOLDING ADVERSELY TO REMAINDERMEN.**

Inasmuch as the interests of the remaindermen (children of the life tenant and plaintiffs in this suit) were equitable, legal title to which was vested in the trustees named in the will and their successors in trust, prescription would run in favor of a third person holding adversely to the estate. Under the undisputed evidence introduced by the plaintiffs and that brought out by cross-examination of the plaintiffs' witness as to adverse possession by the defendant under color of title for more than the prescriptive period, the judge did not err in granting a nonsuit. *Watts v. Boothe*, 148 Ga. 376, 96 S. E. 863.

Error from Superior Court, Thomas County; W. E. Thomas, Judge.

Action by W. B. Sparks and others against D. B. Anderson and others. From a judgment of nonsuit plaintiffs bring error. Affirmed.

C. P. Grantham, of Thomasville, and E. K. Wilcox, of Valdosta, for plaintiffs in error.

Branch & Snow, of Quitman, and H. J. McIntyre, of Thomasville, for defendants in error.

ATKINSON, J. Judgment affirmed. All the Justices concur, except BECK, P. J., absent, and GILBERT, J., absent on account of sickness.

(150 Ga. 79)

**JORDAN v. STATE. (No. 1732.)**

(Supreme Court of Georgia. March 10, 1920.)

*(Syllabus by the Court.)*

1. CRIMINAL LAW §448(11)—TESTIMONY THAT ACCUSED AND WIFE "WERE QUARRELING" WAS NOT CONCLUSION.

On the trial of one indicted for murder, it was not erroneous to admit in evidence the testimony of a witness that the accused and his wife "were quarreling" (the fact being relevant and material), over the objection that the answer given stated a conclusion of fact.

2. CRIMINAL LAW §696(2)—EVIDENCE ADMITTED ON PROMISE OF STATE'S COUNSEL TO SHOW ITS RELEVANCY SHOULD NOT LATER BE EXCLUDED WITHOUT A REQUEST BY DEFENDANT.

Under the ruling in *Stone v. State*, 118 Ga. 705, 45 S. E. 630, 98 Am. St. Rep. 145 (7), where the court provisionally admits evidence on the promise of the state's counsel that he will subsequently connect the same and show its relevancy, it is not for the judge on his own motion to determine whether such promise has been kept and to exclude the testimony without a request to that effect by the defendant. In the present case the court, upon objection by the defendant's counsel, announced that he would sustain the objection and exclude the evidence unless the state should show its relevancy. There was no subsequent motion to exclude the evidence.

3. CRIMINAL LAW §706—STATE COUNSEL'S CONFERENCE WITH A WITNESS OUT OF HEARING OF JURORS OVER OBJECTION THAT WITNESS HAD NOT BEEN CROSS-EXAMINED HELD NOT ERROR.

A witness for the state had been examined in chief. During the absence, by permission of the court and consent of counsel, of some of the jurors from the box, the state's counsel was permitted to confer with the witness in the presence, but not in the hearing, of the jurors who remained in the box. Counsel for the defendant objected to the conference with the witness upon the sole ground that the witness had not been cross-examined. *Held*, that it was not error to permit the state's counsel to confer with the witness under the circumstances stated.

4. SUFFICIENCY OF EVIDENCE.

The evidence authorized the verdict.

Error from Superior Court, Glynn County; J. P. Highsmith, Judge.

Ben Jordan was prosecuted for murder, and from the judgment he brings error. Affirmed.

R. W. Durden and D. W. Krauss, both of Brunswick, for plaintiff in error.

A. V. Sellers, Sol. Gen., of Baxley, J. T. Colson, of Brunswick, Clifford Walker, Atty. Gen., and M. C. Bennet, of Atlanta, for the State.

GEORGE, J. Judgment affirmed. All the Justices concur, except BECK, P. J., absent on account of sickness.

(150 Ga. 68)

**BOATRIGHT v. BOATRIGHT. (No. 1607.)**

(Supreme Court of Georgia. March 9, 1920.)

*(Syllabus by the Court.)*

- APPEAL AND ERROR §588—TRIAL COURT CANNOT APPROVE BRIEF OF EVIDENCE AFTER CERTIFICATION OF BILL OF EXCEPTIONS.

A petition for habeas corpus was brought by a mother against the father, to have the custody of their minor child awarded to her. On July 28, 1919, the judge of the superior court, to whom the petition was addressed, heard the case, and on July 31, 1919, rendered judgment awarding the custody of the child to the mother. Thereupon the father sued out a bill of exceptions complaining of this judgment. The bill of exceptions was certified on August 13, 1919. The evidence is not embodied in the bill of exceptions, but an approved brief of the same is specified as a part of the record. The writ of error was received and filed in the Supreme Court on August 23, 1919. On August 23, 1919, a brief of the evidence was filed in the office of the clerk of the trial court, and was by him transmitted to the Supreme Court. It appears that this brief of the evidence was not approved until August 26, 1919. *Held*, that the brief of the evidence cannot be considered by this court. The trial judge was without authority to approve the brief of evidence after the bill of exceptions had been certified. *Simpson v. Simpson*, 138 Ga. 204, 75 S. E. 98. And as the only questions raised by the assignments of error are dependent for determination upon the brief of the evidence, the judgment of the court below must be affirmed.

Error from Superior Court, Emanuel County; R. N. Hardeman, Judge.

Proceedings between W. R. Boatright and M. L. Boatright. Judgment for the latter, and the former brings error. Affirmed.

Williams & Williams and Walter F. Grey, all of Swainsboro, for plaintiff in error.

A. S. Bradley, of Swainsboro, for defendant in error.

GEORGE, J. Judgment affirmed. All the Justices concur, except BECK, P. J., absent on account of sickness.

(150 Ga. 77)

**JENKINS v. JENKINS. (No. 1820.)**

(Supreme Court of Georgia. March 9, 1920.)

*(Syllabus by the Court.)***1. APPEAL AND ERROR  $\S$  302(3)—MOTION FOR NEW TRIAL SHOULD STATE OBJECTION MADE TO EVIDENCE.**

"It is a well-established rule of practice that a ground of a motion for new trial based upon the admission of evidence should state the objection made to the evidence, and that such objection was urged at the time the objection was made; otherwise no question is raised for determination." *City of Rome v. McWilliams*, 145 Ga. 191, 88 S. E. 981.

**2. APPEAL AND ERROR  $\S$  302(3)—MOTION FOR NEW TRIAL NOT SHOWING WHAT WITNESS WOULD HAVE ANSWERED IF ALLOWED WAS INCOMPLETE.**

Movant complains that the court erred in sustaining the objections of plaintiff's counsel and refusing to allow the plaintiff to answer the following question: "You don't want any alimony, do you?" This ground of the motion is incomplete because it does not show what the witness would have answered if allowed. Moreover, the question appears to be fully answered by the fact that the plaintiff, to whom the question was propounded, was at the time prosecuting her suit in court for the recovery of alimony.

**3. APPEAL AND ERROR  $\S$  302(1)—GROUND OF MOTION FOR NEWLY DISCOVERED EVIDENCE NOT SHOWING IGNORANCE OF FACTS AND DILIGENCE CANNOT BE CONSIDERED.**

The ground of the motion based on alleged newly discovered evidence cannot be considered, because it is not shown that the facts therein set out were unknown to the defendant or his counsel before the trial; nor is it shown that such facts could not have been discovered by the exercise of ordinary diligence. *Civ. Code 1910, § 6066*. Moreover, the newly discovered evidence is merely impeaching.

**4. OTHER GROUNDS OF MOTION FOR NEW TRIAL.**

Other grounds of the motion for new trial are without merit, and not of such character as to require special mention. The evidence authorized the verdict.

Error from Superior Court, Ben Hill County; O. T. Gower, Judge.

Action by Mrs. H. H. Jenkins against H. H. Jenkins for the recovery of alimony. Judgment for plaintiff, and defendant brings error. Affirmed.

Jas. H. Dodgen and Wall & Grantham, all of Fitzgerald, for plaintiff in error.

A. J. & J. C. McDonald and Vessie Jones, all of Fitzgerald, for defendant in error.

GILBERT, J. Judgment affirmed. All the Justices concur, except BECK, P. J., absent on account of sickness.

(150 Ga. 76)

**JAMES v. STATE. (No. 1817.)**

(Supreme Court of Georgia. March 9, 1920.)

*(Syllabus by the Court.)***1. CRIMINAL LAW  $\S$  593—SHOWING REQUIRED WHERE CONTINUANCE SOUGHT ON ACCOUNT OF ABSENCE OF COUNSEL STATED.**

All applications for continuances are addressed to the sound legal discretion of the court. *Penal Code 1910, § 992*. "Continuances on account of the absence of counsel are not favored, and a strict showing is required; particularly where other competent counsel have been secured, and no injury is shown." *Poppe v. State*, 71 Ga. 276(2).

**2. CRIMINAL LAW  $\S$  608—EVIDENCE TO FORM BASIS FOR CONTINUANCE ON ACCOUNT OF ABSENCE OF COUNSEL HELD INSUFFICIENT.**

Where such a motion was predicated on a statement of associate counsel "in his place" that the absent counsel "was in New York state, sick, that he left Georgia for the purpose of regaining his health, and that he would not be physically able to appear in court if he was here," it was not error to overrule the motion. The evidence of the absent counsel's illness was too indefinite as to time and when employment began, and appeared to be based upon the opinion of one other than a physician, without disclosing the source of his information. *Lloyd v. State*, 45 Ga. 57(4).

**3. CRIMINAL LAW  $\S$  938(1)—NEWLY DISCOVERED EVIDENCE AS TO WEAKNESS OF DEFENDANT'S MIND HELD INSUFFICIENT TO AUTHORIZE NEW TRIAL.**

A new trial will not be granted on account of newly discovered evidence to the effect that the "defendant's mind is weak and has been weak all of his life," and from observation of that fact the witness believes the defendant does not know the distinction between right and wrong; especially where the affidavits in regard to diligence fail to meet the requirements of the law. It is not made to appear that the counsel for the accused, who was absent at the trial, did not know of the alleged newly discovered facts prior to the trial of the case.

**4. ASSIGNMENTS OF ERROR.**

The remaining assignments of error, in so far as they are complete and sufficient in themselves, do not show cause for the grant of a new trial. The verdict was supported by evidence.

Error from Superior Court, Twiggs County; J. L. Kent, Judge.

Joe James was convicted of an offense, and he brings error. Affirmed.

John R. Cooper and W. O. Cooper, Jr., both of Macon, for plaintiff in error.

E. L. Stephens, Sol. Gen., of Wrightsville, Clifford Walker, Atty. Gen., and M. C. Bennet, of Atlanta, for the State.

GILBERT, J. Judgment affirmed. All the Justices concur, except BECK, P. J., absent on account of sickness.

(150 Ga. 11)

EDWARDS et al. v. SANDS. (No. 1478.)

(Supreme Court of Georgia. Feb. 14, 1920.)

*(Syllabus by the Court.)*

1. EXECUTORS AND ADMINISTRATORS  $\S$  137—  
ORDER OF ORDINARY REQUIRED FOR AN AD-  
MINISTRATOR'S SALE OF LAND.

An order granted by the ordinary to an administrator to sell land of his intestate's estate is a condition precedent to a valid sale.

2. EXECUTORS AND ADMINISTRATORS  $\S$  347—  
ORDINARY'S ORDER TO SELL MUST DESCRIBE  
LAND AS "DEFINITELY AS POSSIBLE."

Such order must specify "therein the land as definitely as possible." Civ. Code 1910, § 4026; 18 Oyc. 749.

3. EXECUTORS AND ADMINISTRATORS  $\S$  347—  
DESCRIPTION OF LAND IN ORDER OF SALE  
HELD INSUFFICIENT.

Where, upon the trial of a claim to land advertised for sale by administrators, they introduced in evidence, as their authority to sell, an order granted by the ordinary of Tattnall county, wherein the only description of the land was: "50 acres, more or less, of the lands of the deceased, situate, lying, and being in the 401st district G. M. of Tattnall county, and bounded north by lands of Jim Tippins and Hattie Dasher, east, south, and west by other lands of A. J. Edwards, deceased," the intestate of the administrators, and there was no other evidence as to the identity of the land to be sold—*held*, that the order gave the administrators no power to sell any land of their intestate's estate, for the reason that the reference in the order to an indefinite number of acres—"50 acres, more or less, of the lands of the deceased," bounded on three sides, "east, south, and west by other lands of" the deceased, was too vague and uncertain to specify any land to be sold. *Huntress v. Portwood*, 116 Ga. 351, 42 S. E. 513; *Luttrell v. Whitehead*, 121 Ga. 699, 49 S. E. 691; *Crawford v. Verner*, 122 Ga. 814, 50 S. E. 958. Such description was insufficient to deprive the heirs at law of the intestate of their title and interest in any land of the intestate, and moreover a bidder at a sale of such described land could not know what land he was bidding for.

4. EXECUTORS AND ADMINISTRATORS  $\S$  329(1)—  
CANNOT SELL LAND IN ADVERSE POSSES-  
SION OF ANOTHER.

"An administrator cannot sell property held adversely to the estate by a third person; he must first recover possession." Civ. Code 1910, § 4033.

(a) Occupation by the claimant of land at the time it was advertised for sale by an administrator, evidenced by the claimant working the trees thereon for turpentine, is such adverse possession as to forbid the sale of the land by the administrator. *Guthrie v. Bullock*, 143 Ga. 17, 84 S. E. 59; *Booth v. Young*, 149 Ga. 276, 99 S. E. 886.

(b) If the claimant be in possession and contend that he is holding the land adversely, it matters not whether his title be good. *Hall v. Armor*, 68 Ga. 449 (2).

## 5. DIRECTED VERDICT.

Applying the rulings above announced to the facts of the case appearing from the evidence, a finding was demanded that the land was not subject to be sold by the administrators, and the court did not err in directing a verdict to that effect.

Error from Superior Court, Evans County; W. W. Sheppard, Judge.

Proceeding by E. E. Edwards and others, administrators of A. J. Edwards, for the sale of land of the estate, opposed by W. D. Sands. Directed judgment for defendant, and plaintiffs bring error. Affirmed.

A. S. Way, of Redsville, and P. M. Anderson, of Claxton, for plaintiffs in error.

Hines, Hardwick & Jordan, of Atlanta, J. Saxton Daniel, of Claxton, and W. G. Warnell, of Savannah, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(150 Ga. 74)

GRAVETT v. STATE. (No. 1788.)

(Supreme Court of Georgia. March 9, 1920.)

*(Syllabus by the Court.)*

1. CRIMINAL LAW  $\S$  814(3)—REFUSAL OF IN-  
STRUCTION NOT PERTINENT TO EVIDENCE  
HELD NOT ERROR.

There is no merit in the complaint made in the fourth ground of the motion for new trial that the court failed to instruct the jury as therein set out. This is true for the reason that the instruction which it is claimed the court should have given was not pertinent to the evidence in the case.

2. CHARGE OF COURT.

The court clearly, fully, and correctly instructed the jury as to the law of conspiracy applicable to the case; and the mere failure to give an instruction as set forth in the fifth ground of the motion was not error.

3. CRIMINAL LAW  $\S$  784(7), 829(15)—REFUSAL  
OF CHARGE ALREADY FULLY COVERED NOT ER-  
ROR; CHARGE ON CIRCUMSTANTIAL EVIDENCE  
HELD CORRECT.

It was not error to refuse a request to instruct the jury as follows: "In all cases of circumstantial evidence, where out of the evidence produced there arises fairly and legitimately two theories, one of guilt, and one of innocence, it is the duty of the jury to accept the theory of innocence and acquit the defendant, rather than to accept the theory of guilt; and this is true even though you may consider that the theory of guilt is supported by much stronger evidence than the evidence tending to establish the theory of innocence." The court clearly, fully, and correctly charged the jury in respect to the law of circumstantial evidence as applicable to all the theories presented in the case, and, in reference to the point here raised gave the following instructions: "To warrant a con-

viction on circumstantial evidence, the proved facts must not only be consistent with the hypothesis of guilt, but must exclude every other reasonable hypothesis save that of the guilt of the accused. When the guilt of the defendant depends on circumstantial evidence alone, the rule is that each separate fact or link which goes to make the chain of circumstances from which the deduction of guilt is sought to be drawn must be clearly proved, and a fact not clearly proved should not be considered as a part of the chain of circumstances, but should be rejected by the jury, and the circumstances proved must not only be consistent with the defendant's guilt, but they must exclude every other reasonable hypothesis than that of the defendant's guilt. If any one or more of the circumstances relied on by the state are not clearly proved, and for this reason you reject one or more of the circumstances relied on, then you will inquire whether the other remaining circumstances proved, if they are clearly proved, are consistent with defendant's guilt and inconsistent with any other reasonable hypothesis than that of the defendant's guilt. All essential facts and circumstances necessary to show the commission of the crime and to connect the defendant therewith as the party committing the act must be proved." This charge was approved in *Davis v. State*, 74 Ga. 869. The request, among other defects, failed to refer to any reasonable hypothesis of innocence.

**4. CRIMINAL LAW §235(1)—CREDIBILITY OF WITNESSES IS FOR JURY.**

It was the province of the jury to determine the credibility of the witnesses. They believed the witnesses for the state, and their testimony authorized a verdict that the accused was guilty as charged. The court did not err in refusing a new trial.

Error from Superior Court, Jackson County; A. J. Cobb, Judge.

Marvin Gravett was convicted of an offense, his motion for new trial was denied, and he brings error. Affirmed.

P. Cooley, of Jefferson, for plaintiff in error.

W. O. Dean, Sol. Gen., of Monroe, Clifford Walker, Atty. Gen., M. C. Bennet, of Atlanta, and W. W. Stark, of Commerce, for the State.

FISH, C. J. Judgment affirmed. All the Justices concur, except BECK, P. J., absent on account of sickness.

(150 Ga. 78)

**BENJAMIN v. STATE. (No. 1532.)**

(Supreme Court of Georgia. March 10, 1920.)

(Syllabus by the Court.)

**1. CRIMINAL LAW §824(5)—FAILURE TO CHARGE LAW OF CONFESSIONS IN ABSENCE OF REQUEST NOT GROUND FOR NEW TRIAL.**

Even if the statements attributed to the defendant were of such character as to amount

to a confession, the failure of the court to charge the law of confessions, in the absence of an appropriate and timely request, is not cause for the grant of a new trial. *Patterson v. State*, 124 Ga. 408, 52 S. E. 534 (2); *Roberson v. State*, 135 Ga. 654, 70 S. E. 175.

**2. HOMICIDE §297, 309(3)—FAILURE TO CHARGE VOLUNTARY MANSLAUGHTER OR JUSTIFIABLE HOMICIDE NOT ERROR WHERE ISSUES NOT INVOLVED.**

Under the evidence, neither voluntary manslaughter nor justifiable homicide is involved in this case; and consequently a failure to charge the law on those subjects is not error.

**3. HOMICIDE §221—CHARGE ON DYING DECLARATIONS HELD NOT AUTHORIZED BY STATEMENTS OFFERED FOR PURPOSE OF IMPEACHMENT.**

Even if the statements alleged to have been made by the deceased, and testified to by a witness on the commitment trial, amounted to dying declarations, such testimony, when offered in evidence for the purpose of the impeachment of such witness, did not authorize a charge on dying declarations.

**4. CRIMINAL LAW §828—FAILURE TO CHARGE AS TO IMPEACHMENT OF WITNESSES NOT GROUND FOR NEW TRIAL IN ABSENCE OF WRITTEN REQUEST.**

"The failure to charge upon the subject of impeachment of witnesses is not cause for the grant of a new trial, in the absence of appropriate, timely, written request to instruct in reference thereto." *Dean v. State*, 139 Ga. 561, 77 S. E. 874; *Perdue v. State*, 135 Ga. 278, 69 S. E. 184 (6). Where, on the conclusion of the charge of the court to the jury, the court was orally asked by defendant's counsel "to charge the rule of impeachment in this case," and the court did charge generally on the subject of impeachment of witnesses by contradictory statements, it was not error as contended (there being no specific request in writing to charge), for the court to fail "to call the attention of the jury to the fact of the false statement before the grand jury (which was by said witnesses acknowledged to have been under oath and knowingly false), and to instruct the jury that if they found that said witnesses, or either of them, had knowingly, willfully, absolutely, and falsely sworn in a matter material to the issue in question, during the examination before the grand jury, while under oath duly and lawfully administered, that the evidence of the witnesses so swearing should be rejected, provided the jury found such false testimony was not the result of fears, either well-founded or groundless."

**5. ASSIGNMENTS OF ERROR.**

The other assignments of error are without merit.

**6. SUFFICIENCY OF EVIDENCE.**

The verdict is supported by the evidence.

Error from Superior Court, Camden County; J. P. Highsmith, Judge.

David Benjamin was convicted of an offense, and he brings error. Affirmed.

Cowart & Vocelle, of St. Marys, and E. H. Williams, of Brunswick, for plaintiff in error.

Alvin V. Sellers, Sol. Gen., of Baxley, Clifford Walker, Atty. Gen., and M. C. Bennet, of Atlanta, for the State.

HILL, J. Judgment affirmed. All the Justices concur, except BECK, P. J., absent on account of sickness.

(150 Ga. 80)

LANDERS v. COBB, Judge. (No. 1938.)

(Supreme Court of Georgia. March 11, 1920.)

*(Syllabus by the Court.)*

**1. EXCEPTIONS, BILL OF  $\S$ 53(7) — WHEN MERITS OF RIGHT TO COMPEL TRIAL JUDGE TO CERTIFY BILL OF EXCEPTIONS WILL BE CONSIDERED STATED.**

An extraordinary motion for a new trial was predicated on the ground of alleged newly discovered evidence to the effect that the foreman of the jury trying the case which found the movant guilty was an incompetent juror, because of the fact that before his selection as a juror he had made certain declarations which clearly showed that he was not a fair juror, but was biased and prejudiced against the movant, and that after the trial another juror who had tried the case made an affidavit to the effect that the foreman of the jury had stated, in the jury room while the verdict was being considered, that, if the movant was not found guilty of murder without a recommendation, he would be hanged by a mob, and that the juror making the affidavit as to such statement by the foreman was induced thereby to agree to the verdict. Four disinterested persons made affidavits as to the declarations of the foreman of the jury, made prior to the trial, showing, if true, his incompetency; and they deposed that such declarations were made to affiants separately and on different occasions. Numerous affidavits were made by citizens of the community in which such four affiants resided, as to their good character and their reputable associates where they lived. The foreman of the jury, whose competency was so attacked, made an affidavit denying that he had made any of the declarations set out in the affidavits of the four persons by whom it was sought to prove his incompetency; and affidavits of citizens of his county were submitted as to his good character and standing in the community. The affidavit of the juror which sought to impeach the verdict was held by the judge, upon hearing the motion, to be incom-

petent evidence, and was not considered. The motion for a new trial was overruled. A bill of exceptions was duly presented to the judge during the term at which the new trial was refused, complaining of the refusal. The judge refused to certify the bill of exceptions, using this language: "I decline to sign and certify this bill of exceptions, as the assignments of error therein are, in my opinion, without merit; the grounds of the extraordinary motion upon which the bill of exceptions is based being, in my opinion, without merit." Whereupon the movant petitioned the Supreme Court for a mandamus requiring the judge to certify the bill of exceptions. *Held:*

Upon an application for a mandamus to compel the trial judge to certify to a bill of exceptions, the merits of the case will not be considered, if it be the first bill of exceptions after verdict; but if it is upon a ruling relating to an extraordinary motion for a new trial, the merits of the motion will be inquired into, and the mandamus will not be granted unless the motion is based upon meritorious grounds. *Rawlins v. Mitchell*, 127 Ga. 24-27, 55 S. E. 958.

**2. NEW TRIAL  $\S$ 143(1) — AFFIDAVITS IMPEACHING VERDICT PROPERLY EXCLUDED ON MOTION BASED UPON EVIDENCE AS TO INCOMPETENCY OF JUROR.**

"The affidavits of jurors may be taken to sustain, but not to impeach their verdict." Civ. Code 1910, § 5933. It was not error, therefore, to exclude the affidavit of the juror made for the purpose of impeaching the verdict.

**3. NEW TRIAL  $\S$ 151—REFUSAL TO GRANT ON AFFIDAVITS ATTACKING COMPETENCY OF JUROR NOT ABUSE OF DISCRETION.**

This court cannot hold that the trial judge, in considering the affidavit attacking the competency of the foreman of the jury, and the affidavits sustaining his competency, abused his discretion in refusing to grant a new trial on the extraordinary motion therefor. *Thompson v. State*, 147 Ga. 745, 95 S. E. 292 (3). It follows that the judge was authorized to decline to certify the bill of exceptions. Accordingly this court refuses to grant a nisi upon the application for mandamus.

Original proceedings in mandamus by Hollis Landers against Andrew J. Cobb, Judge. Mandamus nisi refused.

Wolver M. Smith, Geo. C. Thomas, W. Milton Thomas, and Jno. B. Gamble, all of Athens, for plaintiff.

PER CURIAM. Mandamus nisi refused.

$\Rightarrow$  For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes



(150 Ga. 46)

LOVE et al. v. GOODSON. (No. 1414.)

(Supreme Court of Georgia. Feb. 25, 1920.)

(Syllabus by the Court.)

1. EXECUTION  $\S$  328—ON INTERVENTION BY CLAIMANTS OF FUND ON RULE NISI AGAINST SHERIFF, INTERVENERS COULD NOT OBJECT TO JURISDICTION OF COURT WHERE THE CASE WAS A MONEY RULE PROCEEDING; "MONEY RULE PROCEEDING."

A rule nisi was issued against a sheriff by the judge of the superior court to show cause why he should not pay over money in his hands to a named plaintiff in *fi. fa.*; the rule stating fully the details of the plaintiff's claim. The sheriff filed his answer setting up certain matters relied on to show that the plaintiff was not entitled to the fund admitted to be in his hands, and that other named claimants were entitled to the fund. Afterwards the other claimants filed an intervention substantially the same as the sheriff's answer, and prayed that the money be awarded to them. Subsequently the intervention was amended by setting up additional matters, relied on to show that the interveners were entitled to the fund. *Held*, that the case thus presented by the pleadings was a money rule proceeding, as contemplated in Civ. Code 1910,  $\S$  5348; and the interveners took the case as they found it. *Charleston, etc., Ry. Co. v. Pope*, 122 Ga. 577, 50 S. E. 374; *Hilton v. Haynes*, 147 Ga. 725, 95 S. E. 220. Therefore the interveners could not object to the jurisdiction of the court and have the entire proceeding dismissed on the ground that there was no petition upon which to base the rule nisi issued against the sheriff.

2. EXECUTION  $\S$  328—PLEADING IN INTERVENTION PROPERLY FILED AS AGAINST OBJECTION THAT IT WAS UNTIMELY.

Where at the trial the plaintiff in *fi. fa.*, who brought the rule, offered a paper called a traverse of the sheriff's answer, but in effect a denial of the averments in the sheriff's answer and in the intervention, it was not error to allow the paper to be filed over the objection that it should have been filed at the first term.

3. MARSHALING ASSETS AND SECURITIES  $\S$  2—APPLICATION OF RULE AS TO CREDITOR HOLDING CLAIM AGAINST ONE OF TWO JOINT DEBTORS STATED.

Equity will not, where one creditor holds a claim against two, and another holds a claim against one of those two, compel the former to proceed against that one of his joint debtors against whom the latter has no claim, in order that the funds of his debtor may be applied exclusively to the payment of his claim. Equity will never do this for the sake of the creditor who has a single claim, but will do it when it is equitable as between the two debtors that it should be done. *Newson v. McLendon*, 6 Ga. 392, 400; *Hanesley v. National Park Bank*, 147 Ga. 96, 92 S. E. 879; *Ex parte Kendall*, 17 Vesey, 520; 2 Story's Eq. Jur. (14th Ed.)  $\S$  864 et seq. If anything said in the opinion in *Richardson v. Conn*, 100 Ga. 89, 27 S. E. 978, conflicts with the ruling above announced, it must yield to the older decision by this court.

4. PARTNERSHIP  $\S$  220(2)—PROCEEDS OF SALE OF A PARTNER'S INDIVIDUAL PROPERTY WAS PROPERLY APPLIED TO SATISFACTION OF JUDGMENT AGAINST BOTH PARTNERS IN PREFERENCE TO JUNIOR JUDGMENT AGAINST SUCH INDIVIDUAL PARTNER.

On February 24, 1905, Goodson obtained a judgment against a partnership composed of Cavender and Shahan, and against each partner individually, and execution was duly issued upon the judgment. On August 24, 1905, Evans obtained a judgment against Shahan and Jasper Love, and the execution issued thereon was transferred to C. J. Love and others. A fund was raised by the sheriff's sale, under the junior *fi. fa.*, of Shahan's individual property; and on the trial, before the judge without a jury, of a money rule against the sheriff, the plaintiffs in *fi. fa.* under these judgments each claimed a prior right to the fund. The evidence authorized the judge to find the facts to be: (1) That the partnership of Cavender & Shahan was terminated by Shahan voluntarily and of his own accord severing his connection with the business, announcing that he would have nothing more to do with it, moving away, and never afterwards participating in the business of the firm. (2) That Cavender took charge of all the assets of the firm he could secure, "did the best he could" with them, and applied them all to the payment of the firm's indebtedness; that they were not sufficient to satisfy all of such indebtedness; and that he used some of his individual funds in payment thereof, but paid nothing on Goodson's claim. (3) That Goodson borrowed from Cavender, after the rendition of Goodson's judgment, a sum of money less than the amount of the judgment, and the loan was made on the express agreement between Cavender and Goodson that it should not be credited on the judgment. (4) That no part of Cavender's judgment had been paid. (5) That Shahan was insolvent and Cavender was solvent. *Held*:

(a) The judge was authorized to hold that, as between Cavender and Shahan, it was not equitable that Goodson, the holder of the senior judgment, should be required to proceed against Cavender's property alone for its satisfaction, thus leaving the fund in court to be awarded to the junior judgment.

(b) The fund being insufficient to satisfy in full the senior judgment, it was not error to award it all to that judgment, without requiring the amount of Cavender's loan to the holder of the senior judgment to be credited thereon.

Error from Superior Court, Walker County; Moses Wright, Judge.

Proceedings between C. J. Love and others and Jacob Goodson. Judgment for the latter, and the former bring error. Affirmed.

W. M. Henry and Shattuck & Shattuck, all of La Fayette, for plaintiffs in error.

D. F. Pope and R. M. W. Glenn, both of La Fayette, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur, except GILBERT, J., absent on account of sickness.

(150 Ga. 69)

**PUTNAL v. HICKMAN.** (No. 1610.)

(Supreme Court of Georgia. March 9, 1920.)

*(Syllabus by the Court.)*

1. DESCENT AND DISTRIBUTION ~~64~~—RECORD SHOWING APPOINTMENT OF TEMPORARY ADMINISTRATOR HELD PROPERLY EXCLUDED ON ISSUE AS TO WHETHER WIDOW ELECTED TO TAKE CHILD'S PART.

On the trial of the issue as to whether a widow had elected to take a child's part in the estate of her deceased husband, the court did not err in refusing to admit in evidence the record of the court of ordinary showing the appointment of a temporary administrator of the estate, the appointment of appraisers, and the return of the appraisers; the attempt to set aside the estate as a year's support being void because no application for a year's support had ever been made. See *Putnal v. Hickman*, 148 Ga. 621, 97 S. E. 668.

2. DESCENT AND DISTRIBUTION ~~64~~—ONLY CHILD OF INTESTATE PROPERLY AWARDED ONE-HALF UNDIVIDED INTEREST IN LAND AND MESNE PROFITS.

The undisputed evidence showed that the widow sold the entire interest of her deceased husband in the land within the time allowed her to elect between a child's part and a dower. There is no evidence showing or tending to show that she did not intend this conveyance to operate as an election to take a child's part. The court therefore did not err in directing a verdict in favor of the plaintiff, who was the only child of the deceased, for one-half undivided interest in the land and one-half interest in the mesne profits. *Brown v. Cantrell*, 62 Ga. 257.

Error from Superior Court, Colquitt County; W. E. Thomas, Judge.

Suit by Mrs. J. A. Putnal against W. G. Hickman. Directed verdict for plaintiff, her motion for new trial overruled, and she excepts and brings error. Affirmed.

Mrs. J. A. Putnal filed suit on August 28, 1917, to recover certain lands of which her father, D. E. Willis, died seized and possessed on August 8, 1890. A temporary administrator of the estate of the deceased was appointed and qualified on August 8, 1890, and was formally dismissed at the February term, 1891, of the court of ordinary. No permanent administrator was ever appointed, so far as the record discloses. The deceased left a

widow and only one child, Mrs. Putnal. The widow sold the land on October 30, 1891, to J. B. Sinclair, predecessor in title of the defendant, and executed a deed, the habendum clause of which was as follows:

"The same to have and to hold unto the said J. B. Sinclair, his heirs and assigns, forever in fee simple."

This deed was recorded on December 13, 1893. The defendant has been in possession of the land since December 24, 1913. The plaintiff has never been in possession of any of the land. On the trial the plaintiff sought to introduce in evidence a transcript of the record purporting to set apart the whole of the land as a year's support to the widow and child. This judgment of the court of ordinary had previously been declared void by this court. *Putnal v. Hickman*, 148 Ga. 621, 97 S. E. 668. The object of the proffered evidence was to show that the widow believed that she was conveying to Sinclair a title to the land which she had derived from the judgment of the court of ordinary setting aside the year's support, and that her deed was not intended as an election to take a child's part. On objection the court refused to admit the evidence; there being no evidence, except the deed, tending to show whether or not the widow had elected to take a child's part. The court ruled that the deed was conclusive proof that the widow had elected to take a child's part, and directed a verdict in favor of the plaintiff for one-half undivided interest in the land and one-half of the mesne profits. The plaintiff moved for a new trial upon the general grounds, and upon the refusal of the court to admit in evidence the transcript of the record in regard to year's support, and the direction of a verdict for a half interest instead of the whole interest in the land and mesne profits. The motion was overruled, and the plaintiff excepted.

L. L. Moore, of Moultrie, and Branch & Snow, of Quitman, for plaintiff in error.

J. S. Ridgill, of Tifton, and W. A. Covington and Parker & Gibson, all of Moultrie, for defendant in error.

GILBERT, J. Judgment affirmed.

All the Justices concur, except BECK, P. J., absent on account of sickness.

For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(150 Ga. 61)

**HAWKINS et al. v. HAWKINS et al.**  
(No. 1550.)

(Supreme Court of Georgia. March 10, 1920.)

*(Syllabus by the Court.)***1. HUSBAND AND WIFE §135—HUSBAND TAKING TITLE TO PROPERTY PURCHASED WITH WIFE'S SEPARATE ESTATE HOLDS IN TRUST.**

Where a husband purchases property at the request and direction of his wife, as a home for her, with money which is her separate estate, and takes the title in his own name, but recognizes until his death the property so purchased as that of his wife, he will be deemed to have held it in trust for her, in the absence of direct evidence showing that the wife intended to make a gift or lend the money to the husband.

**2. HUSBAND AND WIFE §135—IMPROVEMENTS BY HUSBAND WITH PROCEEDS OF REALTY PURCHASED WITH WIFE'S SEPARATE ESTATE DEEMED IMPROVEMENT ON TRUST ESTATE.**

Where during the lifetime of the wife the husband sells a portion of the property so purchased, and expends the proceeds of the sale in improvements on the remaining portion, he will be deemed to have expended the money in improvements on the trust estate as such, and not as asserting a claim adverse to his cestui que trust.

**3. DESCENT AND DISTRIBUTION §55, 90(1)—WHERE SURVIVING HUSBAND DEVISES PROPERTY TO SECOND WIFE TO EXCLUSION OF CHILDREN OF FIRST WIFE CHILDREN MAY RECOVER INTEREST DEVISED.**

On the death of the wife intestate before that of the husband, her property descends to the husband and her children as her heirs at law, as tenants in common; and where the father marries again and subsequently dies, leaving a will by which the property is devised to the second wife to the exclusion of the children of the first wife, these children can maintain an action to recover their interest in the property in the adverse possession of their step-mother.

**4. DESCENT AND DISTRIBUTION §90(2)—36 YEARS' DELAY IN SUING FOR RECOVERY OF INTEREST AS HEIR DOES NOT BAR RECOVERY.**

The plaintiff's allegations did not present a stale demand, and they are not barred of recovery for that reason.

**5. SUFFICIENCY OF PETITION.**

The petition set out a cause of action, and the court did not err in overruling the demurrer.

Error from Superior Court, Sumter County; Z. A. Littlejohn, Judge.

Suit by Eugene A. Hawkins and others against Mrs. William R. Hawkins and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

Eugene A. Hawkins and certain of his brothers and sisters filed a petition against Mrs. William R. Hawkins, individually and as executrix of E. A. Hawkins, deceased, and against Mrs. Welborn Clarke, as tenant in

possession, praying that it be ascertained and adjudicated that the title to a certain house and lot is in the plaintiffs; that they recover the premises, except a certain interest admitted to be in Mrs. William R. Hawkins; that they have judgment against Mrs. Hawkins for their respective interests in the rents, issues, and profits, as the same may appear to be due; and, inasmuch as the property is incapable of division in kind, that it be sold and the proceeds be divided between the plaintiffs and Mrs. Hawkins, as their respective interests appear. The petition alleges substantially as follows:

The plaintiffs are the children of E. A. Hawkins and Mrs. Mary Ann McCleskey Hawkins, both deceased. Mrs. Mary Ann McCleskey Hawkins died intestate on December 14, 1910, leaving no debts. There has been no administration on her estate, and the plaintiffs are all her heirs at law. On February 5, 1913, E. A. Hawkins was married to Mrs. William R. Hawkins, one of the defendants. On November 5, 1917, E. A. Hawkins died leaving a will in which Mrs. William R. Hawkins was named as executrix. The will has been duly probated in the court of ordinary, and by its terms the house and lot in controversy, situated in the city of Americus, were devised to Mrs. William R. Hawkins.

About January 15, 1882, Mrs. Mary Ann McCleskey Hawkins inherited the sum of \$3,161.33. The money was collected for her by E. A. Hawkins, and at her instance and request it was by him invested in the house and lot just mentioned; but he took a deed to the property in his own name instead of in his wife's name. She was a loving and trusting wife, and never had any business training, and knew nothing about business affairs; while E. A. Hawkins was a lawyer and skilled in the management of business affairs, by reason of which, and with the full confidence that his wife had in him, she intrusted the management of her separate estate entirely to him. No other instructions or limitations were given to him than that he buy and provide for her a home with the money she had so inherited. This was done, and he and his wife occupied the house and lot as their home for the remainder of her life. During all this time E. A. Hawkins recognized and referred to the home as her property. At no time up to her death did he ever repudiate the trust so resulting, nor did he ever give notice to her of any individual personal claim to the house and lot in himself, but he ratified the existence of said trust relation so created with reference to the property. By reason of the facts set out, a trust in him resulted, and he held the property in law, equity, and good conscience as the trustee of his wife, and so held it at the time of her death; and by reason of this

relation, at the time of her death the plaintiffs, her children, and their father, E. A. Hawkins, became tenants in common of the property. After the death of their mother their father and some of the plaintiffs continued to occupy the premises, without any change with reference to the property, until the time of their father's death. Upon his marriage to Mrs. William R. Hawkins, they, together with some of the plaintiffs, continued to reside on the property to the date of his death.

On May 9, 1916, plaintiffs' father executed a will devising the property to Mrs. William R. Hawkins. The plaintiffs knew nothing of this bequest until the day succeeding the death of their father, when his will was read. This was the first notice of any claim that their father did not hold the property under the relation of trustee of plaintiffs' mother. He had always previously referred to it as her home. Prior to the execution of the will E. A. Hawkins had been weakened physically and mentally by disease. Mrs. William R. Hawkins was ever kind and attentive to him, except on questions affecting plaintiffs, when she was extremely unkind and at times abusive, when this was necessary to prevent a reconciliation with his children. This was done designedly on her part (as plaintiffs are advised and charge), in order to procure the execution of the will and to prevent the plaintiffs from being more substantially provided for therein. E. A. Hawkins was a man of high sense of honor, and was influenced by the defendant to repudiate his trust; and he did so to effect his peace of mind and continued domestic harmony, that became more necessary to him by reason of his weakened condition from disease, and of the ideal domestic conditions that had always existed, and that he had become accustomed to, between him and the plaintiffs' mother.

Mrs. William R. Hawkins, individually and as executrix, filed a demurrer to the petition, which was overruled, and the defendants accepted.

Jule Felton, of Montezuma, Wallis & Fort, of Americus, and Little, Powell, Smith & Goldstein, of Atlanta, for plaintiffs in error.

Hixon & Pace, Shipp & Sheppard, and W. W. Dykes, all of Americus, for defendants in error.

HILL, J. (after stating the facts as above). [1, 3] 1. The Civil Code (1910), § 3739, provides that—

"Trusts are implied whenever the legal title is in one person, but the beneficial interest, either from the payment of the purchase money or other circumstances, is either wholly or partially in another."

According to the allegations of the petition in this case, the property in controversy was purchased by the plaintiffs' father with

money which had been inherited by his wife, their mother, and under her direction the money was invested in the property in controversy; but instead of having the deed executed in the name of his wife he took a deed in his own name. It is alleged that from that time until the date of his death E. A. Hawkins, in whose name the legal title was, recognized the property as that of his wife. Under these circumstances, which are set out more in detail in the statement of facts, we think that a trust is implied, and that the husband as trustee held the property for his wife, the cestui que trust, and so held it at the time of her death, when he and her children became by inheritance tenants in common of the property. In the case of *Barber v. Barber*, 125 Ga. 226, 53 S. E. 1017, it was held that—

"Whenever a husband acquires the separate property of his wife, with or without her consent, he must be deemed to hold it in trust for her benefit, in the absence of any direct evidence that she intended to make a gift of it to him."

There is nothing in the petition to indicate that the wife intended the money as a gift or loan to her husband, but on the contrary, it is alleged that it was to be invested in a home for the wife, and that the husband recognized the property as that of his wife as long as he lived. On demurrer these allegations must be taken to be true, and if they be true then they negative the idea of a gift or loan of the money to the husband. It was also held in the *Barber Case*, supra:

"As long as the husband is in possession of the property, using it for the wife's benefit and recognizing her ownership, no lapse of time will bar the wife from asserting her title or calling the husband to an accounting."

See, also, to the same effect, *Jenkins v. Georgia Investment Co.*, 149 Ga. 475, 100 S. E. 635. This, we think, is an answer to the contention that the present suit is a stale demand, having been brought 36 years after the father acquired title to the property in 1882. See, also, *Brooks v. Fowler*, 82 Ga. 329, 9 S. E. 1089; *Parker v. Barnesville Savings Bank*, 107 Ga. 650, 34 S. E. 365; *Burt v. Kuhn*, 113 Ga. 1143, 39 S. E. 414; *Guinn v. Truitt*, 148 Ga. 112, 95 S. E. 968.

[2] But it is insisted that the father, during the lifetime of plaintiffs' mother, sold off a part of the property purchased with the mother's money, thereby asserting his individual claim to the property adversely to that of his wife. The reply to this is that the allegations of the petition are to the effect that the proceeds of the sale of the property by the husband in the instant case were devoted, at least in part, to improving the wife's property, and therefore, under the allegations, whatever was done in this regard will be considered as having been done by the husband as trustee for the benefit of

the trust estate; nothing appearing to the contrary. A case similar in its facts to the one now under review was recently decided by this court in accordance with the ruling here made. *McDowell v. Donalson*, 149 Ga. —, 101 S. E. 578.

[4.5] From what has been said we reach the conclusion that the petition set forth a cause of action, which was not barred, and the court did not err in overruling the demurrer.

Judgment affirmed.

All the Justices concur, except BECK, P. J., absent on account of sickness.

(149 Ga. 812)

TOWN OF ADEL et al. v. LITTLEFIELD.  
(No. 1501.)

(Supreme Court of Georgia. Feb. 13, 1920.)

*(Syllabus by the Court.)*

1. MANDAMUS  $\S$ 185—FAILURE OF MUNICIPAL AUTHORITIES TO COMPLY WITH ORDER TO PAY JUDGMENT CONSTITUTED CONTEMPT.

Where the plaintiff in a money judgment against a municipality filed an application for a writ of mandamus against the municipal authorities to compel them to pay off and discharge the judgment, alleging that the municipality had on hand an amount of money largely in excess of the amount of the judgment, and that the town authorities could levy a tax to raise money with which to pay off the judgment, and the municipality met these allegations by a denial that it had on hand funds with which to pay off and discharge the judgment, alleging that all funds on hand could be applied only to certain other stated purposes, and where the judge, upon the hearing of the application and the response, granted a mandamus absolute, requiring that the town authorities pay the amount of the judgment, this was an adjudication that the town authorities did have on hand the necessary funds, and this judgment was binding upon the town authorities, and a failure to comply with the order in the mandamus absolute rendered the respondents liable to be attached for contempt.

2. APPEAL AND ERROR  $\S$ 238(6)—NECESSITY OF EXCEPTION TO RULINGS ON ORDER DISMISSING MOTION FOR NEW TRIAL STATED.

Where a judgment was rendered for the plaintiff against the defendant in a suit, and the losing party made a motion for a new trial, which was afterwards dismissed by the court because of want of prosecution and of failure to file a brief of evidence in accordance with the order taken in term time, if this order was improvidently or improperly granted, or was based upon grounds which did not exist, the movant, upon learning of its passage, should promptly have moved to vacate it or set it aside, and, upon refusal of the motion to vacate, should have excepted thereto, or, if the motion to vacate was improperly dismissed, he should have excepted to that, and

upon such exception he could have had the question determined upon review.

Error from Superior Court, Cook County:  
W. E. Thomas, Judge.

Action by J. J. Littlefield against the Town of Adel and others. Judgment for plaintiff, and defendants bring error. Affirmed.

See, also, 99 S. E. 38.

In July, 1916, J. J. Littlefield filed suit against the town of Adel, and on the trial of the case in November, 1917, obtained a judgment for a stated sum of money against the defendant. The latter filed a motion for a new trial on November 21, 1917, and the motion was set for a hearing on the second Monday in January following. This hearing was continued from time to time. The order was taken in term, allowing completion of the motion and brief of the evidence at or before the hearing. The motion was finally set down for hearing May 19, 1918, and was then by order of the judge dismissed for want of prosecution; no brief of evidence having been filed. On June 6, 1918, the plaintiff's counsel made a demand on the municipal authorities for payment of the amount due on the judgment. On July 26, 1918, a motion was filed in the same court to set aside the verdict and the judgment entered in the preceding November. Two months later this motion to set aside the verdict and judgment was dismissed. On June 8, 1918, on an application for mandamus against the mayor and council of the municipality, a mandamus nisi was issued. In answer the respondents averred that they had no funds which would be subject to such judgment and execution, even if they were legal and valid, which they denied; that such funds as they had on hand were not subject to this common-law judgment, as they had been collected for the purpose of paying off bonded indebtedness, for school purposes, and from the levy of a street tax. After a hearing, a mandamus absolute was granted, requiring the town authorities to pay the amount of the judgment. Upon failure and refusal of the town to pay in accordance with the mandamus absolute, a petition for attachment for contempt was brought against the mayor of the town, the councilmen, and the secretary and treasurer. A rule nisi was issued upon this petition, and an answer was filed, which consisted in part of the allegations of fact set forth above.

J. P. Knight, of Nashville, for plaintiffs in error.

R. A. Hendricks, of Nashville, for defendant in error.

BECK, P. J. (after stating the facts as above). The judgment granting a mandamus absolute against the town of Adel and the municipal authorities, which was rendered

September 25, 1918, stands unreversed, and is binding upon the municipality. A writ of error containing exceptions to that judgment was sued out, and the question brought here for review. But the writ of error was dismissed. *Town of Adel v. Littlefield*, 149 Ga. 56, 99 S. E. 38. Counsel for the plaintiffs in error refers to the fact that the judgment granting the mandamus absolute was not affirmed; but the dismissal of the writ of error, as stated, had the same effect, relatively to the mandamus absolute, as a judgment of affirmance would have had. In the application for mandamus the prayer was that the municipality be required to pay the judgment, alleging that it had \$10,000 or other large sum on hand; but in the application it is also pointed out that, if the defendant has not sufficient funds in hand with which to discharge the judgment and execution, the plaintiff is entitled to have the town of Adel levy a tax sufficient to pay off the judgment and the execution founded thereon. After considering the evidence submitted at the hearing for mandamus, the court did not grant an order containing the alternative of paying off the judgment out of funds on hand, or of levying a tax to raise the money for the purpose of discharging the judgment, but directed and commanded the municipal authorities to pay the judgment. The question as to whether the town had the funds in hand to pay this was an issue before the judge at the hearing of the application for mandamus, and his judgment ordering the payment, instead of a judgment ordering the levy of a tax with which to raise the necessary money, adjudicated the question as to whether or not the town had the funds with which to meet the judgment, and decided that question against the contention of the defendant.

[1] Whether the judge found erroneously, under the facts submitted, that the town did have the necessary funds, is not before us. The judgment was conclusive upon that question. But, looking into the record, we can well understand that the judge might have held that general statements, in the evidence and pleadings of the defendants, that the money which they had on hand was subject to a bonded debt, and could only be used for certain other stated purposes, was not sufficient; that the respondents in the mandamus proceedings should have shown precisely or approximately the sum they had on hand, how much was then due on the bonded debt, how much would be appropriated to the school fund, and how much was raised from street taxes. But, whether the showing of the municipality upon these questions was sufficiently definite or not, that question was settled by the judgment grant-

ing the mandamus absolute, and the failure to file a proper bill of exceptions to that judgment left it to stand, and so far as this record shows it is still standing, and is of full force and effect. But counsel for plaintiffs in error insist that at the time the mandamus absolute was granted there was pending a motion to set aside the original verdict in the case and the judgment founded thereon. One motion of this character had been made and dismissed by the court, and another had been made, and it was the second motion to set aside the verdict and judgment that was pending when the mandamus absolute was granted.

[2] We do not think these motions to set aside can avail anything. They had properly made a motion for a new trial soon after the rendition of the verdict in the case. That had been dismissed for want of prosecution. The conduct of the judge in dismissing it had been attacked. But if that order dismissing the motion for a new trial was improvidently or improperly granted, the defendant should have attacked that, asking that the order dismissing the motion for a new trial be itself set aside and that the motion be heard upon its merits; and if the court had refused to vacate or set aside the judgment dismissing the original motion for a new trial, his refusal to vacate or set aside that judgment could have been made the subject of a writ of error to this court; and if the grounds upon which the motion to vacate was based were justifiable in their character, they could have been examined by a reviewing court, and a judgment had upon review, according to the merits of the question. But the judgment for mandamus absolute, as we have pointed out above, stands. It was a judgment rendered by a court of competent jurisdiction, and it was not sufficiently met by a renewal of the statements upon the part of the town authorities that they did not have the funds on hand, or, if they had the funds, they were not subject to this judgment. There was no question as to whether or not they had funds in their hands, so as to make an issue of fact which would require submission to a jury. The mandamus absolute settles the question as to whether they had the funds or not, and a refusal to obey that judgment rendered the respondents in the contempt proceedings liable to punishment for contempt for refusal to obey the mandamus absolute according to its terms. The judgment in the contempt proceedings was that the town authorities pay the money or be attached for contempt; and the court did not err as against the plaintiffs in error in rendering that judgment.

Judgment affirmed. All the Justices concur.

(150 Ga. 55)

(102 S.E.)

**MILLTOWN LUMBER CO. v. TOWN OF  
MILLTOWN et al. (No. 1335.)**

(Supreme Court of Georgia. Feb. 28, 1920.)

*(Syllabus by the Court.)*

1. INJUNCTION  $\S$  136(2), 151—INTERLOCUTORY INJUNCTION MAY BE GRANTED TO PREVENT RAILROAD FROM DISCONTINUING OPERATION TO PLAINTIFF'S INJURY; ON INTERLOCUTORY HEARING JUDGE MAY CONSIDER STATUS EXISTING WHEN HE GRANTED TEMPORARY ORDER.

At the interlocutory hearing for injunction the judge was authorized to find that the defendant, by valid contracts with certain of the plaintiffs to operate its railroad permanently, upon which the public had acted, and by its conduct in holding itself out to the plaintiffs and the public as a common carrier, had devoted its road to the public use, and had estopped itself from removing its railroad and discontinuing its operation, and that the threatened and intended removal of the road would work irreparable injury to the plaintiffs. Under these circumstances there was no abuse of discretion in granting an interlocutory injunction.

(a) In passing upon the merits of the case at the interlocutory hearing the judge could consider the status as it existed when he granted the temporary restraining order. See *Byne v. Byne*, 54 Ga. 257.

2. RECEIVERS  $\S$  4—COURT HAD AUTHORITY TO APPOINT RECEIVER OF RAILROAD IN AID OF INJUNCTION AGAINST DISCONTINUANCE OF OPERATION.

After the grant of the ex parte restraining order, and prior to the interlocutory hearing, the defendant ceased to operate the railroad. In the order granting the interlocutory injunction it was provided: "It appears that the defendant company has failed to operate the railroad, under the order heretofore granted, as required by the terms of said order. It is now further ordered that, if after ten days from the date of this order the defendant company still discontinues the operation of the said railroad according to law and in terms of this order, then and in that event it is ordered that" a named person "take charge of all of the physical properties of the railroad necessary for its operation, and that he operate same to the reasonable satisfaction of the interest involved and pending the litigation, unless further ordered to the contrary. \* \* \* He may make application for authority to lease any engine or rolling stock necessary for the operation of

the railroad, until the engine now held by the defendant company can be repaired." *Held*, being authorized to grant an interlocutory injunction, the judge also had authority, under the circumstances, to appoint a receiver in aid of the injunction. *Columbian Athletic Club v. State*, 143 Ind. 98, 40 N. E. 914, 28 L. R. A. 727, 52 Am. St. Rep. 407; 34 Cyc. 23(3); 23 Am. & Eng. Enc. Law, 1016.

Beck, P. J., and George, J., dissenting.

Error from Superior Court, Berrien County; W. E. Thomas, Judge.

Action for injunction by Town of Milltown and others against the Milltown Lumber Company. Interlocutory injunction granted, and receiver appointed pending litigation, and defendant brings error. Affirmed.

E. K. Wilcox, of Valdosta, for plaintiff in error.

C. A. Christian and R. A. Hendricks, both of Nashville, for defendants in error.

ATKINSON, J. Judgment affirmed. All the Justices concur, except BECK, P. J., and GEORGE, J., dissenting, and GILBERT, J., absent on account of sickness.

BECK, P. J., and GEORGE, J. (dissenting). A line of railroad constructed, owned, and operated by a corporation under charter power conferred upon it by the superior court, and possessing no right to exercise the power of eminent domain or other attribute of sovereignty, is not, by reason of the fact that it carried passengers and freight for the public for hire, nor by reason of the fact that it held itself out to the plaintiff and the public as a common carrier, so impressed with a public use as to bring it within the principle announced in *Leverett v. Middle Georgia & Atlantic Railway Co.*, 96 Ga. 385, 24 S. E. 154, *Brown v. Atlantic & Birmingham Railway Co.*, 126 Ga. 248, 55 S. E. 24, 7 Ann. Cas. 1028, and *Atlantic & Birmingham Railway Co. v. Kirkland*, 129 Ga. 552, 59 S. E. 220. We are unable to agree that the evidence in the record authorized the judge to find that the defendant, by valid and enforceable contracts made with any of the plaintiffs, was bound to operate its railroad for any particular time or permanently, or that by its conduct it was estopped from discontinuing the operation of its road.

$\S$  For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(150 Ga. 12)

**LAMB v. HOWARD** (No. 1492.)

(Supreme Court of Georgia. Feb. 14, 1920.)

*(Syllabus by the Court.)***LIMITATION OF ACTIONS §130(7)—SUIT MAY BE BROUGHT WITHIN SIX MONTHS OF DISMISSAL OF SUIT BROUGHT IN WRONG COUNTY.**

Where suit was brought against a railroad company to recover damages for a tort committed in another county in this state, and was dismissed by the plaintiff after the rendition of a decision by this court, holding that the court of the county in which the suit was brought had no jurisdiction of the case, the suit might be brought again within six months of the dismissal in the county in which the cause of action originated, although the bar of the statute of limitations would attach but for the pendency of the first suit.

**Certified Question from Court of Appeals.**

Suit by George P. Howard against E. T. Lamb, receiver of the Atlanta, Birmingham & Atlantic Railroad Company. Demurrer overruled, and defendant took error to the Court of Appeals, which certified a question. Question answered.

Judgment conformed to by Court of Appeals 102 S. E. 133.

The Court of Appeals certified to the Supreme Court the following question:

"Under section 2798 of the Civil Code, providing that in certain kinds of cases 'all railroad companies shall be sued in the county in which the cause of action originated,' and that 'any judgment rendered in any other county than the one in which the cause so originated shall be utterly void,' and in view of the decision in the case of Atlanta, Knoxville & Northern Railway Co. v. Wilson, 119 Ga. 782 [47 S. E. 366], was the entire proceeding in a case to which these provisions applied, and in which the Supreme Court held that 'the petition shows upon its face that the courts of Coweta county alone had jurisdiction of this suit, and that the superior court of Fulton county did not have jurisdiction,' and 'it should have been dismissed upon general demurrer' (145 Ga. 850 [90 S. E. 63]), so utterly void as to prevent renewal of the action within six months, so that the renewed case should stand upon the same footing, as to limitation, with the original case, as provided in section 4381 of the Civil Code, where the losing party dismissed his case before the remittitur from the Supreme Court was made the judgment of the court below?"

A. H. Freeman, of Newnan, Hatton Lovejoy, of Le Grange, and Brandon & Hynds, of Atlanta, for plaintiff in error.

Westmoreland, Anderson & Smith, of Atlanta, for defendant in error.

BECK, P. J. On May 25, 1914, George P. Howard filed suit in the superior court of Fulton county, Ga., against E. T. Lamb, as receiver of the Atlanta, Birmingham & At-

lantic Railroad Company, to recover a sum of money alleged to be the value of property delivered by him to the receiver in May, 1910, for transportation from Atlanta to Senola, Ga., which he claimed the receiver converted at Senola, Ga., by an unlawful delivery. In less than 15 days the action would have been barred by the four-year statute of limitations. A general demurrer was interposed by the defendant, on the ground that the superior court of Fulton county, Ga., had no jurisdiction of the case, for the reason that the conversion complained of took place, if at all, in Coweta county, and not in Fulton county. The court, upon argument, sustained the general demurrer, but allowed the plaintiff 10 days in which to amend. The plaintiff did amend by alleging that his suit was for breach of contract, and not for the conversion. The defendant renewed his demurrer, which was overruled, and the amendment was allowed. Exceptions were filed by the defendant, and upon hearing the case the Supreme Court held that the action was *ex delicto*, and could not be changed by amendment into an action *ex contractu*; that the superior court of Fulton county did not have jurisdiction of the suit, and that the court erred in not sustaining the general demurrer to the amended petition. See *Lamb v. Howard*, 145 Ga. 847, 90 S. E. 63.

On March 24, 1917, seven years after the cause of action is said to have originated, George P. Howard filed his suit in the Coweta superior court, seeking to recover for the same alleged conversion. In his petition he alleges that he had previously brought suit against the defendant in the superior court of Fulton county, that he voluntarily dismissed said suit on the 6th day of November, 1916, and that he brings the present suit within six months as a renewal of the original suit. To this new suit the defendant demurred, on the grounds that it set out no cause of action; that it was barred by the statute of limitations; that it did not appear that the prior suit was such a suit as would have tolled the statute of limitations; that the prior suit was filed in the superior court of Fulton county, Ga., to recover for a conversion alleged to have taken place in Coweta county, Ga.; that the superior court of Fulton county had no jurisdiction of the prior suit; that any judgment rendered therein would have been utterly void; and that a renewal suit cannot be brought within six months when the court in which the first suit was filed was without jurisdiction; and that the suit in the superior court of Fulton county, Ga., was not such a case as the plaintiff could dismiss and recommence within six months. The court, after argument, overruled this demurrer, whereupon the defendant excepted and brought the question to the Court of Appeals for review.



It is declared in section 2798 of the Civil Code, relating to the venue of suits against railroads and electric companies, that all railroad companies shall be sued in the county in which the cause of action originated, by any one whose person or property has been injured by such railroad company, its officers, agents, or employes, for the purpose of recovering damages for such injuries, and that any judgment rendered in any other county than the one in which the cause so originated shall be utterly void. And it is contended by counsel for the plaintiff in error that, as in the proceedings against the railroad company in the suit brought in Fulton county any judgment rendered there would have been utterly void, the entire proceedings were a nullity, and could not operate to toll the statute so as to prevent a bar of the statute if the statutory period had elapsed between the time of the alleged injury and the date of bringing the suit in Coweta county, which alone had jurisdiction. Counsel insists that section 2798 of the Civil Code is not merely a statute relating to venue, but takes away jurisdiction of such cases from the courts of counties other than the one in which the action originates, and that under the plain language of the statute, where suit for damages to recover for injuries to property in any county of this state is brought in some other county, a judgment rendered in the court of such other county is utterly void. Up to this point we agree with the contention of counsel for plaintiff in error. But we cannot agree with them to the extent of holding that suits brought in other counties than that in which the cause of action originated are utter nullities and have no effect whatever—not even the effect of tolling the statute. We have not overlooked the forceful argument made that if the suit could result at the most in a judgment that was utterly void, the proceedings were necessarily void and amounted to nothing. Nor have we overlooked the numerous decisions cited in the brief of counsel for plaintiff in error; some of them to the effect that the suit brought elsewhere than as provided in the statute is void, and the defendant cannot waive the question of jurisdiction by pleading to the merits; that a railroad company, expressly or by silence, cannot give jurisdiction to a court of a county other than that in which the tort was committed; that the provisions of the statute are mandatory (*Summers v. So. Ry. Co.*, 118 Ga. 174, 45 S. E. 27; *Epps v. Buckmaster*, 104 Ga. 698, 30 S. E. 959); that jurisdiction of subject-matter cannot be given by consent and cannot be waived (*Dix v. Dix*, 132 Ga. 630, 64 S. E. 790; *South Carolina, etc., R. Co. v. Dietzen*, 101 Ga. 780, 29 S. E. 292). We have also considered the cases where it has been decided that where a declaration was filed in office of the clerk and no process was attached and

no service effected, and no waiver made, the proceeding was void, and was properly dismissed at the trial term for that reason; that such defects were not amendable (*McGhee v. Mayor, etc.*, 78 Ga. 790, 3 S. E. 670); and that such an action does not constitute the pendency of a suit, so as to prevent the bar of the statute from arising, thereby giving the plaintiff the right to bring a second action within six months of the dismissal of the first (*Murray v. Hawkins*, 144 Ga. 613, 87 S. E. 1068). Nor have we overlooked the decisions holding that a petition for certiorari which does not plainly and distinctly set forth an assignment of error on any ruling or decision of the inferior judicatory is void, and, being void, no renewal of it can be had within six months (*Citizens' Banking Co. v. Paris*, 119 Ga. 517, 46 S. E. 638); and similar rulings in regard to attachments dismissed because void. Notwithstanding these decisions, the rulings in which are not questioned as being correct upon the facts of those cases, we are nevertheless of the opinion that the statute in section 4381 of the Civil Code is a remedial statute, and is to be liberally construed so as to preserve the right to renew the cause of action set forth in a previous suit, wherever the same had been disposed of on any grounds other than one affecting the merits. *Atlanta, Knoxville & Northern Ry. Co. v. Wilson*, 119 Ga. 781, 47 S. E. 366. In the case last cited it is said:

"The railroad company insists that it was ruled in *Wilson v. A. K. & N. R. Co.*, 116 Ga. 189 [42 S. E. 356], that the superior court of Cobb county had no jurisdiction. It contends, therefore, that the suit was void, did not arrest the running of the statute of limitations, and cannot be used as a basis for a renewal within six months under Civil Code, § 3786. It relies upon *Williamson v. Wardlaw*, 46 Ga. 128, *Ferguson v. New M. Co.*, 51 Ga. 609, and *McLendon v. Hernandez Co.*, 100 Ga. 219 [28 S. E. 152], that suits void for want of service; *Hamilton v. Phenix Co.*, 111 Ga. 875 [36 S. E. 960], and *Hill v. State*, 115 Ga. 833 [42 S. E. 286], that a void application for a certiorari; *Edwards v. Ross*, 58 Ga. 149, that a void attachment; *Moss v. Keesler*, 60 Ga. 44, that a suit in another state, or in the United States court—cannot be relied on to prevent the running of the statute, nor to preserve the privilege of renewal. It relies particularly upon *Gray v. Hodge*, 50 Ga. 262, and *Moss v. Keesler*, 60 Ga. 44, where it was held that 'a suit in a court having no jurisdiction is no suit at all, but a mere nullity,' and cannot be the foundation for the right of renewal. On the other hand, the defendant in error seeks to differentiate these cases, drawing the distinction between 'void' and 'voidable' suits, insisting that what was said in *Moss v. Keesler* as to jurisdiction was obiter, and that the case was rightly decided on the ground that a suit brought in the United States court is not within the provisions of Civil Code, § 3786. She also insists that *Gray v. Hodge* was rightly decided on grounds other than that relating to jurisdic-

tion, as the renewal statute could not be used to save a case barred by the limitation act of 1869; that the court had no jurisdiction of the subject-matter, under the Constitution of 1868, the consideration of the debt being a slave; that the judgment of dismissal of the first suit on the ground that the court had no jurisdiction was conclusive that the same court for the same debt had no jurisdiction in the second; and that what was written as to a void suit was obiter. She also relies on *Rountree v. Key*, 71 Ga. 214, where the petition alleged that the courts of Telfair county had jurisdiction, and the defendant filed a plea that he resided in Macon county. Acquiescing in the correctness of this plea, the plaintiff failed to prosecute his action, and the suit was dismissed after the bar had attached, but within six months it was renewed in Macon county, where the defendant then resided; and this court held that, though the dismissal had not been by the plaintiff, it might be renewed in Macon county, saying that 'this court has gone to great lengths in permitting the renewal of suits within six months, so as not to be barred, if the original suit was not barred, so as to extend the provisions to almost any case where the suit was dismissed not on its merits.' It is not necessary to re-examine these cases, nor to determine whether there is any real conflict, and, if so, which line of authorities is to be followed. For here it is evident that the suit in Cobb county cannot be treated as void. It was sufficiently valid to be used as a means of abating the later suit brought in the city court of Atlanta. And if enough of a former suit to sustain a plea in abatement, it was enough of a suit to prevent the running of the statute, and to form a stock upon which the renewal suit might be grafted. When this court decided that the plea in abatement, because of the pendency of the former suit in Cobb county, was well founded in point of law and fact, it was necessarily adjudicated, in view of Civil Code, § 5064, that 'the first action was not so defective that a recovery thereunder could not possibly be had.' It was not absolutely void; the court had jurisdiction of the subject-matter. In fact, in passing on the plea in abatement, it was distinctly recognized that the suit in Cobb county was far from being a nullity; for it was expressly said that: 'The defendant has surely been called upon to do something in the way of defending against the original action. If it had ignored that action, it would not, after a judgment therein, have been heard to say that the same was "ineffectual." *A. & N. Ry. Co. v. Wilson*, 115 Ga. 183 [41 S. E. 699]. In selecting Cobb county as the venue in which her action was to be tried the plaintiff made a mistake, but was not guilty of such laches as to warrant the defendant in insisting that nothing had been done to interrupt the running of the statute. Section 3786 of the Civil Code was intended to afford relief from such mistakes, accidents, and errors. If the plaintiff had brought her suit properly, there would have been no occasion to discontinue. When the reason for discontinuance appeared, or was determined by the court, the statute allowed a renewal for the very purpose of avoiding the result of the error. The mistake cannot, then, be relied on to prevent the right to renew. Unless the case is an absolute

nullity, the defective or improper suit may be used to nurse the cause of action into full life in the proper form and forum. The acts of 1847 and 1856 (Civil Code, § 3786) are remedial. The decisions of this court to that effect, in *Gordon v. McCalla*, 73 Ga. 699, *Cox v. Berry*, 13 Ga. 306, and *Rountree v. Key*, 71 Ga. 214, are in accord with the decisions of courts in other states under similar statutes. In *Coffin v. Cottle*, 16 Pick. [Mass.] 385, Chief Justice Shaw said: 'This is a remedial statute, \* \* \* and should have such construction as will best carry into effect the intent of the Legislature. This statute is founded on the presumption that if a creditor had permitted his debt to remain a certain length of time without any attempt to enforce it, or to revive and perpetuate the evidence of it, it is paid or otherwise discharged. \* \* \* But this presumption does not arise if the creditor resorts to legal diligence to recover his debt within the time limited; and the proviso follows this obvious consideration, and declares that where the plaintiff has been defeated by some matter not affecting the merits, some defect or informality which he can remedy or avoid by new process, the statute shall not prevent him from doing so, provided he follows it promptly by a suit within a year.'

While some of that which is said in the *Wilson Case* is not applicable to the subject-matter of the present inquiry, as the tort there sued on was committed in the state of Tennessee, much of the opinion and the reasoning upon which the conclusion rests is applicable and pertinent.

The plaintiff in error also relies upon the case of *Georgia R., etc., Co. v. Seymour*, 53 Ga. 499, wherein it was held:

"When a suit is brought against the Georgia Railroad Company, ex contractu, in a county other than Richmond, although the defendant may plead to the merits, it is incumbent on the plaintiff to show that the contract was made or to be performed in the county where the suit is brought, and on failure of the plaintiff to make such proof, the defendant may move to dismiss for want of jurisdiction."

The decision in the *Seymour Case* was rendered by two Justices (the court at the time of making this decision consisting of three Justices), and one of them dissented. We cannot concur in the entire opinion of the majority in that case, and are not bound thereby. It is true when the instant case was previously here the court said:

"The petition in this case shows upon its face that the courts of Coweta county \* \* \* had jurisdiction of this suit, and that the superior court of Fulton county did not have jurisdiction." *Lamb v. Howard*, 145 Ga. 847, 90 S. E. 63.

This ruling goes no further than we are prepared to go now—no further than we are compelled to go under the plain language of the statute; but it is not a holding that the proceeding in Fulton county was such a com-

plete nullity that it did not have the effect of tolling the statute so as to allow the bringing of a suit within six months after its dismissal.

All the Justices concur.

(150 Ga. 37)

**SEABOARD AIR LINE RY. v. BREWTON.**  
(No. 1481.)

(Supreme Court of Georgia. Feb. 24, 1920.)

(Syllabus by the Court.)

**1. CERTIORARI**  $\S$  60—BRIEFS HELD PROPERLY SERVED AND PETITION HELD SUFFICIENT.

Rule 2 adopted by the Supreme Court, as to the manner of taking cases from the Court of Appeals to the Supreme Court by writ of certiorari (146 Ga. 840, 91 S. E. vi), provides, among other things: "Notice of the date of the filing of the petition, together with a copy of the petition, and brief, if any, in support of the same, shall be served on counsel for the respondent within three days after such date." *Held*, that the petition for certiorari in this case is not subject to dismissal on the ground that the plaintiff in error "failed to serve defendant in error with any brief or argument, or copy of same, to be presented in said case, as required by said rule." Moreover, the petition itself fully set forth the grounds for certiorari and the authorities relied on to sustain them, and was duly served on the respondent.

**2. TRIAL**  $\S$  256(18)—FAILURE TO INSTRUCT AS TO MEASURE OF DAMAGES FOR TEMPORARY INJURIES ERROR, WHERE CHARACTER OF INJURIES IN ISSUE.

In an action for damages based on personal injuries, where under the pleadings and the evidence there was an issue whether the injuries were permanent or temporary in character, and the judge instructed the jury relatively to the measure of damages applicable to a case where the injury was permanent, but omitted to give instructions as to the measure of damages that would be applicable if the injury were not permanent, such omission, even without proper request for charge, would be cause for reversal. *Central Railroad, etc., Co. v. Dottenheim*, 92 Ga. 425, 17 S. E. 662; *Central of Ga. Ry. Co. v. Johnston*, 106 Ga. 139, 32 S. E. 78; *Southern Ry. Co. v. O'Bryan*, 112 Ga. 127, 37 S. E. 161; *Western & Atlantic R. Co. v. Smith*, 145 Ga. 276, 88 S. E. 983; *A. B. & A. Ry. Co. v. Barnwell*, 138 Ga. 569, 75 S. E. 645; *Western & Atlantic R. Co. v. Knight*, 142 Ga. 801, 83 S. E. 943; *Western & Atlantic R. Co. v. Roberts*, 144 Ga. 250, 86 S. E. 933. In the first four of the cases just cited the motions for new trial expressly alleged that the damages were excessive, but the rulings made did not in any wise refer to that fact. In the last four cases, where similar rulings were made, the motions for new trial did not allege that the damages were excessive.

**3. APPEAL AND ERROR**  $\S$  1068(5)—ERROR IN MEASURE OF DAMAGES APPLIED REVIEWABLE, EVEN IN ABSENCE OF COMPLAINT OF EXCESSIVE DAMAGES.

In *Central Railroad v. Harris*, 76 Ga. 501 (only two of the three justices presiding), it

was said: "No complaint of excessive damages is made, and therefore it is immaterial what measured them." This ruling has been followed and applied by the Court of Appeals in the following cases: *Gainesville Midland Ry. v. Jackson*, 1 Ga. App. 632, 57 S. E. 1007; *Gainesville & Northwestern R. Co. v. Galloway*, 17 Ga. App. 702, 87 S. E. 1093. We do not concur in the correctness of the decision in 76 Ga. 501, and decline to follow it.

**4. APPEAL AND ERROR**  $\S$  1068(5)—ERROR IN INSTRUCTION ON MEASURE OF DAMAGES REVIEWABLE, EVEN IN ABSENCE OF ALLEGATION IN MOTION FOR NEW TRIAL THAT DAMAGES WERE EXCESSIVE.

Applying the law as above announced, the Court of Appeals erred in affirming the judgment of the trial court, refusing to grant the railroad company a new trial on the ground of failure to instruct the jury as to the measure of damages when not permanent.

Certiorari from Court of Appeals.

Action by J. A. Brewton against the Seaboard Air Line Railway. Judgment for plaintiff was affirmed by the Court of Appeals (99 S. E. 226), and defendant brings certiorari. Reversed.

Anderson, Cann, Cann & Walsh, of Savannah, for plaintiff.

H. B. Strange, of Statesboro, and J. P. Dukes, of Pembroke, for defendant.

FISH, C. J. Judgment reversed. All the Justices concur, except GILBERT, J., absent on account of sickness.

(150 Ga. 67)

**JOHNSON v. STATE.** (No. 1563.)

(Supreme Court of Georgia. March 9, 1920.)

(Syllabus by the Court.)

**1. CRIMINAL LAW**  $\S$  720½, 730(9)—IMPROPER REMARKS OF STATE'S COUNSEL HELD NOT GROUND FOR NEW TRIAL WHERE JUDGE INSTRUCTS JURY TO DISREGARD.

It is improper for counsel for the state, on the trial of a defendant charged with crime, to state to the jury his belief that the defendant is guilty. *Jones v. State*, 123 Ga. 129, 51 S. E. 312; *Brownack v. State*, 109 Ga. 514, 35 S. E. 123. But where the trial judge promptly expresses disapproval of the remarks, and instructs the jury not to consider them in rendering their verdict, the refusal to declare a mistrial on account of such remarks will not require the grant of a new trial.

**2. CRIMINAL LAW**  $\S$  561(3)—CONVICTION MAY BE HAD EVEN THOUGH GOOD CHARACTER OF ACCUSED BE PROVED.

It was not error to instruct the jury: "I charge you that proof of good character may in itself generate in the mind of the jury a reasonable doubt of the guilt of the accused. While that is true, if the proof is plain and convincing to the minds of the jury, satisfying their

minds beyond a reasonable doubt of the guilt of the accused, then they are authorized to convict, even though there may be proof of good character."

**3. CRIMINAL LAW**  $\S$  805(1)—FAILURE WHEN GIVING CORRECT PRINCIPLE OF LAW TO INSTRUCT AS TO OTHER CORRECT PRINCIPLES NOT ERROR.

The excerpt from the charge as to conspiracy, to which exception was taken, stated a correct principle of law.

(a) It is not a good assignment of error upon an instruction stating a correct principle of law applicable to the case that the judge did not in the same connection instruct as to some other correct and applicable principle of law.

**4. ADMISSIBILITY OF EVIDENCE.**

The rulings of the court upon the admissibility of evidence show no error.

**5. CRIMINAL LAW**  $\S$  742(1)—CREDIBILITY OF WITNESS IS FOR JURY.

The credibility of the witnesses was exclusively for the jury. The evidence submitted by the state, though entirely circumstantial, which the jury had a right to believe, was sufficient to support the verdict.

**6. MOTION FOR NEW TRIAL.**

None of the grounds of the motion for new trial show cause for reversal.

Error from Superior Court, Schley County;  
Z. A. Littlejohn, Judge.

James Johnson was convicted of an offense, and he brings error. Affirmed.

W. B. Short, of Buena Vista, C. R. McCrory, of Ellaville, and Shipp & Sheppard, of Americus, for plaintiff in error.

Jule Felton, Sol. Gen., of Montezuma, Jno. H. Cheney, of Ellaville, Clifford Walker, Atty. Gen., and M. C. Bennet, of Atlanta, for the State.

ATKINSON, J. Judgment affirmed. All the Justices concur, except BECK, P. J., absent on account of sickness.

(150 Ga. 68)

**HILL v. STATE.** (No. 1562.)

(Supreme Court of Georgia. March 9, 1920.)

(Syllabus by the Court.)

**FOLLOWED CASE.**

The rulings made in the case of Johnson v. State, 102 S. E. 439, this day decided, control this case. The plaintiffs in error in the two cases were jointly indicted for the same offense, and the complaints are practically the same.

Error from Superior Court, Schley County;  
Z. A. Littlejohn, Judge.

Rounder Hill was convicted of an offense, and he brings error. Affirmed.

W. B. Short, of Buena Vista, C. R. McCrory, of Ellaville, and Shipp & Sheppard, of Americus, for plaintiff in error.

Jule Felton, Sol. Gen., of Montezuma, Jno. H. Cheney, of Ellaville, Clifford Walker, Atty. Gen., and M. C. Bennet, of Atlanta, for the State.

ATKINSON, J. Judgment affirmed. All the Justices concur, except BECK, P. J., absent on account of sickness.

(149 Ga. 813)

**ADAMS MOTOR CO. et al. v. OLER, Tax Collector, et al.** (No. 1515.)

(Supreme Court of Georgia. Feb. 13, 1920.)

(Syllabus by the Court.)

**1. TAXATION**  $\S$  42(1)—STATUTE TAXING AUTOMOBILE DEALERS NOT UNCONSTITUTIONAL AS TO CLASSIFICATION ACCORDING TO POPULATION OF COUNTIES.

Subsection 12 of section 2 of the General Tax Act passed by the General Assembly of Georgia in the year 1918 (Acts 1918, pp. 43-83), is not unconstitutional and invalid because the classification of the dealers in automobiles there made was arbitrary, discriminatory, or unreasonable.

**2. TAXATION**  $\S$  42(1)—STATUTE TAXING AUTOMOBILE DEALERS NOT VOID BECAUSE AUTHORIZING EXCHANGES WITHOUT PAYMENT OF ADDITIONAL TAX.

There is no merit in the contention that the classification was arbitrary, discriminatory, and unreasonable because of the provision permitting any person who has paid the tax to resell any automobile or vehicle taken in exchange for an automobile without the payment of an additional tax.

(Additional Syllabus by Editorial Staff.)

**3. TAXATION**  $\S$  40(2)—TAX ON BUSINESS IS "NOT A TAX ON PROPERTY."

A tax upon business is not a tax upon "property," within the meaning of the ad valorem and uniformity clause (Const. art. 7, § 2 [Civ. Code 1910, § 6553]).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Property.]

Error from Superior Court, Chatham County; P. W. Mildrim, Judge.

Suit by the Adams Motor Company and others against Fred Cler, Tax Collector, and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

The plaintiffs filed a petition praying for injunction against the tax collector and the sheriff of Chatham county, alleging that they are automobile dealers selling several makes of automobiles, and that the tax collector, Fred Cler, has assessed each of them \$165 upon each make of automobile, under sub-

section 12 of section 2 of the General Tax Act of 1918 (Acts 1918, p. 47), which imposes a tax of \$165 for each make of automobile sold by the dealer; and that the section of the act imposing this tax is unconstitutional, in that it is discriminatory: (a) It makes an arbitrary, discriminatory, and unreasonable classification between dealers who deal in one make of automobile and dealers who sell more than one make, without reference to the value of the automobiles sold, the number of automobiles sold, the gross or net profits received therefrom; (b) it makes an arbitrary, discriminatory, and unreasonable classification in favor of persons who take automobiles in exchange from others and resell them; (c) it makes an arbitrary, unreasonable, irregular, and ununiform classification in providing a tax of only \$27.50 in counties with a smaller population than 20,000 inhabitants, \$55 in counties of a smaller population than 30,000, \$82.50 in counties with a population less than 50,000, \$110 in counties with a population of less than 75,000, and \$165 in counties of less than 100,000 population, thereby offending the due process clause of the state and federal Constitutions and the tax uniformity clause of the state Constitution.

The judge of the superior court held that the statute was constitutional, and refused an injunction, and to this judgment the plaintiffs excepted.

Osborne, Lawrence & Abrahams, of Savannah, for plaintiffs in error.

Geo. W. Owens, of Savannah, for defendants in error.

BECK, P. J. (after stating the facts as above). [1] 1. The section of the General Tax Act passed by the General Assembly of Georgia in the year 1918 which the plaintiffs contend is invalid because it violates certain provisions of the state and federal Constitutions is in the following language:

"12th. Automobiles. Upon every agent of, and upon every dealer in, and upon every person soliciting orders for the sales of automobiles, the sum set out below, viz.: In each county for each make of such vehicle only one such tax for such make for each agency to be taxed in any one county. Any agency having paid such tax to be allowed any number of employees within the county wherein such tax has been paid, free from such liabilities. Provided, that any person, firm or corporation paying this tax shall be permitted to resell any automobile or other vehicle taken in exchange for automobiles without the payment of additional tax. In each county with a population of less than 20,000, \$27.50. In each county with a population of between 20,000 and 30,000, \$55.00. In each county with a population of between 30,000 and 50,000, \$82.50. In each county with a population between 50,000 and 75,000, \$110.00. In each county with a population of between 75,000 and 100,000, \$165.00. In each county with a population of between 100,000 and 150,000, \$220.00. In each county with a population exceeding 150,000, \$275.00."

[3] The soundness of the criticisms upon this act depends upon whether the section in question makes an arbitrary and unreasonable classification of dealers in automobiles subject to the tax imposed by this section. After careful consideration of the subject of this inquiry it does not seem to us that the Legislature, in exercising its right to make a classification for the purpose of imposing a tax like that in question, has acted arbitrarily and unreasonably. It is settled law that a tax upon a business is not a tax upon property, within the meaning of the ad valorem and uniformity clauses of the Constitution, and it is not a valid objection that another business or object is not taxed, or is taxed a different amount. The requirement of this kind of classification is that it shall be uniform upon all business of the same class. *Weaver v. State*, 89 Ga. 639, 15 S. E. 840, and cases there cited. Under the provisions of the section of the tax act in question, the classification is made with reference to the population of the county within which the business is carried on. And to fix the amount of the tax according to the population of a county is fixing it with reference to a fact that is not arbitrarily chosen, but has some relation to the question of the amount of tax that would be right and proper. If the amount of tax fixed had to be precisely adjusted so as to impose the same burden upon every dealer in proportion to the amount of business done or the opportunity for doing business, it would be extremely difficult, if not impossible, to select any fact or standard by which the classification could be made. The only requirement is that the fact selected for the classification under which a tax like that in question is imposed shall not be arbitrary, but shall bear a reasonable relation to the tax imposed upon the business. It may be true that a county with less than 20,000 population may in some cases afford a more profitable field for the conduct of business than an adjoining county having a population of 30,000; but it cannot be held that the Legislature in enacting the provision in question could not decide that there was a reasonable relation between the population of a county and the amount of business of a given character carried on in that county.

Another ground taken by the plaintiffs is that the classification between dealers who deal in one make of automobile and dealers who sell more than one make, without reference to the value of the automobile sold, is arbitrary, discriminatory, and unreasonable. And again we must reply that the fact selected by the Legislature as a ground of classification bears an actual relation to the classification made. As we said in discussing the other ground of attack upon the act, it may not precisely fix an amount adjusted to the amount of business that will be done by dealers in different classes, but it is a fact

that might reasonably be taken into consideration in determining the tax to be imposed. In the case of *Sawtell v. Atlanta*, 138 Ga. 687, 75 S. E. 982, an ordinance of the city of Atlanta imposing a tax of a fixed amount upon all ice houses, ice manufacturers, or agencies not employing more than five wagons for selling or delivery purposes, and for each additional wagon above the number of five an additional tax of \$10, was held to be not invalid on the ground that it violated the constitutional provision that all taxes must be uniform upon the same class of subjects. Under the ordinance there attacked, if the ice house employed one or five wagons the tax was \$50; but if it employed more than five wagons there was an additional tax of \$10 for each additional wagon. And in the case of *Witham v. Stewart*, 129 Ga. 48, 58 S. E. 463, it was said:

"Section 2, par. 2, of the act of the General Assembly approved December 16, 1902 (Acts 1902, p. 19), provides that a 'specific tax' of \$10, for each of the fiscal years 1903 and 1904, shall be levied 'upon the presidents of each of the express, telegraph, steamboat, railroad, street railroad, telephone, electric light, sleeping and palace car companies, banks, building and loan associations, and gas companies doing business in this state.' Held that, under the provisions of said act, where it appears that the same person is the president of two or more banks, a tax of \$10 may be collected from such person for each bank of which he is president. It appearing in the present case that the plaintiff in error was the president of several banks doing business in this state, he was liable to be taxed in the amount specified in the above act for each bank of which he was the president."

[2] 2. There is no merit in the contention that the classification was arbitrary, discriminatory, and unreasonable because of the provision permitting any person who has paid the tax to resell any automobile taken in exchange for an automobile without the payment of an additional tax.

The act in question not being invalid for any of the reasons set forth above, it follows that it is not in violation of the due process clause of the state and federal Constitutions.

Judgment affirmed.

All the Justices concur.

(149 Ga. 822)

SAVANNAH PAIGE CO. et al. v. CLER, Tax Collector, et al.

BRYSON et al. v. SAME.

(Nos. 1516, 1517.)

(Supreme Court of Georgia. Feb. 13, 1920.)

(Syllabus by the Court.)

CONTROLLING CASE.

These cases are controlled by the decision in *Adams Motor Co. v. Cler*, 102 S. E. 440.

Error from Superior Court, Chatham County; P. W. Meldrim, Judge.

Separate proceedings between the Savannah Paige Company and others and F. A. Bryson, Jr., and others against Fred Cler, Tax Collector, and others. Judgments for the latter, and the former bring error. Affirmed.

Osborne, Lawrence & Abrahams, of Savannah, for plaintiffs in error.

Geo. W. Owens, of Savannah, for defendants in error.

BECK, P. J. Judgment affirmed.

All the Justices concur.

(150 Ga. 6)

GARNER v. STATE BANKING CO.  
(No. 1442.)

(Supreme Court of Georgia. Feb. 14, 1920.)

(Syllabus by the Court.)

1. FRAUDULENT CONVEYANCES ¶104(1)—TRANSACTIONS BETWEEN HUSBAND AND WIFE WILL BE CLOSELY SCANNED.

Transactions between husband and wife to the prejudice of creditors are to be closely scanned by a jury on the trial of an issue between creditors in whose favor an execution has been levied upon property as the property of the husband and the wife, who claims the property.

2. FRAUDULENT CONVEYANCES ¶95(3)—PROPERTY GIVEN BY HUSBAND TO WIFE SUBJECT TO CREDITORS' JUDGMENT AGAINST HUSBAND.

There was evidence authorizing the charge submitting to the jury the theory that the husband was insolvent, owning no property in Georgia, and furnished the money from his own funds with which the purchase of the property levied on was effected, though the title was taken in the wife's name; and the court properly instructed the jury that such a transaction would in effect be a gift by the husband to the wife and render the property subject to a judgment in favor of the creditors against the husband.

3. TRIAL ¶193(2)—INSTRUCTION CONSTRUED NOT TO BE EXPRESSION OF COURT'S OPINION.

Under the court's instruction it was left to the jury to say whether or not the husband had furnished the money with which to purchase the property the title to which was taken in the wife's name; and it was not an expression of opinion of what was proved for the court to further instruct them that, if they ascertained the facts hypothetically submitted to be true, the transaction would amount to a gift from the husband to the wife.

4. FRAUDULENT CONVEYANCES ¶95(1)—INSOLVENT HUSBAND'S GIFT OF PROPERTY TO WIFE VOID AS AGAINST HIS CREDITORS.

If a husband, insolvent at the time and having no property subject to the demands of

judgment creditors, makes a gift of property to his wife, such a gift would be void as against creditors, whether or not the wife had knowledge or notice of the husband's fraudulent intent. Civil Code 1910, §§ 3224 (3), 4149.

**5. CHARGE OF COURT AUTHORIZED BY EVIDENCE.**

The court instructed the jury: "If the defendant in *fi. fa.* was insolvent and furnished the money to buy the property levied on, and title was taken in the wife's name, in a proceeding of this sort, if it appears to involve dealings between husband and wife, which is challenged by a creditor for fraud, then the burden would be on the wife to show it was her own money that paid for the property, and, unless she carried this burden, then such a transaction would be void as to creditors, and the property would be subject to levy and sale by the creditor of the husband." The evidence submitted, with the inferences which the jury were authorized to draw from it, authorized this charge. *Gray v. Collins*, 139 Ga. 776, 78 S. E. 127.

**6. EVIDENCE ¶584(2)—DEPOSITIONS TAKEN UNDER STATUTE STAND ON SAME FOOTING AS TESTIMONY OF OTHER WITNESSES WITH CORROBORATING CIRCUMSTANCES TO OVERCOME THE TESTIMONY SO GIVEN.**

Where the depositions of a party to a case are taken under the provisions of the statute and introduced as evidence in the case, such evidence stands upon the same footing as that of any other interested witness; and it does not require the testimony of two witnesses, or one witness with corroborating circumstances, to overcome the testimony thus given.

**7. TRIAL ¶230(3)—NOT ERROR TO REFUSE REQUEST COVERED BY CHARGE GIVEN.**

Nor did the court err in failing to charge as to the weight and effect of the answers of the claimant to questions propounded to her in depositions by counsel for plaintiff in attachment. The evidence of the claimant given in the examination by depositions was covered by the general instruction to the jury that they were the judges of the evidence and the credibility of the witnesses.

**8. FRAUDULENT CONVEYANCES ¶309(1)—CHARGE STATING SUBSTANCE OF LAW ON MATERIAL ISSUE HELD NOT ERRONEOUS.**

The court instructed the jury in the following language: "But if the money was sent here by the husband by check, in his name, not her name, sent here in his name payable to the wife, if that money was used to buy this property, then I charge you, in this transaction of these issues made, the burden would be on the wife, the claimant." While this charge might have been inaccurate in some respects, it stated the substance of the law upon one of the material issues in the case, and the court did not err in thus charging.

(a) Nor was this charge error in that it instructed the jury that the burden would be upon the claimant in the event the jury believed certain facts hypothetically stated to be the truth of the case.

(b) Nor did the court err in refusing, on written request, to charge that "prima facie these drafts or cashier's checks represented the money

of that bank, and not money of" the defendant in *fi. fa.*

**9. APPEAL AND ERROR ¶1064(1)—ERRONEOUS CHARGE AS TO WIFE'S RIGHT AGAINST ATTACHING PLAINTIFF HELD NOT SO MISLEADING AS TO BE REVERSIBLE.**

The court charged the jury as follows: "This is a transaction attacked by creditors between husband and wife, and the burden would be on the wife to show it was her property, her money, her separate estate; and if it wasn't, and she don't carry that burden, it wasn't her separate estate, and the money, the transaction, would be a gift." This charge was erroneous; but when the charge is considered in its entirety, in view of the well-defined issues presented, the jury could not have been misled by this erroneous charge, and it was therefore not hurtful.

Error from Superior Court, Hall County; J. B. Jones, Judge.

Attachment suit by the State Banking Company against John D. Garner, with claim to attached property by Millie Garner, the wife of defendant in attachment. Verdict for plaintiff, claimant's motion for new trial denied, and she brings error. Affirmed.

State Banking Company sued out an attachment against John D. Garner on the ground that he was a nonresident and was indebted to the bank in a stated sum. The attachment was levied upon a lot of land in the city of Gainesville, Hall county, Ga. Mrs. Garner, the wife of the defendant in attachment, filed a claim to this property. At the trial the issue was joined and upon the trial of this issue the jury returned a verdict finding the property subject. Mrs. Garner made a motion for a new trial, and, after hearing the same, the court overruled the motion.

H. H. Perry, of Gainesville, for plaintiff in error.

Ed Quillian, C. N. Davie, and W. A. Charters, all of Gainesville, for defendant in error.

BEOK, P. J. (after stating the facts as above). [1] 1. Error is assigned upon the following charge of the court to the jury:

"I charge you further, gentlemen, that transactions between husband and wife on one side and creditors on the other side, where those transactions are attacked for fraud, then if that is true, then they should be looked into carefully, closely, by the jury and the facts and circumstances must be looked into with care and caution."

The movant contends that there is no evidence authorizing this charge; that it "tended to prejudice or bias the jury against the contention of claimant, and to create a suspicion against her side of the case; that it placed too much emphasis upon the burden charged

to be upon the claimant." The exception to this charge is not well taken. The court was authorized by the evidence to give the charge, when all the facts and circumstances embodied in the record are considered.

"Transactions between husband and wife and near relatives to the prejudice of creditors are to be closely scanned and their bona fides clearly established." *Gray v. Collins*, 139 Ga. 776, 78 S. E. 127.

[2-7] 2-7. The rulings made in headnotes 2, 3, 4, 5, 6, and 7 require no extended discussion.

[8] 8. Error is assigned upon the following charge:

"But if the money was sent here by the husband by check; in his name, nor her name, sent here in his name, payable to the wife, if that money was used to buy this property, then I charge you, in this transaction of these issues made, the burden would be on the wife, the claimant."

Movant insists that there was no evidence to show that "the money was sent here by the husband by check, in his name, or was sent here in his name." As appears from the record, Mrs. Garner received the money which the vendor of the property in question was paid the purchase price in the form of two checks, which in words and figures read as follows:

"Farmers' State Guaranty Bank 86-310. Thomas, Oklahoma, Oct. 21st, 1916. No. 8389. Pay to the order of Mrs. John D. Garner \$2,500.00 two thousand five hundred dollars. Cashier's Check. John D. Garner, Pres."

"Farmers' State Guaranty Bank 86-310. Thomas, Okla., Dec. 23rd, 1916, No. 8634. Pay to the order of Mrs. John D. Garner \$2,500.00 two thousand five hundred dollars. Cashier's Check. John D. Garner, Pres."

"(1 Natl. Bk.)"

The words "1 Natl. Bk." are written in pencil.

It also appears from the record that John D. Garner was the president of the Farmers' State Guaranty Bank at Thomas, Okl.

Strictly speaking, a remittance by a check of this kind is not a remittance of the individual who signed such a check officially; it is more properly a cashier's check, although signed by Garner as president, a cashier's check being the bank's own check which is issued by the cashier at the request of a depositor against whose account it is charged. But when all the facts of this case are considered, and assuming that the jury found that Garner was insolvent, that as a matter of fact he did furnish the money, that it was his funds that were the consideration for the check, that he was the husband of the claimant, that there were creditors in Gainesville, Ga., having large claims against him, the jury would have been authorized to

find that this was a remittance by him from his own funds, and, though the check might be a cashier's check, and therefore not a check "in his [Garner's] name," that nevertheless it was money actually sent and actually furnished by the husband, by a check that the husband had procured with his own funds, and that the wife knew this; and if the jury so believed, as they might have found from the evidence, the charge was substantially correct, and was inaccurate only in the use of the expression "in his name." Nor was this charge error in that it instructed the jury that the burden would be upon the claimant in the event the jury believed certain facts hypothetically stated to be the truth of the case.

[9] 9. Exception is taken to the following charge:

"This is a transaction attacked by creditors between husband and wife, and the burden would be on the wife to show it was her property, her money, her separate estate, and if it wasn't, and she don't carry that burden, it wasn't her separate estate, and the money, the transaction, would be a gift."

The court should not have instructed the jury in the language here quoted. Standing here to itself, it placed the burden of proof squarely on the claimant in this case, without reference to other facts or subsidiary questions involved. The wife had the written title to the property in question, and was in possession of it at the time of the levy. The burden was upon the plaintiff to show the property was actually that of the husband; that the written title of the wife was void because under the facts of the case it was a gift by the insolvent husband to the wife, and therefore void as against creditors. Consequently, considered merely as a legal proposition, this charge must be pronounced erroneous. But in another part of the charge the court had properly and clearly instructed the jury that the burden was on the plaintiff to make out its case by a preponderance of the evidence; and as to material issues in the case here that instruction, in substance, had been repeated. And though where erroneous instructions are given as to the issues involved in the case, and correct instructions are also given, the giving of the correct instructions does not cure the error unless the jury's attention is called to the correct rule, and the error in the false rule is pointed out to them, nevertheless this judgment should not be set aside in the present case on account of the erroneous instructions quoted above, because, taking the entire charge together, the jury could not have been misled as to the controlling issue which was submitted to them. It would be assuming that the jury was composed of men of a very low order of intelligence to suppose that they did not understand that the issue before them



was whether or not the money with which the property levied upon was purchased was furnished by the defendant in *fi. fa.* or by the claimant. That substantial, controlling question is made prominent and clear in every part of the charge, except those parts which are largely formal, containing the instruction that the jury are the judges of the credibility of the witnesses, etc.

Judgment affirmed.

All the Justices concur.

(150 Ga. 19)

DAVIS v. STATE. (No. 1510.)

(Supreme Court of Georgia. Feb. 14, 1920.)

(Syllabus by the Court.)

1. CRIMINAL LAW §=958(1)—“WITNESSES,” AS USED IN STATUTE, REFERS TO WITNESSES WHOSE EVIDENCE IS TO BE USED ON THE MERITS ON A NEW TRIAL.

The word “witnesses,” as employed in the last paragraph of section 6086 of the Civil Code of 1910, refers to witnesses whose evidence is to be used on the merits of a case, if a new trial is had. But, where a new trial is asked or granted on account of newly discovered evidence showing relationship within the prohibited degrees of a juror who sat in the case and the prosecutor, the fact of relationship does not have to be proved on the second trial, and therefore the provisions of the above section of the Code as to “supporting affidavits” do not apply.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Witness.]

2. CRIMINAL LAW §=958(6) — AFFIDAVITS HELD NOT TO PROPERLY SHOW PROHIBITED RELATIONSHIP BETWEEN PROSECUTOR AND JUROR.

Where, after conviction of one accused of crime, a motion for new trial is made upon the ground that one of the jurors was related to the prosecutor within the prohibited degrees, affidavits in form as set out in the second question propounded by the Court of Appeals, will not require the judge to find that such relationship had been established, in the absence of any showing that the witnesses were testifying either from personal knowledge, or from declarations made by persons shown to have been related by blood or marriage to the parties, or that for some other reason they were within the purview of section 5764 of the Civil Code of 1910. Therefore it could not be said as a matter of law that the alleged relationship was so clearly established that the trial judge erred in overruling this ground of the motion for new trial.

Atkinson, J., dissenting.

Certified Questions from Court of Appeals.

Proceeding between the State and J. V. Davis. From the judgment, defendant brings error (100 S. E. 782), and the Court of

Appeals certified questions. Questions answered.

For opinion conforming to answer to certified questions, see 102 S. E. 378.

L. D. McGregor, of Warrenton, for plaintiff in error.

R. C. Norman, Sol. Gen., of Washington, Ga., and M. L. Felts, of Warrenton, for the State.

HILL, J. The Court of Appeals desires instructions from the Supreme Court upon the following questions:

“1. In a criminal case, where an amendment to the motion for a new trial is based solely upon the ground that one of the jurors was related within the prohibited degree to the volunteer prosecutor in the case, it being alleged in the ground that the relationship was unknown to the defendant and his counsel until after the trial of the case, and the newly discovered evidence as to the relationship is that of witnesses, do the provisions of section 6086 of the Civil Code as to supporting affidavits, apply?”

“2. Where in such a case (whether or not the Code provisions above referred to apply) the affidavits of the witnesses relied on to sustain the allegations as to the relationship do not meet any of the requirements of section 5764 of the Civil Code, and it is not shown that the affiants were related by blood or marriage to the persons in question, or that they were testifying from any personal knowledge, or from what source they obtained their information, can this court hold, as a matter of law, that the alleged relationship was so clearly established that the trial judge erred in overruling this ground of the motion for new trial? All of the affidavits submitted to show the alleged relationship were similar (except as to the name of the affiants) to the following one:

“State of Georgia, Warren County. Personally appeared before me, an officer duly authorized by law to administer oaths, James M. English, who, after being duly sworn, deposes and says: That Randall Johnson and Aaron Johnson were full brother by blood, having the same father and mother; that Randall Johnson was the father of Mrs. Lucy English (née Lucy Johnson); that Mrs. Lucy English (née Lucy Johnson) was the mother of Mrs. Rachael Cody (née Rachael English); that Mrs. Rachel Cody (née Rachael English) was the mother of James M. W. Cody, and that James M. W. Cody was the father of Mrs. C. R. Fitzpatrick (née Cody), the living wife of C. R. Fitzpatrick, the volunteer prosecutor in the above-stated case; that Aaron Johnson, the full brother of Randall Johnson, was the father of Mrs. Sarah Adams (née Johnson), Mrs. Sarah Adams (née Sarah Johnson) was the mother of Mrs. Martha Landrum (née Martha Adams); that Mrs. Martha Landrum (née Martha Adams) was the mother of S. F. Landrum, one of the jurors who rendered the verdict of guilty against the defendant in the above stated case. This affidavit is made to be used as evidence in the hearing of the motion for a new trial in the above-stated case.”

[1] 1. Civ. Code 1910, § 6086, which prescribes the rule as to the grant of new trials on the ground of newly discovered evidence, provides, among other things, that—

"If the newly discovered evidence is that of witnesses, affidavits as to their residence, associates, means of knowledge, character, and credibility must be adduced."

The word "witnesses," employed here, refers to witnesses whose evidence is to be used on the merits of the case on a new trial, if one is had. The provision making it necessary to show the residence, associates, means of knowledge, character, and credibility of "witnesses" has the effect of excluding the necessity for showing these things, where the affidavits are made by persons not intended to be used as witnesses on the next trial. This is on the principle that "the expression of one thing is the exclusion of others." It is of importance to the court that the residence, associates, means of knowledge, character, and credibility of the witnesses should be shown on the hearing of the motion, in order for the court to have the means of forming an opinion as to what effect such newly discovered evidence might have on the new trial; for this court has held that a new trial will not be granted on account of newly discovered evidence which probably would not produce a different result on another trial. If a new trial should be granted on account of the affidavits showing the relationship between the juror and the volunteer prosecutor, this fact will not have to be proved on the second trial, because it already has been proved, and because of the improbability that the same juror will be put upon the defendant at the next trial.

Section 6086 lays down the rule to be followed in determining whether newly discovered evidence is sufficient for the grant of a new trial. This is a question of practice, and is merely the determination of a fact showing the disqualification of a juror to serve, and does not go to the merits of the case, and on another trial the evidence will not be relevant. The answer to the first question is given as a construction of section 6086; but we do not mean to imply that, independently of that section, the trial judge could not require similar affidavits supporting the evidence of one who testifies, or deposes, as to the relationship of a juror to the prosecutor, or a similar question arising on a motion for new trial. This question is therefore answered in the negative. *Hinkle v. State*, 94 Ga. 595, 21 S. E. 595 (2).

[2] 2. Civ. Code 1910, § 5764, provides:

"Pedigree, including descent, relationship, birth, marriage, and death, may be proved either by the declarations of deceased persons related by blood or marriage, or by general reputation in the family, or by genealogies, inscriptions, 'family trees,' and similar evidence."

Where, after conviction of one accused of crime, a motion for new trial is made upon the ground that one of the jurors was related to the prosecutor within the prohibited degrees, affidavits in form as set out in the second question propounded by the Court of Appeals will not require the judge to find that such relationship had been established, in the absence of any showing that the witnesses were testifying either from personal knowledge or from declarations made by persons shown to have been related by blood or marriage to the parties, or that for some other reason they were within the purview of section 5764. Therefore it could not be said as a matter of law that the alleged relationship was so clearly established that the trial judge erred in overruling this ground of the motion for new trial. This question is answered in the negative.

All the Justices concur, except

ATKINSON, J. (dissenting). The first question should be answered in the affirmative; and it follows that the second question should be answered in the affirmative.

(150 Ga. 1)

PARKER et al. v. CROSBY et al.

CROSBY et al. v. PARKER et al.

(Nos. 1417, 1418.)

(Supreme Court of Georgia. Feb. 14, 1920.)

(Syllabus by the Court.)

1. ESTOPPEL  $\hookrightarrow$  97, 118—TRIAL  $\hookrightarrow$  89, 252  
(4)—ONE ACTING ON REPRESENTATIONS NOT INTENDED FOR HIM CANNOT CLAIM ESTOPPEL; INSTRUCTION ON ESTOPPEL NOT IN CASE ERRONEOUS.

If one acts on representations not made to him, and not intended by the declarant for him, he will do so at his own risk. Such declarations do not operate as an estoppel against the declarant.

(a) Under the evidence in the record, estoppel is not involved in the case; and a charge on that subject was error, as being not authorized by evidence.

(b) It was also error to refuse to rule out, on motion, the evidence relied on to show estoppel.

2. LIS PENDENS  $\hookrightarrow$  24(1)—PENDING SUIT IS GENERAL NOTICE TO PURCHASER FROM TIME PETITION IS FILED.

"A pending suit is a general notice of an equity or claim to all the world from the time the petition is filed and docketed; and if the same is duly prosecuted, and is not collusive, one who purchases pending the suit is affected by the decree rendered therein."

3. MOTION FOR NEW TRIAL.

The other grounds of the motion for new trial, in so far as they were sufficient to present a question for decision, are not of such character as to require a reversal.

**4. PETITION NOT DEMURRABLE.**

The petition as amended was not subject to any of the grounds of the demurrer.

**5. DISALLOWANCE OF AMENDMENT.**

It was not error to disallow the amendment to the defendant's answer.

**6. REFUSAL TO NONSUIT.**

The court did not err in refusing to dismiss the case on motion for nonsuit.

Error from Superior Court, Appling County; J. P. Highsmith, Judge.

Action by H. J. Parker and others, receivers of the Citizens' Banking Company of Baxley, Ga., for the use of H. Cleland, against C. C. Crosby and others. Verdict and judgment for defendants, motion for new trial overruled, and plaintiffs bring error, and defendants file a cross-bill of exceptions. Reversed on main bill of exceptions, and affirmed on the cross-bill.

H. J. Parker et al., receivers of the Citizens' Banking Company of Baxley, Ga., for the use of H. Cleland, filed a petition for partition against R. L. Reynolds, S. B. Brooks, and C. C. Crosby, alleging substantially the following facts:

On September 10, 1906, Sarah Crosby conveyed a certain tract of land to F. I. Thornton, who immediately thereafter conveyed an undivided half interest to J. E. Chitty. On May 15, 1907, H. Cleland filed his petition in the superior court of Appling county against F. I. Thornton and J. E. Chitty, claiming an undivided third interest in the lands, and praying for specific performance. The case was referred to an auditor on March 13, 1912, and final judgment was rendered on July 18, 1914; the decree adjudging H. Cleland entitled to specific performance by conveyance of an undivided third interest in the land in question. On November 12, 1914, H. Cleland executed to the Citizens' Banking Company, for a consideration of \$5, his deed to an undivided third interest in the land in controversy; the deed reciting the fact that it was given to secure the bank for an indebtedness then owing by Cleland. Pending the litigation, on September 23, 1907, F. I. Thornton and J. E. Chitty sold and conveyed the land under warranty deed to H. C. Newton. On December 3, 1907, Newton conveyed the land to Robert L. Reynolds and S. B. Brooks, executing quitclaim deeds to each other for a half interest in the land. S. B. Brooks executed a bond for title to C. C. Crosby to 127½ acres of the land. Reynolds and Crosby are in possession of the land (when the present suit by the receivers was filed). The receivers pray that the land be partitioned and sold, and that one-third of the proceeds of the sale be delivered to them.

Reynolds, Brooks, and Crosby filed separate answers, averring that they purchased the land in good faith, and in good faith have

kept and held the uninterrupted, exclusive, and adverse possession of them for a period of more than seven years, with title thereto, making valuable improvements thereon; that H. C. Newton, their predecessor in title, purchased the lands in good faith and relying on the statements of H. Cleland; and that Cleland was thereby estopped to deny the title of the defendants. The defendants pray that the security deed to the bank, executed by H. Cleland, be canceled as a cloud upon their title.

On the trial H. D. Dowdy testified that he and H. C. Newton were negotiating for the purchase of the land, and witness went to H. Cleland and stated to him that he was going to buy the land if he was not going to get into a lawsuit about it, and Cleland said:

"They have given bond, and I depend on my bond; go ahead and buy the property, if you want to."

Witness informed Newton of what Cleland had stated, and Newton purchased the property; Dowdy deciding that he did not want to be a party to the purchase. Newton testified that Dowdy told him of the conversation he had with Cleland, and that he then purchased the land from Thornton and Chitty. Newton did not testify unequivocally that Cleland told him personally to buy, and that he relied on his bond. The jury returned a verdict in favor of the defendants, and judgment was entered, decreeing "that the prayers of the plaintiffs' petition be and the same are hereby denied and refused." The plaintiffs made a motion for new trial, which was overruled, and they excepted. The defendants in error filed a cross-bill of exceptions to rulings referred to in the fourth, fifth, and sixth headnotes.

Padgett & Watson, of Baxley, for plaintiffs in error.

C. H. Parker and W. W. Bennett, both of Baxley, for defendants in error.

HILL, J. (after stating the facts as above).

[1] 1. None of the headnotes require elaboration, except the first and second. On the trial of the case certain evidence was offered, tending to show declarations made by Cleland to Dowdy and Newton, which it is argued would act as an estoppel on Cleland in setting up title to the land in controversy as against Newton and his privies in estate. The evidence was admitted, and later a motion was made to rule it out, for the reason that it was not sufficient to show that the declarations were made directly to Newton, or to any one for him. The motion was overruled, and exception was taken to that ruling. The court also gave to the jury certain instructions on the doctrine of estoppel. Exception was also taken to these charges, on the ground that the evidence did not authorize a charge on

the law of estoppel. One of the witnesses for the defendants, Dowdy, testified as follows:

"After Mr. Cleland had given bond, I had come to town here, and was going to buy the place, Mr. Newton and myself; in other words, I was doing the trading, and Mr. Newton was going to take a half interest, and I went to Cleland. I was acting for myself and Mr. Newton, and met Cleland about the drug store down here, and told Mr. Cleland that I was going to buy that land if I was not going to get in a lawsuit about it, and Mr. Cleland said: 'They have given bond, and I depend on my bond; go ahead and buy the property, if you want to.' I informed Mr. Newton of that. That was the same day Mr. Newton bought it we commenced to fix the title; we went right on up there in the office, and was going to fix the title, and some of the heirs of the Crosby estate hadn't—the title was not exactly like I wanted it, and I says to Mr. Newton: 'You can have it all. I don't care to try to get the heirs to sign it. I will just turn the whole thing over to you. I don't care to fool with it.' I didn't consider Thornton and Chitty's title just what it ought to be. I thought the heirs of the Crosby heirs would have to sign it to make it a perfect title, and I didn't care to fool with it to get that done; and I just said: 'Mr. Newton, if you want to take it and perfect the title, you can have my interest, and I will come out at that point.'"

Another witness for the defendants, Newton, testified:

"I could not swear that I heard him; either he or Mr. Dowdy informed me or told me."

The plaintiffs introduced an abstract of the evidence of Newton as reported by the auditor upon the trial of the case of Cleland v. Thornton and Chitty, for specific performance, as follows:

"I remember the conversation with Mr. Cleland about buying this land. The information that I received from Mr. Cleland was to go ahead and buy the land, and he was relying entirely upon his bondsmen. This is the first time that I ever heard that after I bought the land I would buy a lawsuit. I can't remember what he said, but Mr. Dowdy and myself, between the two, wanted to buy the land, and he might have done the talking, and we went to see Mr. Cleland, either one or both of us; but I was instructed to buy the land, that he was relying entirely upon his bondsmen. I could not swear that I heard Mr. Cleland make that statement, either he or Mr. Dowdy. He didn't tell me that, if I bought it, I would buy a lawsuit. I knew when I bought the land this lawsuit was pending at the time. At the time I bought the land these defendants (Chitty and Thornton) were in possession thereof."

Cleland denied making the representations attributed to him. It will be seen, from a close inspection of the evidence of Dowdy and Newton, that the evidence is equivocal as to whether the statements were made directly to Newton, or to any one for Newton. Dowdy did not act upon the representations that

were made to him, for he declined to buy the land; nor does the evidence show that Dowdy was authorized to make the same representations to Newton that were made directly to him by Cleland. In *Harvey v. West*, 87 Ga. 553, 13 S. E. 693, it was held:

"Admissions against one's title to land and in favor of the title of a third person will be no estoppel in behalf of one to whom they were not made and who has merely heard of them; it not appearing that they were made for the purpose of being acted upon, or with any design or intention that they should be acted upon."

See, also, 11 Am. & Eng. Enc. L. 439 (7).

There is nothing in the evidence here to show that Cleland made such declarations, as alleged, directly to Newton or in his presence, or to any one for him; and there is nothing to show that Cleland knew or had cause to suspect that Newton was acting upon representations which are alleged to have been made to Dowdy. It might well be that one making declarations to one against his own title would not make such declarations to a third person; and as estoppels are not favored by our law, in order for declarations, amounting to an estoppel, to be binding, it must appear that they were made to the person for whom they were intended, or to some one for him. As it does not so appear from the evidence in this case, estoppel was not established; and the court therefore erred in overruling the motion to exclude evidence bearing upon the question of estoppel, and likewise in charging the jury with reference thereto.

[2, 4-8] 2. Reynolds, Brooks, and Crosby, in their answers, aver that they purchased the land in controversy in good faith, and that they have kept and held the uninterrupted, exclusive, and adverse possession of the land for a period of more than seven years, with title thereto, having made valuable improvements thereon, and that Newton, their predecessor in title, purchased the land in good faith, relying on the statements of Cleland, set out in the first division, and that Cleland was thereby estopped to deny defendants' title. But, as we have already observed, there is not sufficient evidence to show that Cleland made such declarations to Newton, or to any one with knowledge that such person was acting for him. Therefore Newton bought, so far as the evidence in this record discloses, at his own peril. Besides, at the time that Newton purchased, the suit of Cleland v. Thornton and Chitty was pending in the superior court, and Newton himself testifies that he knew of the pendency of that suit when he bought, but that he relied upon the declaration of Cleland that he would look to his bond, and not to the land, for his remedy. The rule is that he who takes with notice of an equity takes subject to that equity. Civil Code (1910) § 4529. A pending suit is a general notice of an equity or claim

to all the world from the time the petition is filed and docketed; and if the same is duly prosecuted, and is not collusive, one who purchases pending the suit is affected by the decree rendered therein. Civil Code (1910) § 4533; Royal Arcanum v. Riley, 143 Ga. 79, 84 S. E. 428 (2). Suit was likewise pending when the other defendants bought from Newton, and they would be likewise bound by such notice of the equity of Cleland in the land, unless, of course, Cleland had estopped himself by some declaration, which does not appear in the record.

It is argued that the suit of Cleland v. Thornton and Chitty was not duly prosecuted, and therefore the suit was not notice to them; but it will be observed from the foregoing statement of facts that the suit for specific performance was filed May 15, 1907, and that Newton purchased the land from Thornton and Chitty on September 23, 1907, while the suit was pending. This contention is without merit. It was likewise pending when the other defendants purchased, to wit, on December 3, 1907. The defendants, therefore, being chargeable with notice of the equity that Cleland had in the land, under such circumstances, it cannot be held that the suit was not duly prosecuted by the plaintiff, although judgment was not obtained until 1914. Under such circumstances the defendants' title could not ripen by prescription.

[3] 3. The other grounds of the motion for new trial, in so far as they were sufficient to present a question for decision, are not of such character as to require a reversal.

Judgment reversed on the main bill of exceptions, and affirmed on the cross-bill.

All the Justices concur.

(149 Ga. 816)

# BROWN v. STATE. (No. 1505.)

(Supreme Court of Georgia. Feb. 13, 1920.)

(Syllabus by the Court.)

## 1. CRIMINAL LAW §1183, 1214—SUPERIOR COURT MAY ON CERTIORARI TO COURT OF SAVANNAH MODIFY SENTENCE NOT EXCEEDING MAXIMUM.

The Court of Appeals certified certain questions to which rulings set out below are answers:

By the act approved March 28, 1917 (Acts Ex. Sess. 1917, p. 8), it was made unlawful for any person "to have, control, or possess in this state" specified kinds of liquors or beverages. In section 16 of the act it was provided: "That the punishment for any violation of any of the provisions of this act, wherein a different punishment is not prescribed, shall be as for a misdemeanor as provided in section 1065 of the Penal Code of 1910." That section of the Penal Code provides: "Except where otherwise provided, every crime declared to be a misdemeanor is punishable by a fine not to

exceed one thousand dollars, imprisonment not to exceed six months, to work in the chain-gang on the public roads, or on such other public works as the county or state authorities may employ the chain-gang, not to exceed twelve months, any one or more of these punishments in the discretion of the judge." The city court of Savannah having by law jurisdiction to try persons charged with misdemeanors for violating the prohibition statutes mentioned above (see Acts 1868, p. 165), and upon conviction of the accused to impose any one or all of the penalties specified in Penal Code, § 1065, within the discretion of the trial judge, the superior court has no power, under the writ of certiorari, to modify a sentence which imposes a punishment not exceeding the maximum punishment prescribed by that law. See Whitten v. State, 47 Ga. 298; Loeb v. Jennings, 133 Ga. 798, 801, 67 S. E. 101, 18 Ann. Cas. 376; Coppage v. State, 4 Ga. App. 696, 62 S. E. 113; 11 Corpus Juris, 106, § 40, and cases cited in note 77; Phillips v. State, 80 Ark. 200, 96 S. W. 742 (2).

(a) There is no special law relating to the city court of Savannah which confers on the judge of the superior court power, on certiorari, to modify a sentence imposed by the judge of the city court of Savannah while acting within his jurisdiction. Under this view the reasoning in Cole v. State, 2 Ga. App. 734, 738, 59 S. E. 24, would not apply. The doctrines pronounced in McDonald v. Ludowici, 3 Ga. App. 654, 656, 60 S. E. 337, and Johnson v. Atlanta, 6 Ga. App. 779, 65 S. E. 810, will not be followed.

(b) In a case of the character mentioned above where the trial judge enters a formal judgment imposing a fine for the maximum amount authorized by law, his sentence is not to be held on certiorari as "excessive and illegal," on the ground that while imposing sentence the judge stated to the accused that he was endeavoring "to reach" another person who would probably pay the fine "instead of the defendant."

## 2. CRIMINAL LAW §369(6)—ON TRIAL IN CITY COURT OF SAVANNAH FOR VIOLATION OF PROHIBITION LAW COPIES OF INDICTMENTS RETURNABLE TO UNITED STATES DISTRICT COURT AND EXCERPTS FROM MINUTES OF THAT COURT HELD IRRELEVANT.

On the trial in the city court of Savannah of a defendant accused, with others, of violating the prohibition statute mentioned in the preceding note, in so far as the questions propounded by the Court of Appeals show, certain documents were irrelevant; the documents being: (a) Copies of certain indictments returnable in the United States District Court for the Southern District of Georgia charging the defendant on trial in the city court of Savannah and others with "the offense of conspiracy and violation of the Reed-Jones Amendment [U. S. Comp. St. §§ 10387a-10387c], to the Post Office Appropriation Act of March, 1917, with the pleas and verdicts thereon"; (b) certain excerpts from the minutes of the United States District Court in the Southern District of Georgia which showed that in two cases against the same persons who were indicted in the city court of Savannah, in

one of which they were charged with violation of "Act March 3, 1917, and section 332, U. S. Penal Code [U. S. Comp. St. § 10506]," and in the other with violation of "section 37, U. S. Penal Code [U. S. Comp. St. § 10201], and Act March 3, 1917," juries were duly impaneled and witnesses for the government questioned, and after the prosecution had closed its case the attorney for the defendants moved to direct a verdict for the defendants, and the motion was overruled; whereupon "by agreement" a verdict of guilty was entered as to all of the defendants.

### 3. CRIMINAL LAW §1068—QUESTIONS PROPOUNDED BY COURT OF APPEALS HELD NOT OF SUCH CHARACTER AS TO REQUIRE ANSWER.

Certain questions propounded by the Court of Appeals were not of such character as to require an answer by this court; the questions being: (1) Upon the trial of the issue raised by the accusation and the plea of not guilty in this case, and under the evidence, did the court err (a) in charging the jury in specified language, and (b) "in refusing to charge" in stated words? (2) "Did the court err in excluding the" testimony of a named witness, giving a stated answer to a stated question?

#### Certified Questions from Court of Appeals.

Joe Brown, alias Oscar Johnson, was prosecuted in the city court of Savannah for a violation of the prohibition law, and a verdict of guilty was entered, certiorari was denied, and he brings error, and questions were certified to the Supreme Court. Questions answered.

Conformed to by Court of Appeals. 102 S. E. 450.

Shelby Myrick and Robt. L. Colding, both of Savannah, for plaintiff in error.

Walter C. Hartridge, Sol. Gen., of Savannah, for the State.

ATKINSON, J. Answered as shown in headnotes. All the Justices concur.

(24 Ga. App. 774)

### BROWN v. STATE. (No. 10351.)

(Court of Appeals of Georgia. Division No. 1. Feb. 24, 1920.)

#### (Syllabus by the Court.)

### 1. RESPONSE OF SUPREME COURT TO CERTIFIED QUESTIONS.

In answer to certain questions certified to it in this case the Supreme Court said (102 S. E. 449):

"By the act approved March 28, 1917 (Acts Ex. Sess. 1917, p. 8), it was made unlawful for any person 'to have, control, or possess in this state' specified kinds of liquors or beverages. In section 16 of the act it was provided: 'That the punishment for any violation of any of the provisions of this act, where-in a different punishment is not prescribed, shall be as for a misdemeanor as provided in

section 1065 of the Penal Code of 1910.' That section of the Penal Code provides: 'Except where otherwise provided, every crime declared to be a misdemeanor is punishable by a fine not to exceed one thousand dollars, imprisonment not to exceed six months, to work in the chain-gang on the public roads, or on such other public works as the county or state authorities may employ the chain-gang, not to exceed twelve months, any one or more of these punishments in the discretion of the judge.' The city court of Savannah having by law jurisdiction to try persons charged with misdemeanors for violating the prohibition statutes mentioned above (see Acts 1868, p. 165), and upon conviction of the accused to impose any one or all of the penalties specified in Penal Code, § 1065, within the discretion of the trial judge, the superior court has no power, under the writ of certiorari, to modify a sentence which imposes a punishment not exceeding the maximum punishment prescribed by that law. See Whitten v. State, 47 Ga. 298; Loeb v. Jennings, 133 Ga. 798, 801, 67 S. E. 101, 18 Ann. Cas. 376; Coppage v. State, 4 Ga. App. 696, 62 S. E. 113; 11 Corpus Juris, 106, § 40, and cases cited in note 77; Phillips v. State, 80 Ark. 200, 96 S. W. 742(2).

"(a) There is no special law relating to the city court of Savannah which confers on the judge of the superior court power, on certiorari, to modify a sentence imposed by the judge of the city court of Savannah while acting within his jurisdiction. Under this view the reasoning in *Cole v. State*, 2 Ga. App. 734, 738, 59 S. E. 24, would not apply. The doctrines pronounced in *McDonald v. Ludowici*, 3 Ga. App. 654, 658, 60 S. E. 337, and *Johnson v. Atlanta*, 6 Ga. App. 779, 65 S. E. 810, will not be followed.

"(b) In a case of the character mentioned above, where the trial judge enters a formal judgment imposing a fine for the maximum amount authorized by law, his sentence is not to be held on certiorari as 'excessive and illegal,' on the ground that while imposing sentence the judge stated to the accused that he was endeavoring 'to reach' another person who would probably pay the fine, 'instead of the defendant.'

### 2. CRIMINAL LAW §1169(2)—ERRONEOUS ADMISSION OF EVIDENCE HARMLESS WHERE DEFENDANT'S WITNESS TESTIFIED TO SUBSTANTIALLY SAME FACTS AS EMBRACED BY DOCUMENTS.

"2. On the trial in the city court of Savannah of a defendant accused, with others, of violating the prohibition statute mentioned in the preceding note, in so far as the questions propounded by the Court of Appeals show, certain documents were irrelevant; the documents being: (a) copies of certain indictments returnable to the United States District Court for the Southern District of Georgia charging the defendant on trial in the city court of Savannah and others with 'the offense of conspiracy and violation of the Reed-Jones Amendment [U. S. Comp. St. § 8739a] to the Post Office Appropriation act of March, 1917, with the pleas and verdicts thereon'; (b) certain excerpts from the minutes of the United

States District Court in the Southern District of Georgia which showed that in two cases against the same persons who were indicted in the city court of Savannah, in one of which they were charged with violation of 'Act March 3, 1917, and section 332, U. S. Penal Code [U. S. Comp. St. § 10506],' and in the other with violation of 'section 37, U. S. Penal Code [U. S. Comp. St. § 10201], and act March 3, 1917,' juries were duly impaneled and witnesses for the government questioned, and after the prosecution had closed its case the attorney for the defendants moved to direct a verdict for the defendants, and the motion was overruled; whereupon 'by agreement' a verdict of guilty was entered as to all of the defendants." While under this ruling the documentary evidence referred to therein was improperly allowed to go to the jury, this error, in the opinion of a majority of the court, was harmless, because the defendant introduced a witness who swore to substantially the same facts embraced in the documentary evidence. Because of the peculiar facts of this case, the writer is in doubt on this proposition.

**3. CRIMINAL LAW §820, 822(1)—INSTRUCTION IS TO BE CONSTRUED WITH THE ENTIRE CHARGE IN THE EVIDENCE.**

There was no error in the excerpt from the charge of the court of which complaint is made when the same is considered in connection with the entire charge and in the light of all the evidence.

**4. CRIMINAL LAW §829(1)—REQUEST COVERED BY CHARGE GIVEN IS PROPERLY REFUSED.**

The request to charge was sufficiently covered by the charge given.

**5. CRIMINAL LAW §1064(1)—EVERY GROUND OF MOTION FOR A NEW TRIAL SHOULD BE COMPLETE WITHIN ITSELF.**

Every ground of a motion for new trial should be complete within itself and understandable without reference to another part of the record. Under this rule we are not called upon to consider the sixth ground of the amendment to the motion for a new trial.

**6. CRIMINAL LAW §1160—APPROVED VERDICT WILL BE AFFIRMED.**

There was some evidence to support the verdict, which has the approval of the trial judge, and the judgment is affirmed.

Error from Superior Court, Chatham County; P. W. Meldrim, Judge.

Joe Brown, alias Oscar Johnson, was prosecuted in the city court of Savannah for violation of the prohibition law, and a verdict of guilty was entered, certiorari was denied, and defendant brought error, and questions were certified to Supreme Court. Affirmed in conformity with answers of the Supreme Court (102 S. E. 449).

Shelby Myrick and Robt. L. Colding, both of Savannah, for plaintiff in error.

Walter O. Hartridge, Sol. Gen., of Savannah, for the State.

BLOODWORTH, J. Affirmed.

BROYLES, C. J., and LUKE, J., concur.

(25 Ga. App. 23)

**MARIETTA MINING CO. v. ARMSTRONG.**  
(No. 11106.)

(Court of Appeals of Georgia, Division No. 1.  
March 3, 1920.)

(Syllabus by the Court.)

**1. APPEAL AND ERROR §848(3)—ASSIGNMENT BASED ON REFUSAL TO AWARD NONSUIT WILL NOT BE CONSIDERED, WHERE SAME QUESTION IS REVIEWABLE ON APPEAL FROM ORDER OVERRULING NEW TRIAL.**

Under repeated rulings of this court an assignment of error upon the refusal of the court to award a nonsuit will not be considered, where the case proceeded to a verdict, and the defendant excepted to the overruling of the motion for a new trial, which included the ground that the verdict in favor of the plaintiff was contrary to the evidence and without evidence to support it.

**2. ACTION §27(1), 28—ACTION EX DELICTO ALONE AVAILABLE WHERE PERSONALTY IS WRONGFULLY CONVERTED, BUT NO MONEY RECEIVED; TORT MAY NOT BE WAIVED.**

"Where one wrongfully takes the personal property of another and converts the same to his own use in some other manner than by a sale, and does not receive any money therefor, the owner has a right of action ex delicto against such wrongdoer, and is restricted to this form of action. In such a case the tort cannot be waived, and an action ex contractu be brought, for the reason that, until the wrongdoer has received money to which the owner of the property is entitled, there can be no action for money had and received, or upon an implied promise to pay money. *Spencer v. Hewitt*, 20 Ga. 426; *Barlow v. Stalworth*, 27 Ga. 517. See, also, *Reynolds v. Padgett*, 94 Ga. 347 [21 S. E. 570]; 40 Am. Law Reg. N. S. 50, et seq." *Oragg v. Arendale*, 113 Ga. 181, 83 S. E. 399 (4). See, also, *Woodruff v. Zaban*, 133 Ga. 24, 65 S. E. 123, 134 Am. St. Rep. 186, 17 Ann. Cas. 974, and *Southern Ry. Co. v. Roberson*, 136 Ga. 146, 71 S. E. 129.

(a) The instant case was "an action of debt upon account," and when the above principle of law is applied to its facts the verdict in favor of the plaintiff was contrary to law and the evidence, and the court erred in refusing to grant a new trial.

Error from Superior Court, Cobb County; N. A. Morris, Judge.

Action by A. Armstrong against the Marietta Mining Company. Judgment for plaintiff, and defendant brings error. Reversed.

J. Z. Foster, of Marietta, for plaintiff in error.

H. B. Moss, of Marietta, for defendant in error.

BROYLES, C. J. Judgment reversed.

LUKE and BLOODWORTH, JJ., concur.

(24 Ga. App. 798)

STEPHENS v. BLACKWELL et al.  
(No. 10944.)

(Court of Appeals of Georgia. Division No. 1.  
March 2, 1920.)

(Syllabus by the Court.)

1. PRINCIPAL AND SURETY  $\S$ 144 — SET-OFF AND COUNTERCLAIM  $\S$ 33(1) — PRINCIPAL AND SURETIES MAY SET OFF UNLIQUIDATED DAMAGES FROM BREACH OF INDEPENDENT CONTRACT BETWEEN PLAINTIFF AND THE PRINCIPAL; DAMAGES FOR CONTRACT SUBJECT OF SET-OFF IN SUIT ON CONTRACT.

"In an action on a note given by a principal and sureties, the defendants may set off unliquidated damages flowing from the breach of an independent contract between the plaintiff and the principal, and competent testimony tending to support this plea should not be repelled." *Pickett v. Andrews*, 135 Ga. 299, 69 S. E. 478. In the opinion in that case, it is said: "Damages for the breach of a contract do not spring from a tort, but from the violation of a contract; and therefore such damages arise ex contractu, and constitute a mutual demand, which is the subject-matter of set-off in a suit on a contract." Under the above rulings the court did not err in overruling the demurrer to the plea, and the charge of the court was not subject to the exception taken. See, also, Civil Code 1910,  $\S$  4340; *Buchanan v. McClain*, 110 Ga. 477, 35 S. E. 665 (3).

2. APPEAL AND ERROR  $\S$ 728(3) — ASSIGNMENT OF ERROR NOT LITERALLY OR SUBSTANTIALLY SETTING FORTH THE EVIDENCE EXCLUDED AS TOO INDEFINITE.

"An assignment of error upon a ruling of the court excluding evidence, which does not set forth the evidence literally or in substance, is too indefinite to present any question for consideration." *Fountain v. State*, 23 Ga. App. 120, 98 S. E. 178 (5), and cases cited: *Edenfield v. Boyd*, 143 Ga. 97, 84 S. E. 436 (7). This ruling disposes of special grounds 1, 2, and 4 of the motion for a new trial.

3. TRIAL  $\S$ 171 — REFUSAL TO DIRECT A VERDICT IS NOT ERROR.

"The refusal to direct a verdict is not error in any case." *Dudley v. Isler*, 21 Ga. App. 615, 94 S. E. 827 (2), and cases cited.

4. APPEAL AND ERROR  $\S$ 302(1) — UNLESS EACH SPECIAL GROUND OF MOTION FOR NEW TRIAL IS SO COMPLETE AS NOT TO REQUIRE REFERENCE TO RECORD, THE GROUND WILL NOT BE REVIEWED.

The fifth special ground of the motion for a new trial is disposed of by the following: "Under repeated decisions of this court and of the

Supreme Court, each special ground of a motion for new trial must be complete within itself; and when so incomplete as to require a reference to the brief of the evidence, or to some other portion of the record, in order to determine what was the alleged error and whether such error was material, the ground will not be considered by the reviewing court." *McCall v. State*, 23 Ga. App. 770, 99 S. E. 471 (1).

5. EVIDENCE SUPPORTING VERDICT.

The verdict has evidence to support it.

Error from Superior Court, Cherokee County; Geo. D. Anderson, Judge pro hac vice.

Action between J. H. Stephens and F. M. Blackwell and others. Judgment for the latter, and the former brings error. Affirmed.

E. W. Coleman, of Canton, for plaintiff in error.

Jno. S. Wood, of Canton, for defendants in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(25 Ga. App. 7)

INGRAM v. STATE. (No. 11158.)

(Court of Appeals of Georgia, Division No. 1.  
March 2, 1920.)

(Syllabus by the Court.)

CRIMINAL LAW  $\S$ 448(11) — STATEMENT OF WITNESS THAT DEFENDANT HAD A PISTOL CONCEALED WAS NOT MERELY A CONCLUSION.

The jury were authorized to convict the defendant of carrying a pistol concealed. The witness for the state testified that the defendant pulled a pistol from his hip pocket, and that the pistol was concealed. We do not agree with the contention that the evidence amounts to no more than a conclusion drawn by the witness that the pistol was concealed, and that the conclusion was unauthorized. Under the evidence in this case and the statement of the defendant, there is but one verdict that the jury could reach, and that is a verdict of guilty. This case is clearly distinguished from *Stripling v. State*, 114 Ga. 538, 40 S. E. 733. In view of the note of the trial judge and a reading of the charge as a whole, there is no merit in the exception to the charge of the court.

Error from City Court of Oglethorpe; R. L. Greer, Judge.

Jerney Ingram was convicted of carrying a pistol concealed, and he brings error. Affirmed.

Jule W. Felton, of Montezuma, and Hatcher & Smith, of Macon, for plaintiff in error.

Jno. B. Guerrey, Sol., of Montezuma, for the State.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.



(24 Ga. App. 815)

**BULLINGTON v. FIELDS.** (No. 11104.)(Court of Appeals of Georgia, Division No. 1.  
March 2, 1920.)*(Syllabus by the Court.)***APPEAL AND ERROR**  $\S$ 1097(1)—**DECISION ON FORMER APPEAL IS LAW OF CASE IN SUBSEQUENT TRIAL.**

This case was here on a former writ of error, and was reported in 20 Ga. App. 102, 92 S. E. 658. This court, by its decision then rendered, settled the several controlling legal points in the case. The subsequent trial was had in accordance with that decision, which necessarily is the law of the case now. The evidence submitted did not prove the case as laid in the petition, and it was not error to grant a nonsuit.

Error from Superior Court, Turner County; R. Eve, Judge.

Action by A. C. Bullington against T. L. Fields. Judgment of nonsuit, and plaintiff brings error. Affirmed.

W. T. Williams, of Ashburn, and Crum & Jones, of Cordele, for plaintiff in error.

Eldridge Cutts and J. W. Haygood, both of Fitzgerald, for defendant in error.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(24 Ga. App. 808)

**WESTBROOK v. GRIFFIN.** (No. 11088.)(Court of Appeals of Georgia, Division No. 1.  
March 2, 1920.)*(Syllabus by the Court.)***EVIDENCE**  $\S$ 442(1)—**PAROL EVIDENCE ADMISSIBLE TO PROVE INCOMPLETE WRITTEN CONTRACT.**

Where only a part of a contract is reduced to writing and it does not purport to contain all the stipulations of the contract, parol evidence would be admissible to prove other portions or to fill in blanks therein not inconsistent with the writing itself. See Civ. Code 1910,  $\S$  5791; Forsyth Manufacturing Co. v. Castlen, 112 Ga. 211, 37 S. E. 485, 81 Am. St. Rep. 28; Bond v. Perrin, 145 Ga. 208, 88 S. E. 954. The petition in this case, being a suit upon a contract partly in writing and partly in parol, and the parol part not being inconsistent with the writing, set forth a cause of action, and was not subject to the general demurrer which was sustained by the court.

Error from City Court of Americus; W. M. Harper, Judge.

Proceedings between T. B. Westbrook and F. W. Griffin. Judgment for the latter, and the former brings error. Reversed.

Maynard & Williams, of Americus, for plaintiff in error.

Wallis & Fort, of Americus, for defendant in error.

LUKE, J. Judgment reversed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(25 Ga. App. 29)

**THOMPSON v. STATE.** (No. 11141.)(Court of Appeals of Georgia, Division No. 1.  
March 3, 1920.)*(Syllabus by the Court.)***1. CRIMINAL LAW**  $\S$ 511(2)—**CONVICTION IN FELONY CASE CANNOT BE HAD ON ACCOMPLICE TESTIMONY UNLESS CORROBORATED BY INDEPENDENT EVIDENCE.**

Under the ruling made in Childers v. State, 52 Ga. 106, and repeatedly approved and followed by the Supreme Court and this court, a defendant in a felony case cannot be lawfully convicted on the testimony of an accomplice unless that testimony is corroborated by other evidence which in itself, and independently of the testimony of the accomplice, directly connects the defendant with the crime, or leads to the inference that he is guilty. Stokes v. State, 19 Ga. App. 235, 91 S. E. 271, and citations.

**2. CRIMINAL LAW**  $\S$ 511(1), 741(5), 935(1), 1159(5)—**SLIGHT EVIDENCE CORROBORATING ACCOMPLICE TESTIMONY MAY AUTHORIZE JURY TO CONVICT.**

Slight evidence corroborating the testimony of an accomplice may be sufficient to authorize the jury to find the accused guilty, and the sufficiency or weight of the corroborating evidence is a question solely for them; and where there is any evidence which in itself and independently of the accomplice's testimony directly connects the defendant with the crime or raises an inference of his guilt the finding of the jury (if approved by the judge) that the testimony of the accomplice was sufficiently corroborated will not be set aside by this court. Brown v. State, 18 Ga. App. 288, 89 S. E. 342, and citations. However, in a case where the record discloses no evidence whatever that in itself, and independently of the testimony of the accomplice, directly connects the defendant with the crime, or raises an inference of his guilt, the finding of the jury that the testimony of the accomplice was sufficiently corroborated is, as a matter of law, unauthorized, and the judgment refusing a new trial will be reversed.

**3. ERRONEOUS OVERRULING OF MOTION FOR NEW TRIAL.**

Under the above rulings and the facts of the instant case, the court erred in overruling the defendant's motion for a new trial.

Error from Superior Court, Franklin County; W. L. Hodges, Judge.

Proceeding by the State against Dave Thompson. From the judgment and the overruling of his motion for a new trial, Thompson brings error. Reversed.

W. B. Sloan, of Gainesville, for plaintiff in error.

A. S. Skelton, Sol. Gen., of Hartwell, for the State.

BROYLES, C. J. Judgment reversed.

LUKE and BLOODWORTH, JJ., concur.

(25 Ga. App. 47)

**ATKINSON v. SOMMER. (No. 10754.)**

(Court of Appeals of Georgia, Division No. 2.  
March 11, 1920.)

*(Syllabus by the Court.)*

**1. NEW TRIAL §102(1)—DILIGENCE TO DISCOVER EVIDENCE MUST BE SHOWN.**

Considering the alleged newly discovered evidence set out in the only special ground of the motion for a new trial, in connection with the defendant's own testimony, it is clearly apparent that by the exercise of proper diligence its existence would have been revealed to the defendant prior to the time of the trial, and it therefore furnishes no sufficient ground to set aside the verdict. *Rothschild & Co. v. Arenson & Co.*, 22 Ga. App. 337, 96 S. E. 14.

**2. APPEAL AND ERROR §1005(2)—VERDICT SUPPORTED BY SUFFICIENT EVIDENCE AND APPROVED BY TRIAL COURT CANNOT BE DISTURBED.**

There being sufficient evidence to support the verdict, which has the approval of the trial judge, his judgment overruling the motion for a new trial cannot be disturbed.

Error from Superior Court, Pulaski County; E. D. Graham, Judge.

Action between C. C. Atkinson and F. Sommer. Judgment for the latter, motion for new trial overruled, and the former brings error. Affirmed.

H. E. Coates, of Hawkinsville, for plaintiff in error.

H. F. Lawson, of Hawkinsville, for defendant in error

JENKINS, P. J. Judgment affirmed.

STEPHENS and SMITH, JJ., concur.

(25 Ga. App. 27)

**INDEPENDENT ORDER OF PURITANS v. CADDEN. (No. 11118.)**

(Court of Appeals of Georgia, Division No. 1.  
March 8, 1920.)

*(Syllabus by the Court.)*

**1. STATUTES §281—PARTY RELYING ON LAW OF ANOTHER STATE MUST PLEAD AND PROVE IT.**

Where a party relies on the law of another state as furnishing the basis for a right of recovery or defense different from what it would

be under the laws of this state, or the common law, the law of the foreign state should be pleaded and proved. *Southern Express Co. v. Hanaw*, 184 Ga. 445, 67 S. E. 944, 137 Am. St. Rep. 227 (7).

**2. INSURANCE §718 — INSURED RECEIVING POLICY IS BOUND BY BY-LAWS, THOUGH NOT REFERRED TO OR MADE A PART OF THE POLICY; WHERE POLICY CONFLICTS WITH BY-LAW, THE LATTER IS WAIVED.**

While the general rule is that, where a policy is issued by a mutual insurance or benefit insurance society, the insured becomes a member of the society, and must take notice of and be bound by its by-laws, although they are not recited in the policy or expressly made a part thereof, yet where the terms of the policy are in conflict with a by-law of the society, it having power under its charter to issue such a policy, the society must be deemed to have waived the provisions of the by-law in favor of the insured, and the policy will control the rights of the parties. *Gienty v. Knights of Columbus*, 199 N. Y. 108, 92 N. E. 111, 20 Ann. Cas. 928; *McCoy v. Northwestern Mutual Relief Association*, 92 Wis. 577, 66 N. W. 697, 47 L. R. A. 681; *Davidson v. Old People's Mutual Benefit Society*, 39 Minn. 303, 39 N. W. 803, 1 L. R. A. 482; *Morrison v. Wisconsin Odd Fellows Mutual Life Ins. Co.*, 59 Wis. 162, 18 N. W. 13; *Union Mutual Fire Ins. Co. v. Keyser*, 32 N. H. 318, 64 Am. Dec. 375; *Fitzgerald v. Equitable Reserve Fund Life Association (City Ct.)* 3 N. Y. Supp. 214; *Failey v. Fee*, 83 Md. 83, 34 Atl. 839, 32 L. R. A. 811, 55 Am. St. Rep. 326; *Hale v. Equitable Aid Union*, 168 Pa. 377, 31 Atl. 1066.

(a) In passing upon such a conflict, the courts, in determining the rights of the parties, will adopt the provision that will give the greater right to the insured and his beneficiary. *Supreme Tent, etc., v. Volkert*, 25 Ind. App. 627, 57 N. E. 203.

**3. PROPER JUDGMENT FOR AMOUNT OF POLICY OF MUTUAL INSURANCE OR BENEFIT INSURANCE SOCIETY.**

Under the above rulings and the facts of the instant case, the judge, sitting without a jury, properly resolved the conflict between the certificate of membership issued by the society and its by-laws in favor of the former, and did not err in rendering judgment for the plaintiff for the full amount of the policy and interest thereon.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by B. S. Cadden against the Independent Order of Puritans. Judgment for plaintiff, and defendant brings error. Affirmed.

Douglas & Douglas, of Atlanta, for plaintiff in error.

Little, Powell, Smith & Goldstein, of Atlanta, for defendant in error.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(25 Ga. App. 71)

**ALEXANDER v. EASTERLING.**  
(No. 11000.)(Court of Appeals of Georgia, Division No. 2.  
March 11, 1920.)*(Syllabus by the Court.)***1. NEW TRIAL §150(4) — AFFIDAVIT MUST SHOW DILIGENCE TO DISCOVER EVIDENCE.**

The only special ground of the motion for a new trial (other than mere amplifications of the general grounds), to be treated at all, must be considered as in the nature of a motion based on newly discovered evidence; and a new trial cannot be granted for newly discovered evidence where it is not made to appear by affidavit of movant and his counsel that they did not know of such evidence before trial, and that the same could not have been discovered with ordinary diligence. Park's Ann. Code, § 6086, and note.

**2. APPEAL AND ERROR §1005(2)—WHERE APPROVED VERDICT IS SUPPORTED BY EVIDENCE DENIAL OF A NEW TRIAL MUST BE AFFIRMED.**

While the evidence in this case is not at all satisfactory to this court, there is some evidence to support the verdict; and, the verdict having been approved by the trial judge, this court is compelled, under the limitations of the constitutional amendment creating it, to affirm his judgment overruling the motion for a new trial.

Error from City Court of Reidsville; **Q. L. Cowart, Judge.**

Action between **B. F. Alexander** and **J. F. Easterling**. Judgment for the latter, motion for new trial overruled, and the former brings error. **Affirmed.**

**S. B. McCall** and **W. T. Burkhalter**, both of Reidsville, for plaintiff in error.

**A. S. Way**, of Reidsville, for defendant in error.

**SMITH, J.** Judgment affirmed.

**JENKINS, P. J.**, and **STEPHENS, J.**, concur.

(25 Ga. App. 28)

**KELLEY v. RAMEY.** (No. 11129.)(Court of Appeals of Georgia, Division No. 1.  
March 3, 1920.)*(Syllabus by the Court.)***1. MORTGAGES §33(5)—LAW WILL ENFORCE VENDOR'S AGREEMENT TO REPURCHASE AT HIGHER PRICE PAYABLE IN FUTURE.**

"It being legally possible for the owner of realty to sell and convey it to another at an agreed cash price, and at the same time secure the right to repurchase, and become bound so to do, at a higher price payable in the future, the law will enforce such a transaction when actually made." Felton v. Grier, 109 Ga. 320, 35 S. E. 175.

**2. APPEAL AND ERROR §1001(1)—VERDICT SUPPORTED BY EVIDENCE NOT DISTURBED.**

"Though the transaction now under review in many respects very closely resembled a mere loan of money at a usurious rate of interest, secured by a deed to land, yet as there was direct and positive evidence warranting the special findings of fact to the effect that it was a bona fide case of bargain and sale with a contemporaneous agreement by the vendee to resell to the vendor, and a binding contract by the latter to repurchase, the verdict must be allowed to stand." Felton v. Grier, *supra*.

**3. MORTGAGES §39—WHETHER DEED WAS GIVEN AS SECURITY FOR DEBT HELD QUESTION FOR JURY.**

Whether a deed was taken as security for a debt, or, together with a contemporaneous writing, evidenced a sale with option to repurchase, was a question for the jury. Brown v. Bonds, 125 Ga. 833, 837, 54 S. E. 933.

**4. USURY §119—WHETHER TRANSACTION USURIOUS OR BONA FIDE SALE WITH THE RIGHT TO REPURCHASE HELD QUESTION OF FACT.**

Whether a given transaction was a bona fide sale of property with the right to repurchase, or whether it was a ruse designed to avoid the usury laws and to take security for the loan of money at a usurious rate of interest, is a question of fact to be determined by the jury. Rogers v. Blouenstein, 124 Ga. 501, 52 S. E. 617, 8 L. R. A. (N. S.) 213.

**5. USURY §113, 119—BURDEN OF PROVING USURY STATED; LARGE PROFITS NOT NECESSARILY PROOF OF USURIOUS LOAN RATHER THAN SALE.**

The burden of affirmatively showing usury in a transaction is upon the party pleading it, and the mere circumstance that the profit of the other party to the transaction was equivalent to more than the lawful rate of interest per annum on the capital invested would not necessarily show that the transaction was a loan of money and not a sale. Fulwood v. Leitch, 7 Ga. App. 360, 66 S. E. 987.

**6. SUFFICIENCY OF EVIDENCE.**

When the principles of law stated above are applied to the facts of this case, a verdict for the defendant was authorized, and, the finding of the jury having been approved by the judge, this court is without authority to interfere.

Error from Superior Court, Rabun County; **J. B. Jones, Judge.**

Proceedings between **G. B. Kelley** and **J. F. Ramey**. Judgment for the latter, and the former brings error. **Affirmed.**

**R. C. Ramey**, of Clayton, and **McMillan & Erwin**, of Clarksville, for plaintiff in error.  
**Thad. L. Bynum**, of Clayton, for defendant in error.

**BROYLES, C. J.** Judgment affirmed.

**LUKE** and **BLOODWORTH, JJ.**, concur.

(25 Ga. App. 52)

**SOUTHERN EXPRESS CO. v. CUMMING.**  
(No. 10849.)(Court of Appeals of Georgia, Division No. 2.  
March 11, 1920.)*(Syllabus by the Court.)***1. SUFFICIENCY OF PETITION.**

The petition set out a cause of action, and the court properly overruled the demurrer interposed thereto.

**2. NEGLIGENCE  $\S$  98—WHERE BOTH PARTIES WERE EQUALLY NEGLIGENT, THERE CAN BE NO RECOVERY.**

Under the facts developed in this case, which was a suit for personal injuries, the principle of law that, if both the plaintiff and the defendant were equally negligent in causing the injury, there can be no recovery (*Pickett v. Central Railway Co.*, 138 Ga. 177, 181, 74 S. E. 1027, Ann. Cas. 1913C, 1380, and cit.), was germane, and the trial judge erred in refusing to give in charge the timely requested instruction embodying this legal doctrine, which was couched in appropriate form and language, and was not covered by his charge to the jury.

**3. TRIAL  $\S$  260(1)—INSTRUCTIONS COVERED BY GENERAL CHARGE ARE PROPERLY REFUSED.**

The other assignments of error contained in the amendment to the motion for a new trial are without substantial merit, as the written requests to charge set out therein are sufficiently covered by the general charge of the court.

Error from City Court of Richmond County; J. C. C. Black, Jr., Judge.

Action by Ephraim Cumming against the Southern Express Company. Judgment for plaintiff, and defendant brings error. Reversed.

W. K. Miller, of Augusta, for plaintiff in error.

Wm. H. Fleming, of Augusta, for defendant in error.

SMITH, J. Judgment reversed.

JENKINS, P. J., and STEPHENS, J., concur.

(25 Ga. App. 83)

**RUSHIN v. MASSEY.** (No. 11057.)(Court of Appeals of Georgia, Division No. 2.  
March 11, 1920.)*(Syllabus by the Court.)***1. TRIAL  $\S$  208(2)—CHARGE MUST COVER SUBSTANTIAL ISSUES MADE BY PLEADINGS AND EVIDENCE.**

It is the duty of the presiding judge to give appropriate instructions to the jury covering all the substantial issues made either in the pleadings or in the evidence.

**2. TRIAL  $\S$  252(2)—INSTRUCTION ON ISSUE NOT SUSTAINED BY SUBSTANTIAL EVIDENCE NOT REQUIRED.**

In the instant case the only specific ground of the motion for a new trial does not show reversible error. The evidence set out in this exception, taken together with the other evidence in the case, does not present any substantial issue as to the money taken from the safe of the defendant by Raymond Rushin, the son of the defendant, with the knowledge of the plaintiff. In fact Raymond Rushin's testimony in the brief of evidence clearly shows that the money which he took from the safe was paid back by charging it to his individual account.

**3. OVERRULING OF MOTION FOR NEW TRIAL.**

There was evidence to support the verdict, and the court did not err in overruling the motion for a new trial.

Error from City Court of Cairo; L. W. Rigsby, Judge.

Action by J. F. Massey against T. L. Rushin. Judgment for plaintiff, motion for new trial overruled, and defendant brings error. Affirmed.

Ledford & Christopher, of Cairo, for plaintiff in error.

Ira Carlisle, of Cairo, for defendant in error.

SMITH, J. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(25 Ga. App. 83)

**LOUISVILLE & N. R. CO. et al. v. HOWARD.** (No. 11067.)(Court of Appeals of Georgia, Division No. 2.  
March 11, 1920.)*(Syllabus by the Court.)***RAILROADS  $\S$  482(2)—FINDING THAT SPARKS FROM ENGINE CAUSED FIRE NOT WARRANTED BY EVIDENCE.**

Though there was evidence to show that the fire which damaged plaintiff's property was discovered between 25 and 30 minutes after the passing of the train, from the engine of which the plaintiff insists sparks were emitted which caused the fire, there is no testimony to show that the sparks were coming from the engine at the time it passed the property, or that it caused the fire, other than the following: That the wind was blowing in the direction of the burned house from the track, that the fire in question occurred about midnight, and that there had been no fire in or near the house, which was a high two-story dwelling, since about 10 or 11 o'clock in the morning, and that the fire was first seen on the top of the roof. This was not, under the decisions made in *Seaboard Air Line Ry. v. Jarrell*, 145 Ga. 688, 89 S. E. 718, and *G. & S. Railroad Co. v. Edmondson*, 101 Ga. 747, 29 S. E. 213, enough to authorize the jury to find that the

engine of the defendant caused the fire by the emission of sparks; there being uncontradicted proof to show, not only that the engine which passed on the night of the fire was properly equipped with an approved spark arrester, but that it was handled in a skillful and proper manner.

Error from Superior Court, McDuffie County; H. C. Hammond, Judge.

Action by Mrs. Ocran Howard against the Louisville & Nashville Railroad Company and others. Judgment for plaintiff, and defendants bring error. Reversed.

Cumming & Harper, of Augusta, for plaintiffs in error.

John T. West, of Thomson, for defendant in error.

SMITH, J. Judgment reversed.

JENKINS, P. J., and STEPHENS, J., concur.

(24 Ga. App. 780)

**GILL v. ATLANTA, B. & A. RY. CO.**  
(No. 10835.)

(Court of Appeals of Georgia, Division No. 1.  
March 2, 1920.)

(Syllabus by the Court.)

**1. PRINCIPAL AND AGENT**  $\S$ 145(2)—**UNDISCLOSED PRINCIPAL'S LIABILITY DOES NOT EXTEND TO CONTRACTS UNDER SEAL.**

"It is well settled that the rule that an undisclosed principal shall stand liable for the contract of his agent has no application to a contract under seal."

**2. RAILROADS**  $\S$ 104(2)—**PETITION FOR PENALTY FOR FAILURE TO MAINTAIN CATTLE GUARDS MUST ALLEGE FACTS BRINGING IT WITHIN STATUTE.**

To recover the penalty for failure of a railroad company to build and maintain good and sufficient cattle guards, as provided for in Civ. Code 1910, §§ 2699, 2700, the plaintiff's petition must allege such facts as bring it within the provisions of this law.

**3. RAILROADS**  $\S$ 104(2)—**PETITION FOR PENALTY FOR FAILURE TO MAINTAIN CATTLE GUARDS HELD INSUFFICIENT.**

The court properly sustained the demurrers to the plaintiff's petition as amended and dismissed it.

Error from Superior Court, Taylor County; G. H. Howard, Judge.

Action by one Gill against the Atlanta, Birmingham & Atlantic Railway Company, in which, after his death, Mrs. Francis Gill, as executrix, was made a party in his stead. Judgment for defendant, and plaintiff brings error. Affirmed.

Robt. L. Berner, of Macon, and Robt. B. Williamson, of Sylvester, for plaintiff in error.

H. P. Wallace, of Butler, Brandon & Hynds, of Atlanta, and Hatton Lovejoy, of La Grange, for defendant in error.

**BLOODWORTH, J.** Gill brought suit against the Atlanta, Birmingham & Atlantic Railway Company for damages. After his death his wife, Mrs. Francis Gill, as executrix, was made a party in his stead. The original petition as amended was, in substance, as follows:

Petitioner is the owner of a certain tract of cultivatable land in the Twelfth militia district of Taylor county, through which tract the line of railway of defendant runs. Said tract of land was valuable for purposes of cultivation and for rental, and the value for both purposes was destroyed by the breach of the contract set out herein. There is no stock law in force in said district, and cattle are "allowed to run wild" therein. The lands of petitioner were fenced; "said fence running entirely around the lands and up to the right of way of the defendant on each side of the track." In 1905 the petitioner entered into a contract with the defendant, the terms of which are substantially as follows: That in consideration of \$75 the Title Guaranty & Trust Company of Atlanta, Ga., agrees to put up and maintain in good order for the said Gill such stock gaps and road crossings as may be necessary for said Gill to go to his farm and use for other purposes, and to keep the said crossings and stock gaps in good repair for practical use, and put them where it will suit the convenience of the said Gill. It is alleged that the said Title Guaranty & Trust Company was the agent of defendant to procure the right of way for the construction of its roadbed, and was really and in law making the contract for the defendant. The defendant did erect three cattle guards in separate places, and these remained in good condition until the year 1913, when one of them was destroyed by a wreck on the line of railroad of the defendant. Instead of erecting a proper cattle guard or replacing one similar to the one destroyed, the defendant erected one that would not keep out the cattle or hogs, and which was finally abandoned altogether, "thus leaving said land open for the stock of every kind to enter thereon, and by such conduct rendered said lands utterly valueless for cultivation or rent."

During the year 1913 the petitioner rented said land to one George Pyron, and was to receive three bales of cotton "of the value on an average of \$50 per bale." He furnished said tenant money and supplies for making the crop to the amount of \$444.50. His tenant was insolvent and was dependent upon his labor in planting and raising said crops on said land to pay petitioner, who "relied upon his lien as a landlord for the payment

of his rent, and upon his landlord's lien for supplies and necessities, and the failure of said defendant to maintain safe cattle guards caused the destruction of the crops, to the loss of plaintiff the amount of his rent and his bill for supplies. Petitioner has been unable to rent said land or to grow a crop thereon during any of the years since 1913, although he made repeated efforts to do so, and this was due to the absence of the cattle guards, as no one would rent said lands in their absence. During the years 1914, 1915, and 1916 his tenant houses have been unoccupied, and said houses and outhouses have depreciated in value to his loss \$50 annually. After the destruction of the stock gap it was the duty of the defendant to replace the same "without further notice, and because of its failure to do so this defendant is indebted to your petitioner in the sum of \$25 per day for each day the same remained unerected, as is provided by law, as the proper and just amount to be recovered in this action."

The plaintiff offered as an additional amendment to his original petition another petition in the form of a second count, which was practically the same as the original petition, except that the second count alleged that—

"By the breach of said contract as herein set forth the said land has been depreciated in value \$2,000, for which he prays judgment in addition to the special damages."

This count was stricken on objections filed by the defendant.

Demurrers to the original petition and to the petition as amended were filed, and were, in substance, as follows: That the petition fails to set forth a cause of action; that the plaintiff cannot recover for the years that the petition shows that the lands were rented, for the reason that the cause of action, if any, would be in favor of the tenant; that the items of damage set forth in the petition would not be the correct measure of damage; that the allegations as to a contractual obligation should be stricken, "for the reason that the contract attached to the petition and the extract therefrom set forth in the petition show that this defendant is in no wise liable upon said contract, not being a party thereto"; that the plaintiff should not recover, "for the reason that the petition fails to show that the petitioner has done anything whatever to lessen the amount of the damages complained of or in any wise guard against the same"; that the alleged damage because of loss of rent and advances made to the tenant is too remote and speculative, "because the plaintiff is not entitled to recover in law for such damages, even though there was a breach of contract as alleged"; that the alleged damages are "too speculative and remote, and are not the proximate result of the alleged breach of contract"; that

the allegations in the petition in reference to the recovery of \$25 per day for each day the cattle guards remained unerected should be stricken, "because under the allegations of the petition this is not the legal measure of damages and cannot be recovered for the breach of contract alleged in the petition"; that the petition "is indefinite, duplicitous, and uncertain, and it cannot be ascertained therefrom what damages plaintiff is claiming or what plaintiff claims is the measure of damages"; and that the petition does not allege "what would have been the cost to plaintiff to execute the contract or to build the stock gap, or to build a fence in lieu of said stock gap, or to build any other structure to protect his land in the place of said gap." The demurrer was sustained, and plaintiff's petition as amended was dismissed.

There is no reversible error in any of the rulings on the pleadings. Should it be conceded that the court erred in refusing to allow the "amendment in the nature and form of a second count," this could not have been harmful to the plaintiff, for, under the rulings hereinafter announced, this proposed second count was afflicted with the same infirmity as the first, and was subject to the demurrer filed. From the view we take of this case, it would be useless to discuss each of the grounds of demurrer, as the two following propositions are controlling.

[1] 1. The contract attached to the petition, and on which plaintiff bases his alleged rights to recover, is between the plaintiff and the Title Guaranty & Trust Company. The defendant in this case is not mentioned therein—is a stranger to the contract. It is true that the deed or contract refers to the Atlanta, Birmingham & Atlantic Railroad, but there is no mention of the Atlanta, Birmingham & Atlantic Railway Company. The deed or contract in question is under seal, and plaintiff expressly alleges in his petition that he made the contract with the Title Guaranty & Trust Company. It is sought to hold the defendant liable under the allegation that—

"Said Title Guaranty & Trust Company was the agent of the defendant to procure the right of way for the construction of its roadbed, and that said corporation was formed for said purpose, and in making said contract with the plaintiff whereby it acquires the title to that portion of his land was really and in law making a contract for the defendant."

This contention is without merit.

"The rule that an undisclosed principal shall stand liable for the contract of his agent does not apply when the contract is under seal. Accordingly, a lease under seal, executed by an agent as lessee in his individual name, and which does not purport to be executed on behalf of the principal, is not binding upon the latter, although it appears from extrinsic evidence that the lessee was the general agent to

conduct a business for his principal, and that the premises were leased to be used in such business." *Lenney v. Finley*, 118 Ga. 718 (2), 720, 45 S. E. 593, and cases cited.

In *Van Dyke v. Van Dyke*, 123 Ga. 688, 51 S. E. 582, 3 Ann. Cas. 978, the Supreme Court was asked to review and reverse the ruling in the *Lenney* Case, supra, and declined to do so. Applying to the case under consideration the principle above announced, it is clear that under the contract in question a suit will not lie against the Atlanta, Birmingham & Atlantic Railway Company.

[2, 3] 2. The petition alleges:

"That the said defendant erected said stock gaps in the first instance, as it was its duty to do, and after destruction of said stock gaps it became its duty to repair the same and erect the same, and erect the same again where it became necessary, without further notice, and that because of its failure so to do this defendant is indebted to your petitioner in the sum of \$25 per day for each day the same remained uncorrected as is provided by law, as the proper and just amount to be recovered in this action, for which amount also this petitioner asks verdict and judgment."

Treating these allegations as an endeavor to recover the penalty provided for in sections 2699 and 2700 of the Civil Code of 1910, there is no endeavor to set up in the petition a compliance with these statutory provisions; and before the plaintiff can recover under them he must allege such facts as will bring his petition within the provisions of this law. This he utterly failed to do.

Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(24 Ga. App. 799)

**MAGNUSON v. CITY OF BAINBRIDGE.**  
(No. 10958.)

(Court of Appeals of Georgia, Division No. 1.  
March 2, 1920.)

(*Syllabus by the Court.*)

**ELECTRICITY — 19(2) — PETITION HELD NOT TO SHOW CITY'S NEGLIGENCE IN INSTALLING ELEVATOR.**

The court did not err in sustaining the general demurrer to the petition.

Error from City Court of Bainbridge; H. B. Spooner, Judge.

Action by A. Magnuson against the City of Bainbridge. General demurrer to petition sustained, and plaintiff brings error. Affirmed.

A. E. Thornton, of Bainbridge, for plaintiff in error.

Hartsfield & Conger, of Bainbridge, for defendant in error.

LUKE, J. Magnuson brought suit against the city of Bainbridge, alleging, substantially, that on September 17, 1917, he was engaged in working upon the top of a certain elevator in the Bainbridge Hospital at the instance of the Bainbridge Hospital; that the elevator was operated by electricity, with an electric motor inside of said building, and received the current of electricity through and by a transformer placed on a pole outside of the building; that the electricity and the transformer were owned by the city of Bainbridge, and the city furnished the electricity over its wires and through said transformer for pay; that he was working for the Otis Elevator Company, and for them was engaged in installing said elevator, and connecting the same for operation with the motor inside of said building for the owners thereof, and while so engaged he had, previous to said date, connected said motor with the current of electricity from the transformer that was installed by said city, and had been running said elevator so connected; that on said day it was necessary for petitioner to be on top of said elevator to complete the work of installing the same by placing switches in the wire and pipe; that the city of Bainbridge on said date, by its agent and representative, Gibson, an employé of the city, made a change in said transformer on said pole on said street, and, while petitioner was engaged on the top of said elevator as aforesaid, notified him that said transformer was all right; that while the first transformer was in position and being used, said motor was connected with the same, and, by throwing on the switch or connection from said motor and said transformer, the motor would turn and move the elevator up or down as desired by the operator; that the said city, by its agents, employes, and representatives, without the knowledge of petitioner, carelessly and negligently changed said transformer reverse from the first transformer, causing the operation of the motor inside of said building to run reverse or opposite the direction it ran when connected with the first, and said agent of employé of said defendant changed the wires upon said transformer, or changed the wires leading from said transformer to the motor in said building; the said change caused the phases of electricity in said wires to be changed, and the said changes of the phases of electricity reversed the rotation of the current, thereby causing the motor to run in an opposite direction; that "by so carelessly and negligently placing said transformer reverse from the first transformer caused the operation of the motor inside of said building to run reverse or opposite from the direction it ran when connected with the first transformer"; that while so engaged upon the top of said elevator it became necessary for him to put on the

switch that connected said elevator with said motor, for the purpose of going down or lowering said elevator, without knowing said city of Bainbridge had changed or reversed said transformer, and when he put on the switch of connection said elevator, instead of going down or lowering, went up in the opposite direction; that when said elevator went up he was caught between the crosshead of said elevator and the heavy overhead steel beams, mashing him and causing injuries for which he sues; that he made claim upon the city of Bainbridge as required by law, and the city refused to pay for his injuries; that the city was negligent and careless in changing the transformers that furnished the current of electricity to the motor inside of said building, and in connecting the wire in the said transformer the same way that the wires were connected to the first or smaller transformer; that said city was negligent and careless in reversing the larger transformer opposite from the first or smaller transformer, thereby changing the electric phases that operated the motor inside the said building; that said city was negligent and careless in that said city's agents and employes and representatives did not warn or notify petitioner that the transformer as changed had been reversed and had not been placed as on the first or smaller transformer; and that the electric phases had been changed, etc. To this petition the city of Bainbridge demurred, and its demurrer was sustained, upon the ground that the petition set forth no cause of action. Error is assigned upon the judgment sustaining the demurrer.

The petition in this case, construed as it must be, shows that the city of Bainbridge furnished electricity to the Bainbridge Hospital, and furnished such electricity in the usual and ordinary way; that the city was employed only to deliver the current to the building; that the connections inside the building were made by the plaintiff; that the transformer on the outside was changed, and the plaintiff was notified of the change; that the plaintiff, after being notified of the change from a smaller to a larger transformer, did nothing to discover what the effect would be upon his motor in the elevator, the wires to which he had made the connection; that the city had no notice of how he had connected the wires to the motor; that the city did not know which way a turn of the switch on the motor in the building would move the motor, up or down; that the movement of the elevator was a matter exclusively within the knowledge of the plaintiff; and that the use of the electricity passing through the transformer in the operation of the elevator was optional with the plaintiff—in fact one of the allegations of negligence shows that the larger transformer, of the installation of which the plaintiff had notice, was

connected exactly and in the same manner as the smaller transformer.

What was the proximate cause of this injury? Does the petition show that the plaintiff was lacking in ordinary care? Does not the petition show that the plaintiff was notified of the change of transformers on the outside of the building? What did the plaintiff do after having notice that the transformer was changed? Did he do anything to see if his motor was running backward or forward, which motion it got by reason of his connection, before placing himself in a perilous position? We are of the opinion that the injury to this plaintiff was not caused by the negligence of the city of Bainbridge in furnishing electricity to the building in which he was working. See Civil Code 1910, § 4426; 9 R. C. L. 1204. Notice to the plaintiff of the change of transformers was such diligence as was necessary to put him on notice that he might observe for himself the effect of the electricity on his motor operating the elevator; especially is this true when it is not shown that the city even knew that the motor had yet been connected with the electric wire, and, if it had been, how it was connected, or in what way it operated the motor, or in what way the plaintiff wished it to operate the motor—whether a turn of the switch on the motor to the right would cause the motor to revolve right or left. See *Denson v. Ga. Ry. & Electric Co.*, 135 Ga. 133, 68 S. E. 1113.

Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(35 Ga. App. 33)

SOUTHEASTERN MUT. FIRE INS. CO. v. DAVIDSON (two cases).  
(Nos. 11167, 11168.)

(Court of Appeals of Georgia, Division No. 2,  
March 11, 1920.)

(Syllabus by the Court.)

1. CERTIORARI  $\S$  43 — BOND REQUIRED BY STATUTE MUST BE APPROVED BY TRIAL JUDGE.

Before a writ of certiorari can properly issue, unless applied for in forma pauperis, it must appear from the record that the bond required by Civ. Code 1910, § 5185, has been duly approved by the judicial officer before whom the case was tried in the first instance. *Dykes v. Twiggs County*, 115 Ga. 693, 42 S. E. 36; *Daniel v. Citizens' Loan & Guarantee Co.*, 23 Ga. App. 684, 99 S. E. 226. Approval of the bond by a commercial notary public will not suffice.

2. CERTIORARI  $\S$  60—DISMISSAL UPON CALL OF CASE FOR TRIAL PROPER WHERE BOND NOT APPROVED BY TRIAL JUDGE.

Where the writ of certiorari has issued, it is proper, upon the call of the case for trial,



to dismiss the petition upon motion of the defendant in certiorari upon the ground that the certiorari bond has not been approved by the proper officer, when it nowhere appears from the record that the certiorari bond has been approved by the judicial officer before whom the case was tried.

Error from Superior Court, Fulton County; John D. Humphries, Judge.

Separate proceedings between the Southeastern Mutual Fire Insurance Company and F. D. Davidson. Judgment for the latter in each case, and the former brings error. Affirmed.

W. D. Mills, of Atlanta, for plaintiff in error.

STEPHENS, J. Judgment affirmed in both cases.

JENKINS, P. J., and SMITH, J., concur.

(25 Ga. App. 53)

**CENTRAL OF GEORGIA RY. CO. v. POOLE.** (No. 10655.)

(Court of Appeals of Georgia, Division No. 2. March 11, 1920.)

*(Syllabus by the Court.)*

**1. APPEAL AND ERROR ¶1099(6)—DECISION AS TO SUFFICIENCY OF PETITION IS LAW OF THE CASE ON SUBSEQUENT APPEAL.**

This court has held as the law of the case that the petition sets forth a cause of action. See *Poole v. Central of Georgia Ry. Co.*, 23 Ga. App. 285, 97 S. E. 886, in which the main allegations of the petition are set forth. The defendant in the court below now seeks to have a judgment in the plaintiff's favor set aside on a motion containing the general grounds only.

**2. EVIDENCE ¶589 — WHERE EVIDENCE OF PARTY IS CONTRADICTORY, IT MUST BE CONSTRUED MOST STRONGLY AGAINST HIM.**

While it is a well-settled rule that, where the evidence of a plaintiff or a defendant is contradictory within itself, vague, or equivocal, it must be construed most strongly against him (*Watkins v. Woodbery*, 24 Ga. App. 80, 100 S. E. 34 [5]), this principle of law does not govern or control this case under its facts. While in one instance the plaintiff swore on cross-examination, "I don't know what struck me," every fact and every circumstance testified to both by the plaintiff and by every other witness tends abundantly to show that the plaintiff was struck at night by a backing freight car, and was, as he says, "dragged by the car" along the track a considerable distance, mashing his

foot to such an extent as to necessitate its amputation. The one instance in which he used the words first quoted, when construed in connection with the entire evidence in the case, including the plaintiff's own evidence, and with special reference to the plaintiff's evidence as given in immediate connection with the expression quoted, must necessarily be taken to mean that he did not know what hit him in the sense that he did not directly see the impact at the time it unexpectedly occurred. The same reasoning applies to the plaintiff's expression, in answer to a propounded question, "The one next to the depot was the side track upon which I stood." The plaintiff had specifically fixed his position at the time of the accident as being "one foot or two feet from the side track," and in answer to another question stated, "I was nearer to the track than I was to the door." The answer first quoted must therefore, in fairness, be taken to have special reference to which track was being testified about, rather than to his exact position in reference thereto. The plaintiff repeatedly testified in substance that he was standing somewhere near in front of the waiting room. The fact that while testifying to this fact, and insisting that such was the case, he may have failed to designate such position correctly by indicating it with a cross mark on a rather small photograph of the locality when requested to do so by the defendant's counsel, need not necessarily bring the evidence of the plaintiff within the application of the legal rule above stated, especially as the plaintiff, an old man, protested his inability to thus correctly designate his position, for the reason that he could not well see the photograph.

**3. APPEAL AND ERROR ¶1005(2)—APPROVED VERDICT SUPPORTED BY SOME EVIDENCE WILL NOT BE SET ASIDE.**

The plaintiff could not, under any view of the testimony given in this case, be accounted as a trespasser; the verdict is not without evidence to support it; it has the approval of the trial judge; and this court does not feel authorized to set it aside.

Error from City Court of Oglethorpe; E. T. Moon, Judge.

Action by O. P. Poole against the Central of Georgia Railway Company and others. Verdict and judgment for plaintiff, and defendants bring error. Affirmed.

Yeomans & Wilkinson, of Dawson, for plaintiffs in error.

Hatcher & Smith, of Macon, for defendant in error.

JENKINS, P. J. Judgment affirmed.

STEPHENS and SMITH, JJ., concur.

¶ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(25 Ga. App. 45)

**SOUTHERN RY. CO. v. BUNCH.**  
(No. 10728.)(Court of Appeals of Georgia, Division No. 2.  
March 11, 1920.)*(Syllabus by the Court.)***1. CARRIERS ⇨102—MEASURE OF DAMAGES  
FOR UNREASONABLE DELAY IN DELIVERING  
SHIPMENT STATED.**

The petition as amended alleges, in substance, that two separate shipments of toys were sent from Chicago to the owner at Augusta, Ga.; that the goods were received by the defendant company as the last connecting carrier, and were held in the defendant's warehouse at Augusta for a stated long and unreasonable period, without notice to him, although it was the custom at Augusta for railroad companies receiving freight to notify consignees immediately after its arrival; that he was an old citizen of Augusta, and had been a merchant there for the past 18 years, and his name and address were in the city directory, and the defendant knew, or by the exercise of ordinary care and diligence could have known, his address; that after the arrival of this freight he was told repeatedly, in reply to inquiries at the defendant's freight office and depot, that it had not arrived; that he informed the defendant that one of the boxes of toys had been purchased by him for the Christmas trade; that when finally notified of its arrival he complained to the defendant of the long delay in giving him notice, and the defendant notified him that he could get the goods only by paying certain storage charges in addition to the freight. The petition further alleges, as to the second shipment, that had the defendant given him prompt notice of the arrival of the goods he could have disposed of them at a profit; that the goods contained in the first shipment were not salable by him except for the Christmas trade; that goods in the last shipment could have been sold by him had they been promptly delivered, but not later; that because of the alleged unreasonable delay the plaintiff refused to accept the goods, as they were at that time "valueless to him"; that the defendant was negligent because of the unreasonable delay in notifying him of the receipt of the goods, and not allowing him to receive his goods within a reasonable time after their arrival, and by reason thereof he was damaged in the sum of \$450. To the petition as amended the defendant demurred, upon the ground that it failed to set out a cause of action. The trial court overruled the demurrer, and the defendant excepted. *Held:*

"The general rule is that the measure of damages for unreasonable delay by a common carrier in the delivery of goods shipped is the difference between their market value when they should have been delivered and their market value when they were delivered, with interest from the former date, less the freight, if un-

paid" (Southern Express Co. v. Hanaw, 134 Ga. 445, 459, 87 S. E. 944, 137 Am. St. Rep. 227; Civ. Code 1910, § 2773; Southern Railway Co. v. Bloch, 18 Ga. App. 769, 90 S. E. 656), and in the absence of a special contract this measure of damages by delay is exclusive (Wilensky v. Central Railway Co., 136 Ga. 889, 893, 72 S. E. 418, Ann. Cas. 1912D, 271; Columbus & Western Railway v. Flournoy, 75 Ga. 745). If the delivery of goods has been unreasonably delayed by the carrier, the owner must sue for the damages prescribed in section 2773 of the Civil Code, since mere unreasonable delay in transporting does not amount to conversion, so as to authorize the consignee, upon the arrival of the goods, to reject them and sue for their value on that theory. Southern Express Co. v. Hanaw, supra; Wilensky v. Central Railway Co., supra.

**2. CARRIERS ⇨105(1) — PLEADING ⇨207 —  
SUFFICIENCY OF PETITIONS IN ACTION FOR  
DAMAGES FOR UNREASONABLE DELAY IN DE-  
LIVERY; MATTER GOING BEYOND PETITION  
GOOD ON GENERAL DEMURRER WAS GROUND  
FOR SPECIAL DEMURRER.**

As held by this court in a former suit between the same parties respecting the same transaction (Southern Railway Co. v. Bunch, 22 Ga. App. 42, 95 S. E. 323), the suit as now brought is for damages for an unreasonable delay in delivering shipments, and not for a conversion. The petition having alleged the contract of carriage, the duty owing by the defendant to the plaintiff, the breach of the contract, and the resulting breach of duty, and alleging generally that the plaintiff was damaged in the sum of \$450 by reason of such breach, it was sufficient to sustain at least a recovery for nominal damages, and the court did not err in overruling the general demurrer thereto. That the plaintiff went further and undertook specifically to state what would be erroneous elements of such damage, and how and wherein they accrued, was matter for special demurrer. Moss & Co. v. Fortson, 99 Ga. 496, 499, 27 S. E. 745; Sutton v. Southern Railway Co., 101 Ga. 776, 29 S. E. 53; Graham v. Macon, D. & S. R. Co., 120 Ga. 757, 49 S. E. 75.

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action by S. M. Bunch against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Cumming & Harper, of Augusta, for plaintiff in error.

Henry O. Roney, of Augusta, for defendant in error.

JENKINS, P. J. Judgment affirmed.

STEPHENS and SMITH, JJ., concur.

⇨For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(25 Ga. App. 71)

ARMSTRONG et al. v. HARPER et al.  
(No. 10984.)(Court of Appeals of Georgia, Division No. 2  
March 11, 1920.)*(Syllabus by the Court.)*

1. EXECUTORS AND ADMINISTRATORS  $\S$  49—  
JUDGMENT  $\S$  853(1)—ADMINISTRATOR, AND  
NOT HEIRS, HAVE RIGHT TO REVIVE DORMANT  
JUDGMENT; "CHOSE IN ACTION."

A dormant judgment is a "chose in action." Where an administrator in his representative capacity obtained a judgment against several defendants, the right to revive the judgment after it became dormant was in the administrator, and not in the heirs at law. See *Hill v. Maffett*, 3 Ga. App. 89, 59 S. E. 325; *Moughon v. Masterson*, 140 Ga. 699, 704, 79 S. E. 561.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Chose in Action.]

2. JUDGMENT  $\S$  864(1)—AMENDMENT CHANGING SUIT TO ONE IN REPRESENTATIVE CAPACITY AND AS GUARDIAN PROPERLY REFUSED.

Under the above ruling the court did not err in rejecting the amendment, which sought to change the petition so that the suit should proceed in the name of the plaintiff, as administratrix of the estate of J. W. Olliff, deceased, for the use of herself as one of the "sole heirs at law," and as guardian of her ward, who was the other of the "sole heirs" of the said estate.

3. PLEADING  $\S$  198—DISMISSAL ON GENERAL DEMURRER, THOUGH ONLY ONE OF DEFENDANTS FILED A DEMURRER.

The case was properly dismissed on general demurrer; and this is true, although only one of the defendants filed a demurrer. *Funderburk v. Smith*, 74 Ga. 515.

Error from City Court of Reidsville; C. L. Cowart, Judge.

Proceeding between Mrs. Mary Lee Armstrong and others and C. M. Harper and others. Judgment for the latter, and the former bring error. Affirmed.

W. T. Burkhalter, of Reidsville, for plaintiffs in error.

A. S. Way, of Reidsville, for defendants in error.

SMITH, J. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(25 Ga. App. 47)

SMITH v. JONES BROS. (No. 10750.)

(Court of Appeals of Georgia, Division No. 2  
March 11, 1920.)*(Syllabus by the Court.)*

OVERRULING OF MOTION FOR NEW TRIAL.

The evidence supported the verdict, and, there being no error of law committed, the court

did not err in overruling the motion for a new trial.

Error from City Court of Carrollton; James, Beall, Judge.

Action between W. P. Smith and Jones Bros. Judgment for the latter, motion for new trial overruled, and the former brings error. Affirmed.

Smith & Smith, of Carrollton, for plaintiff in error.

Boykin & Boykin, of Carrollton, for defendant in error.

SMITH, J. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(25 Ga. App. 72)

HUGHES v. JEFFERSON STANDARD  
LIFE INS. CO. (No. 11004.)(Court of Appeals of Georgia, Division No. 2  
March 11, 1920.)*(Syllabus by the Court.)*

1. COURTS  $\S$  188(10)—CITY COURT HAS JURISDICTION TO ESTABLISH LIENS ON REAL ESTATE.

Section 8 of the act creating the city court of Camilla (Acts 1905, p. 184) is broad enough to vest that court with jurisdiction to establish liens of real estate. That section is as follows: "Said city court of Camilla shall have jurisdiction to try and dispose of all civil cases of whatever nature of which the superior court of Mitchell county has jurisdiction, except in those cases over which the exclusive jurisdiction is vested in the Superior Court by the Constitution and laws of this state."

2. COURTS  $\S$  163—ESTABLISHMENT OF SPECIAL LIEN ON REALTY AS SECURITY FOR NOTE WAS NOT A CASE RESPECTING "TITLE TO LAND."

In a suit upon promissory notes a prayer for the establishment of a special lien on real estate, conveyed as security for the payment of the debt evidenced by the notes, does not render the proceeding a "case respecting title to land"; and in such a suit the city court of Camilla has jurisdiction to declare a special lien on the realty. *Dixon v. Bond*, 18 Ga. App. 45, 88 S. E. 825(1). See, also, *Edenfield v. Bank of Millen*, 7 Ga. App. 645, 7 S. E. 896.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Title to Real Estate.]

3. MORTGAGES  $\S$  415(1)—WANT OF TITLE IN DEFENDANT NOT BAR TO FORECLOSURE OF STATUTORY LIEN.

Want of title in the defendant to the premises on which the lien is claimed, and alleged title in a third person who is no party to the suit, will not bar an action for foreclosing and enforcing the statutory lien. *Thurman v. Willingham*, 18 Ga. App. 395, 89 S. E. 442, and cases there cited.

#### 4. SUFFICIENCY OF AFFIDAVIT OF ILLEGALITY.

For the reasons given in the preceding notes, the trial judge did not err in sustaining the demurrers to the affidavit of illegality and ordering the levy to proceed.

Error from City Court of Camilla; B. T. Burson, Judge.

Proceedings between W. E. Hughes and the Jefferson Standard Life Insurance Company. Judgment for the latter, and the former brings error. Affirmed.

M. A. Warren and A. S. Johnson, both of Camilla, for plaintiff in error.

Bryan & Middlebrooks, of Atlanta, and Peacock & Gardner, of Camilla, for defendant in error.

SMITH, J. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(24 Ga. App. 790)

CORBETT v. ATLANTIC COAST LINE R. CO. (No. 10848.)

(Court of Appeals of Georgia, Division No. 1. March 2, 1920.)

(Syllabus by the Court.)

NEGLIGENCE  $\Rightarrow$  108(1)—PETITION FOR INJURIES TO CHILD, ATTRACTED BY RAILROAD VELOCIPED, HELD NOT SUBJECT TO GENERAL DEMURRER.

Under the petition in this case, the child alleged to have been injured cannot be treated as a trespasser, and the case must turn upon whether the defendant was negligent as alleged in the petition. Questions of negligence are peculiarly for determination by the jury, and the judge erred in dismissing the petition on general demurrer.

Error from City Court of Waycross; J. L. Crawley, Judge.

Action by W. T. Corbett, as next friend, against the Atlantic Coast Line Railroad Company. Petition dismissed on general demurrer, and plaintiff brings error. Reversed.

W. T. Corbett, as next friend, sued for injuries to Homer Corbett, a child 6 years old, caused by his hand being caught in the gearing and machinery of a railroad velocipede. The petition alleged in part:

"The injuries complained of are as follows: The crushing, laceration, and breaking of the right hand of the said Homer Corbett, and the breaking of the bones therein, rendering it necessary for the physician treating him to take eight stitches upon the same, on account of its severe laceration; and although said hand has since healed, yet, by reason of the breaking of the bones as alleged, the use of the right thumb has been permanently lost. Plaintiff shows that the negligence of the defendant, its agents and employes, causing said injury, was

as follows: L. J. James, who was at the time of said injury an agent, servant, and employe of the defendant company, as electric lineman, using a velocipede for traveling over defendant's line of road, did, on the date alleged, come to Manor, Ga., a small town upon defendant's line of road in said county, and after removing said velocipede car from the track of the company he placed the same in an open and exposed place, near the depot in said town, where the public were accustomed to travel and be, and where the small children of the town were at liberty to go, and where they frequently went. Plaintiff shows further that, while the said agent and employe of the defendant company pretended to fasten said velocipede car, knowing its danger if left exposed to children, the same was not fastened, but so fixed and left that it could be easily moved forward and backward for a distance of two feet or more, and, the same being dangerous and attractive to children, it became more dangerous by reason of the fact that it could be thus moved; and this failure on the part of the defendant's servant and employe to securely fasten said car was a further act of negligence. Among other children who were attracted to said velocipede car, the said Homer Corbett was so attracted, and being a child of tender years he was without discretion or sufficient judgment to realize the danger of contact with or the handling of said velocipede car; and after being attracted to said place of danger, and while playing with said car in its dangerous position and condition, so left by the defendant company by and through its agent as aforesaid, he had his right hand caught in the gearing and machinery of said car, and thereby sustained the injuries complained of, by having his hand badly mashed and the bones in it broken."

In an amendment to the petition it was alleged that—

"Said machine, so constructed as above described, was on the principle of and very much like the construction of an ordinary bicycle, or the usual tricycle or velocipede used by children almost universally as playthings, and it was painted in bright red colors, and was not too large or cumbersome to appear to a child to be a plaything, and for these reasons it was attractive to children, and was an instrument and piece of machinery that would naturally and necessarily attract children of immature years and experience."

The specific acts of negligence set out in the amendment were:

"(a) In leaving a dangerous and attractive machine and velocipede car, unfastened, uninclosed and unguarded, in a public place near the heart of a little town, where people and children are wont to visit it, and pass by it, and play around it and near it; (b) in leaving said velocipede car at or near the depot, and upon the ground where it was easily accessible to children or others who might be near such public place; (c) in failing to fasten securely, and so that the same could not be moved backward or forward, the wheels and gearing and machinery on and connected with said velocipede

car, so as to keep the same from being dangerous to the safety of children who might be near by."

The court sustained the demurrer to the petition and dismissed it, and the plaintiff excepted.

Parker & Parker, of Waycross, for plaintiff in error.

Bennet, Twitty & Reese, of Brunswick, and Wilson & Bennett, of Waycross, for defendant in error.

BLOODWORTH, J. (after stating the facts as above). This case is controlled by the case of American Telephone & Telegraph Co. v. Murden, 141 Ga. 208, 80 S. E. 788. In that case a large chest, with a heavy lid which "had a small chain attached to it, so as to prevent it from going much beyond a perpendicular position when opened," was placed by defendants in a cotton seed house belonging to the father of a minor. "The place was a public one and much frequented by children." The petition alleged:

That the lid, when left up, "could, by a very slight pressure upon the chain, be drawn over so as to fall"; that "on the date mentioned the employes of the defendants left the lid of the chest raised, and went away, leaving the door of the house open as an invitation to children to enter, they all knowing that the place was frequented by children, and that the lid thus left was a dangerous trap, likely to attract the notice and invite the investigation of children. The plaintiff, who was a child between two and three years old, seeing the door open and the lid up, was attracted thereby, and, in seeking to investigate it, according to the natural instincts of a child, pushed upon the chain and threw the lid down. His right thumb was caught and mangled, so that it had to be cut off at the joint. He was incapable of exercising care for his own safety, and the occurrence was due entirely to the negligence of the employes of the defendants in leaving the chest lid open and exposed as stated."

A demurrer to the petition was overruled, and the defendant excepted. The Supreme Court said:

"Under the petition and the general demurrer, we must consider the case as one in which neither party was a trespasser, but both were lawfully at the place where the injury occurred. It must therefore turn upon whether, in view of the situation and the known surroundings as alleged, the agents of the defendants were negligent in leaving the chest in such a way as to create a dangerous situation for the plaintiff, and whether the plaintiff was negligent, in view of his age, in 'investigating' the chest or laying his hand upon it. These questions cannot be solved, as matters of law, in favor of the defendants, on general demurrer."

Under the petition in the instant case, we cannot treat the minor as a trespasser, and the case must turn upon whether or not the

defendant was negligent as alleged in the petition. As questions of negligence are peculiarly for determination by the jury, the judge erred in dismissing the petition on general demurrer.

Judgment reversed.

BROYLES, C. J., and LUKE, J., concur.

(25 Ga. App. 73)

BIBB MFG. CO. v. THORNTON.  
(No. 11008.)

(Court of Appeals of Georgia, Division No. 2.  
March 11, 1920.)

(Syllabus by the Court.)

1. MASTER AND SERVANT  $\S$  258(19)—PETITION HELD TO STATE CAUSE OF ACTION FOR INJURY TO A YOUTHFUL EMPLOYÉ PUT TO DANGEROUS WORK WITHOUT INSTRUCTIONS.

The plaintiff's petition as amended shows that she was 15 years old, and that prior to July 24, 1918, she was an employé of the defendant company, engaged in weaving, her duties being to place raw cotton on frames, but that on that date F. W. Morel, the alter ego of the company, put her to work dusting and rubbing off carding machines while they were in operation, a much more dangerous work than the work she had been doing previously, and that on that date, while she was in the performance of her new duties, the door of one of said machines was negligently left open by "each and all of the officers, agents, and employes" of the defendant, and in dusting and rubbing off the machines the piece of waste she was using was caught by "pinnacles" of one of the machines, causing her right hand to be suddenly drawn into the opening, so mangling it as to make necessary the amputation of her hand. It is alleged that the defendant was negligent in putting her to such dangerous work without giving her any instruction, warning, or information, and in not having the place and machinery about which she was put to work reasonably safe, in that the door of one of the machines was left open. The plaintiff further alleged that she was young and inexperienced at such work and unfamiliar with the dangers incident thereto. *Held:*

The petition as amended set forth a cause of action and was not subject to general demurrer.

2. MASTER AND SERVANT  $\S$  286(41)—NEGLECT IN FAILURE TO INSTRUCT YOUNG AND INEXPERIENCED EMPLOYÉ QUESTION FOR JURY.

"There is no presumption of law that a minor over 14 years of age, who applies for a position involving dangerous service, is aware of the dangers and needs no instruction. The obligation to instruct an employé, before putting him to work, as to any of his duties which are dangerous, does not necessarily follow, as matter of law, from his minority when employed, his inexperience, the fact that the service is dangerous, and the fact that his inexperience

is known to the employer. In a case like the present, it is a question for the jury whether the particular service was so dangerous, and its danger so obscure, or whether the information of the employé was so limited or his mind so immature at the time he was injured as to render it needful and proper that instructions should have been given when he was employed or at some time previous to the injury." *Atlanta Railroad Co. v. Smith*, 94 Ga. 107, 20 S. E. 763 (1, 2).

**3. MASTER AND SERVANT**  $\Rightarrow$  101, 102(1), 201 (3), 285(12)—**DUTY TO PROVIDE SAFE PLACE FOR WORK DEFINED.**

"It is the duty of the master to provide for his servant a reasonably safe place in which to work, and to that end he is bound to make reasonable provision for the protection of the servant against dangers to which he is exposed while engaged in the work he is employed to perform. For a failure to discharge such duty the master is liable to the servant for injuries caused thereby, and this is true though the injuries result from the concurrent negligence of the master and a fellow servant of the one injured, where the injury could not have been sustained but for the failure of the master to perform such duty." *Jackson v. Merchants' Trans. Co.*, 118 Ga. 651, 45 S. E. 254. In the instant case it was, under the facts alleged, for the jury to say whether or not the plaintiff would have been injured had the defendant properly instructed and warned her of the dangers incident to her work.

**4. MASTER AND SERVANT**  $\Rightarrow$  285(6), 287(5), 288 (11)—**NEGLIGENCE IN FAILING TO WARN AND PROVIDE REASONABLY SAFE PLACE FOR WORK HELD QUESTIONS FOR JURY.**

Whether the moving of the plaintiff to a more hazardous occupation without giving her instruction, warning, or information as to the dangers incident thereto, and whether the failure to exercise ordinary care and diligence to provide her a reasonably safe place to work and reasonably safe machinery to work with, and whether the negligence of a fellow servant in opening the door of the machine at which she was injured was the proximate cause of her injury, and whether the dangers surrounding her work were so obvious as to preclude a recovery, are, under the circumstances alleged, all questions of fact for determination by a jury. See, in this connection, *White v. Seaboard Air Line Railway*, 14 Ga. App. 139, 80 S. E. 667 (1b).

**5. MASTER AND SERVANT**  $\Rightarrow$  256(2)—**PETITION HELD NOT SUBJECT TO SPECIAL DEMURRER FOR FAILURE TO GIVE NAMES OF NEGLIGENT AGENTS AND EMPLOYÉS.**

The special demurrers to the petition were properly overruled.

(a) A petition against a corporation for personal injuries which sets forth the time when, the place at which, and the circumstances under which the injury occurred, and alleged that it was the result of the negligence of the officers, agents, and employes of the defendant, was not subject to a special demurrer raising the objection that the names of such officers, agents, and employes were not set forth in the petition. See, in this connection, *Pierce v.*

*Seaboard Air Line Railway*, 122 Ga. 664, 50 S. E. 468 (2).

**Error from City Court of Macon; Du Pont Guerry, Judge.**

Action by B. M. Thornton, by next friend, against the Bibb Manufacturing Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Miller & Jones, of Macon, for plaintiff in error.

John R. L. Smith and Grady C. Harris, both of Macon, for defendant in error.

SMITH, J. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(24 Ga. App. 813)

**DAVIS v. TOWN OF GIBSON.** (No. 11102.)

(Court of Appeals of Georgia, Division No. 1. March 2, 1920.)

(Syllabus by the Court.)

**CRIMINAL LAW**  $\Rightarrow$  913(4), 1028, 1129(3) — **MUNICIPAL CORPORATIONS**  $\Rightarrow$  642(3)—**ASSIGNMENT THAT SAID JUDGMENT IS CONTRARY TO LAW PRESENTS NOTHING FOR ADJUDICATION; POINTS NOT RAISED AT THE TRIAL CANNOT BE FIRST RAISED IN PETITION FOR CERTIORARI; EXCESSIVE SENTENCE IS NO REASON FOR SETTING ASIDE VERDICT.**

Plaintiff in error was arraigned before the mayor of the town of Gibson on the charge of violation of an ordinance which prohibited automobiles running in said town at a greater rate of speed than 15 miles per hour. There was a judgment of guilty, and a fine was imposed, and an application for certiorari was made. Upon the hearing the judge ordered "that the certiorari be overruled and the same dismissed." This ruling is before us for review. The petition alleges error as follows: (1) "Because said judgment was not authorized by the evidence"; (2) "because said fine and sentence was excessive"; (3) "because said judgment was contrary to law and unauthorized by the charter of the town of Gibson." The last of these alleged errors we cannot consider, because: (a) An assignment of error that "said judgment is contrary to law" presents no question for adjudication (*Callaway v. Atlanta*, 6 Ga. App. 354 [2], 355 [2], 64 S. E. 1105, and cases cited); (b) that the judgment is "unauthorized by the town of Gibson" is too indefinite, and presents nothing for determination by this court. Civil Code 1910, § 5183, provides that a petition for certiorari shall "plainly and distinctly set forth the errors complained of." This ground does not attempt to point out how or in what way the judgment is "unauthorized by the charter of the town of Gibson." Besides, this point is raised for the first time in the petition for certiorari. In *Masters v. Southern Express Co.*, 23 Ga. App. 642(1), 90 S. E. 144, it is said: "The writ of certiorari lies for the correction of errors committed by the trial court. Accordingly the writ may not for the first time raise

(102 S.E.)

a point which should have been raised before the trial court, and on which that court should have been given an opportunity to rule at the time of trial." The second assignment of error is not such as would authorize the grant of a new trial. "If there has been a lawful verdict of conviction rendered in a criminal case, an error committed by the judge in the imposition of the sentence will be no sufficient reason for setting aside the verdict and trying the accused again upon the question of his guilt or innocence." *Sable v. State*, 22 Ga. App. 769, 97 S. E. 271. See, also, cases cited.

In addition to the above the movant did not comply with all the conditions precedent to the sanction of a certiorari, named in *Gillespie v. Mayor and Council of Macon*, 19 Ga. App. 1, 90 S. E. 970. The court did not err in "overruling and dismissing" the certiorari.

Error from Superior Court, Glascock County; B. F. Walker, Judge.

Joe Davis was convicted before the Mayor of the Town of Gibson for the violation of an automobile speed ordinance, his petition for certiorari was overruled and dismissed, and he brings error. Affirmed.

M. L. Felts, of Warrenton, for plaintiff in error.

E. B. Rogers, of Gibson, for defendant in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(24 Ga. App. 815)

DAVIS v. TOWN OF GIBSON. (No. 11103.)

(Court of Appeals of Georgia, Division No. 1. March 2, 1920.)

(Syllabus by the Court.)

## CONTROLLED CASE.

The issues raised in this case are identical with those in *Davis v. Town of Gibson*, 102 S. E. 466, No. 11102, and are controlled by the rulings in that case.

Error from Superior Court, Glascock County; B. F. Walker, Judge.

Proceeding between Joe Davis and the Town of Gibson. Judgment for the latter, and the former brings error. Affirmed.

M. L. Felts, of Warrenton, for plaintiff in error.

E. B. Rogers, of Gibson, for defendant in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(25 Ga. App. 13)

BENNETT v. HENDRICKS. (No. 10837.)

(Court of Appeals of Georgia, Division No. 1. March 3, 1920.)

(Syllabus by the Court.)

APPEAL AND ERROR  $\Leftrightarrow$  781(6)—WRIT OF ERROR WILL BE DISMISSED WHERE QUESTIONS HAVE BECOME MOOT BY SETTLEMENT.

It appearing from the uncontradicted certificate of the clerk of the city court, in the record, that this case has been settled between the parties, the questions raised in the bill of exceptions are moot, and the writ of error must be dismissed.

Error from City Court of Nashville; J. D. Lovett, Judge.

Proceedings between O. P. Bennett and R. A. Hendricks. Judgment for the latter, and the former brings error. Dismissed.

Ira S. Olary, of Nashville, for plaintiff in error.

W. G. Harrison, of Nashville, for defendant in error.

LUKE, J. Dismissed.

BROYLES, C. J., and BLOODWORTH, J., concur.

$\Leftrightarrow$  For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(25 Ga. App. 80)

**T. J. & W. R. LIGHTFOOT v. KING et al.**  
(No. 11046.)(Court of Appeals of Georgia, Division No. 2.  
March 11, 1920.)*(Syllabus by the Court.)***1. BROKERS** ⚡71 — **CONTRACT TO PURCHASE BUSINESS WITHOUT INDICATING AMOUNT AND TIME OF DEFERRED PAYMENTS GAVE NO RIGHT TO RETAIN EARNST MONEY DEPOSIT.**

P. G. King and Louie Economy brought suit against T. J. and W. R. Lightfoot, a partnership doing business under the name of "Lightfoot Business Opportunities," to recover \$170, alleging in their petition that they had entered into a contract with the defendants, agreeing to purchase through them a certain named soda water business, and deposited with the defendant the above amount as earnest money, which was to be paid the defendants as a commission in the event that through any fault of the plaintiffs the trade should not be completed. It was also agreed that the trade was to be made on terms of "\$2,000 cash and the balance of \$1,300 in monthly payments." The trade was never consummated, because the plaintiffs and the defendants' principal could not agree on the amount to be paid monthly. The defendants refused, on demand, to refund the \$170 deposit, and the plaintiffs brought this suit. *Held:*

Although the amount of the cash payment agreed upon in the contract is a definite, certain amount, the terms of the payment of the balance of the purchase price are indefinite and uncertain, since the writing fails to indicate the amount, number, or time of such deferred payments. For these reasons the writing was not a contract, and imposed no rights or liabilities, and therefore the defendant had no legal right to retain the deposit, either under the terms of the alleged contract or for services leading up to the same.

**2. PRINCIPAL AND AGENT** ⚡92(2), 184(2) — **PAYMENT TO AUTHORIZED AGENT IS PAYMENT TO PRINCIPAL; ACTION LIES AGAINST EITHER PRINCIPAL OR AGENT FOR MONEY WHICH IN EQUITY OUGHT TO BE RETURNED.**

"Payment to an authorized agent is in law payment to his principal, and if the money ought in equity and good conscience to be returned, an action for money had and received may be maintained, at the option of the owner of the money, against either the agent or the principal, or both, if the agent failed to pay over the money to his principal." *Great Southern, etc., Co. v. Guthrie*, 13 Ga. App. 288, 79 S. E. 162 (4). There is therefore no merit in the contention that this suit could not proceed against the defendants, but should have proceeded against their principal. The evidence is clear that the principal never received the money in dispute, and that the defendant did receive it and refused to refund it to the plaintiffs.

**3. OVERRULING OF CERTIORARI.**

The trial judge properly directed a verdict for the plaintiffs, and the judge of the superior court did not err in overruling the certiorari.

**Error from Superior Court, Fulton County; J. T. Pendleton, Judge.**

Action by P. G. King and others against T. J. & W. R. Lightfoot, a partnership doing business under the name of "Lightfoot Business Opportunities." Directed verdict for plaintiffs, certiorari overruled, and defendants bring error. *Affirmed.*

Robt. C. & Philip H. Alston and Blair Foster, all of Atlanta, for plaintiffs in error.

Weltner & Cheatham, of Atlanta, for defendants in error.

SMITH, J. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

---

**BROWN v. FRIEDBERG.** (127 Va. 1)(Supreme Court of Appeals of Virginia.  
March 18, 1920.)**1. SPECIFIC PERFORMANCE** ⚡58 — **CONTRACT CONTAINING PENALTY FOR BREACH MAY BE ENFORCED.**

Specific performance of a contract for the conveyance of land can be decreed, though it provides for a penalty for liquidated damages in case of a breach, if the parties are not given an option to perform or pay the stipulated sum.

**2. SPECIFIC PERFORMANCE** ⚡58 — **CONTRACT HELD NOT TO GIVE OPTION TO PAY PENALTY INSTEAD OF PERFORMANCE.**

Where, after a contract for the sale of land had been embodied in a receipt for the earnest money, a written contract was made containing a clause for the payment of liquidated damages or penalty in case of breach, because the vendor feared the earnest money was not sufficient security, that clause was not intended to give vendor the option to refuse performance on payment of the stipulated sum, and she could be required to convey.

**Appeal from Circuit Court of City of Newport News.**

Suit for specific performance by Morris Friedberg against Lydia Brown. Decree for complainant, and defendant appeals. *Affirmed.*

Lett & Massie, of Newport News, and John N. Sebrell, Jr., of Norfolk, for appellant.

J. Winston Read, of Newport News, for appellee.

PRENTIS, J. Morris Friedberg entered into a written contract with Lydia Brown for the purchase of a lot in Newport News for \$14,150, of which \$100 was paid in cash and the balance of the purchase price was to be paid within 30 days, or as soon as the vendor should furnish "a perfect title and a deed



with covenants of general warranty," and then the contract concluded with this clause:

"Should either of the parties to this agreement fail to comply with the terms thereof, then the party so failing hereby agrees to pay to the other, or one complying with said terms, the sum of \$500 as liquidated damages for the breach of this agreement."

On the same date, and before that contract had been signed, the vendor had executed her receipt for the \$100, in which the same contract was substantially embodied, except that there was no reference to the \$500. The reason for the stipulation as to the \$500 appears to have been that, when the \$100 was paid, the vendor expressed dissatisfaction with the provision allowing the vendee 30 days within which to pay the balance of the purchase money. Thereupon her attorney, for the purpose of reassuring her, suggested and prepared the clause for her benefit, and at the vendee's suggestion it was made reciprocal.

The vendor having refused to convey the property, at the same time expressing her willingness to pay the \$500, the vendee brought his suit for specific performance, and, the court having decreed in his favor, the vendor appealed.

[1] There seems to be little difference between counsel as to the law of the case, for similar questions have frequently arisen. The approved rule is that a court of equity may decree specific performance of a contract for the sale and conveyance of real estate, which also requires the payment of a sum of money, whether by way of penalty or damages, to secure the performance of such contract; but if the contract is in the alternative, and provides for the performance of either one of two things—that is, where the vendor is given the right either to make the conveyance or, to pay a stipulated sum of money in lieu thereof—then equity will not decree specific performance of the contract to convey. 25 R. C. L. § 29, p. 230; Koch v. Streuter, 218 Ill. 546, 75 N. E. 1049, 2 L. R. A. (N. S.) 210, note; Davis v. Isenstein, 257 Ill. 260, 100 N. E. 940, 45 L. R. A. (N. S.) 52, note.

[2] The controversy, then, leads us to the construction of the contract. For the vendor it is claimed that it did give her the option either to convey the property or to pay \$500, and that it does not give the vendee

the unqualified right to demand specific performance of the contract to convey. There is little in the record to sustain her view. In the first place, the receipt which terminated the negotiation shows that there was an absolute and unqualified agreement on her part to sell and convey, and on the vendee's part to purchase and pay for, the property. It was only because she feared that the small cash payment was not sufficient in amount to make it to the interest of the vendee to comply with his contract that the provision as to the \$500 was inserted. This was a mere incident of the transaction, and as it appears to us was not designed either to change the substance of the agreement or to give either of the parties the option of abandoning the contract and liquidating the damages therefor. It was inserted at the suggestion of the vendor herself, in order to strengthen her security and to enforce the vendee's compliance with the contract. There is no statement, either verbally or in writing, in connection with the transaction, from which it may be fairly inferred that either party might at his option repudiate the sale, or that either had the alternative of renouncing the contract upon the payment of the \$500. Most, if not all, of the authorities cited to support the vendor's contention, are based upon the fact that there was some language in the contract clearly indicating the right or option, either to repudiate the contract of sale or to pay the stipulated amount. We find nothing to justify such a construction of this contract. It is unnecessary to determine whether the \$500 should be construed to be liquidated damages or a penalty, for in either event the result is the same. The provision was inserted, not as a substitute for the performance of the contract of purchase and sale, but its purpose was to induce its prompt performance. If the vendee had been willing to accept the \$500 from the vendor in consequence of the breach of her contract to convey, he had the option to do so, and then, of course, could not have enforced specific performance; but, having declined to accept it, he waives his right to the \$500, and is entitled to specific performance. Our view of the case, therefore, accords with that of the trial court.

Affirmed.

BURKS, J., absent.

(127 Va. 84)

**MEANY et al. v. PRIDDY et al.**

(Supreme Court of Appeals of Virginia. March 18, 1920.)

**WILLS §111(1) — MUST BE AUTHENTICATED BY SIGNATURE OF TESTATOR MANIFESTLY INTENDED AS SUCH.**

No mere intention or effort to dispose of property by will, however clearly expressed in writing, is sufficient, unless the purpose is executed in the single manner authorized by Code 1919, § 5229; that is, the writing itself being authenticated by decedent's signature, it not being sufficient to raise a doubt as to whether his name, used in the heading of the will and its body, was intended to authenticate the paper; the statute requiring signature manifestly as such.

Appeal from Chancery Court of Richmond.

Petition for probate of the last will and testament of Virginia Deane Meany, deceased, by Thomas F. Meany and others, contested by Ida Yale Priddy and others. From an order refusing admission to probate, petitioners appeal. Affirmed.

R. H. Talley, of Richmond, for appellants.  
Jas. E. Cannon and S. A. Anderson, both of Richmond, for appellees.

PRENTIS, J. The petitioners complain of an order refusing to admit to probate a paper alleged to be the last will and testament of Virginia Deane Meany, deceased. This paper was wholly written by the deceased. It was entitled "Virginia Deane Meany's Will," but her name does not otherwise appear thereon, except in the second of the six consecutively numbered items, indicating her wish to make numerous devises and bequests, where it is used apparently for the purpose of making it clear that a certain bequest to one of her nephews should be paid at her own death, and not postponed until the death of her husband, to whom she had attempted in the first item to bequeath a large part of her estate for his life.

The document was found after her death in a sealed envelope, upon which she had written, "Mrs. Virginia Deane Meany's Last Will. Jan. 9th—18."

The question presented is not now open in Virginia. Substantially similar questions have been decided adversely to the claim of the petitioners in several cases, and the subject has been so fully and elaborately discussed in previous opinions of this court that we feel that we can add nothing of value thereto.

No mere intention or effort to dispose of property by will, however clearly and definitely expressed in writing is sufficient. Such purpose must be executed in the only manner authorized by the statute; that is, the writing itself must be authenticated by

the signature of the decedent. It is not sufficient to raise a doubt as to whether his name is intended to authenticate the paper which is propounded as a will, for, to use the explicit language of the statute, it must be signed "in such manner as to make it manifest that the name is intended as his signature," and unless so signed it is not valid. Code 1919, § 5229; Waller v. Waller, 1 Grat. (42 Va.) 454, 42 Am. Dec. 564; Ramsey v. Ramsey, 13 Grat. (54 Va.) 670, 70 Am. Dec. 438; Roy v. Roy, 16 Grat. (57 Va.) 418, 84 Am. Dec. 696; McBride v. McBride, 26 Grat. (67 Va.) 476; Perkins v. Jones, 84 Va. 358, 4 S. E. 833, 10 Am. St. Rep. 863; Warwick v. Warwick, 86 Va. 596, 10 S. E. 843, 6 L. R. A. 775; Dinning v. Dinning, 102 Va. 467, 46 S. E. 473; Murgulondo v. Nowland, 115 Va. 160, 78 S. E. 600; Pilcher v. Pilcher, 117 Va. 356, 84 S. E. 667, L. R. A. 1915D, 902.

Affirmed.

(85 W. Va. 691)

**MILLER v. HAWKER. (No. 3843.)**

(Supreme Court of Appeals of West Virginia. March 2, 1920.)

(Syllabus by the Court.)

**1. VENDOR AND PURCHASER §278, 285(3)—HOLDER OF VENDOR'S LIEN MAY ENFORCE IT AS TO ANY PORTION OF LIEN THEN DUE.**

The holder of a vendor's lien may maintain a suit to enforce the lien as to any part of the purchase money then due, and is entitled to a decree for the remainder as it becomes due; and in its decree of sale the court can provide that the deferred payments shall become due at such times as will meet and discharge the undue notes.

**2. VENDOR AND PURCHASER §277—EQUITY HAS INHERENT JURISDICTION TO ENFORCE VENDORS' LIENS.**

Equity has jurisdiction of suits to enforce vendors' liens, independent of statute.

**3. EQUITY §212—CONDITIONS UNDER WHICH SALE TO ENFORCE VENDOR'S LIEN CAN BE HAD STATED.**

Where, in a suit to enforce a vendor's lien, the defendant, holding a deed with covenants of general warranty of title from the vendor, files his answer averring the existence of a prior subsisting lien upon the land, and prays to have the same discharged, and the plaintiff does not controvert such affirmative matter by a special reply in writing, and no proof is taken, it is error to decree a sale.

Appeal from Circuit Court, Marion County.

Suit by J. Clark Miller against Edith R. Hawker to enforce a vendor's lien. Decree for plaintiff, and defendant appeals. Reversed and remanded.

Showalter & Frame, of Fairmont, for appellant.

Neely & Lively, of Fairmont, for appellee.

WILLIAMS, P. From a decree entered on the 18th of February, 1919, in this suit to enforce a vendor's lien, directing the sale of defendant's land, if the lien amounting to \$8,494.67, was not paid within 20 days from that date, defendant has appealed.

[1] The first assignment is that the suit was prematurely brought. Two purchase-money notes, for \$4,000 each, were given, payable in one and two years, respectively, from the date of sale, and a vendor's lien retained in the deed to defendant to secure them. Only one of said notes was due at the time of the institution of this suit. This assignment is without merit. Plaintiff had a right to enforce his lien as to any portion of the money then due. The bill alleges the price at which the lot was sold was \$12,000, \$4,000 of which defendant paid in cash, and for the balance executed her two notes, in equal amounts, payable in one and two years, respectively, to the plaintiff, with interest from the 7th of February, 1917, the date of sale, and that plaintiff executed to defendant a deed for the lot, retaining a lien therein to secure the notes. Plaintiff was not required to wait until all the purchase money was due before suing. He could maintain his suit for the part that was then due, and was entitled to a decree for the remainder as it became due, and the court could decree a sale on such terms as to make the future payment become due to meet the second note when it became due. *Long v. Perine*, 41 W. Va. 314, 23 S. E. 611; *Moore v. Green*, 90 Va. 181, 17 S. E. 872. However, the second note did fall due before the decree was entered, and it included the amount of both notes, which was entirely proper.

The next point is that no statutory authority exists for the suit. This assignment is based upon the fact that, in re-enacting chapter 75 of the Code (secs. 3842-3857), the Legislature omitted section 10 thereof. See chapter 6, Acts 1917 (Code Supp. 1918, c. 75 [secs. 3842, 3851a-3857]). But this point is not urged in brief.

[2] Equity jurisdiction to enforce a vendor's lien exists independent of statute. In fact the vendor's lien is a creature of equity, founded on the supposed intention of the parties, and is in the nature of a trust. *Redford v. Gibson*, 12 Leigh (Va.) 322, 343. When a vendor conveyed his land to the vendee, before all the purchase money was paid, equity regarded the vendee as holding the title in trust to secure his vendor the unpaid purchase money, and such lien was held to be valid against purchasers from the vendee with notice thereof. This secret lien proved to be such a fruitful source of litigation, however, that the Legislature of Virginia abolished it in 1849, by providing that where a vendor makes a conveyance of his title he shall have no lien unless it is expressly reserved on the face of the conveyance. Section 1, c. 75,

Code W. Va. But the jurisdiction to enforce the lien, when so reserved on the face of the conveyance, continued to exist in equity independent of the statute. *Hempfield R. R. Co. v. Thornburg*, 1 W. Va. 261; *Story's Eq. Juris.* (14th Ed.) § 1626. The enforcement of vendors' liens is a matter peculiarly within the cognizance of a court of equity, independent of statute. 39 Cyc. p. 1846, and numerous cases cited in note; *Moore v. Smith*, 26 W. Va. 379.

[3] It is insisted that it was error to decree a sale, without making the holder of a pre-existing lien a party, or without directing the application of a sufficient amount of the purchase money to the discharge of such lien. Defendant answered the bill, setting up the fact that Tusca Morris, special commissioner, who conveyed the lot to plaintiff, retained a vendor's lien to secure the payment of \$3,013.33 of the purchase money, and that it was then past due and unpaid, and the lien to secure the same was a valid and subsisting lien. Notwithstanding this averment in the answer of affirmative matter and a prayer therein for affirmative relief, plaintiff replied generally thereto. The general replication was no denial of that matter, which therefore must be taken as true. Defendant's answer was a statutory cross-bill under section 35, c. 125, of the Code (sec. 4789). She prayed that the amount of the pre-existing lien might be ascertained and provision made for the discharge thereof, before she was required to pay the purchase money. But the court heard the cause on bill, answer, and general replication only, and decreed a sale of her lot, without requiring plaintiff to amend his bill, bringing in the holder of such lien, and without making any provision for discharging the same out of the purchase money. This was error. The answer, being in effect a cross-bill, demanded a special reply in writing. It was specially framed to secure affirmative relief, for it does not traverse or seek to avoid any of the allegations of the bill. It does not deny the existence or the amounts of the debts, or controvert the validity of the lien. Apparently its only purpose was to obtain relief against the prior lien affecting title, and, not being controverted by special replication in writing it must be taken as true. Section 36, c. 125, Code (sec. 4790); *Hogg's Eq. Proced.* § 456. True, we have some cases holding, where a case has been heard upon such cross-bill answer praying for affirmative relief, to which only a general replication has been filed, and full proof has been taken, and the record shows the case to be such as to have made the cross-bill answer unnecessary before the passage of sections 35 and 36 of chapter 125, Code, that the decree will not be set aside simply because of a failure to reply in writing. *Cunningham v. Hedrick*, 23 W. Va. 579; *Paxton v. Paxton*, 38 W. Va. 616, 18 S. E.

765. But here the case was heard simply upon bill and answer and general replication, without any proof whatever being taken. There is nothing to controvert the affirmative averments of the answer, and they must be taken for confessed as against the plaintiff. *Goff v. Price*, 42 W. Va. 385, 26 S. E. 287.

Plaintiff's counsel insist that in a suit to enforce a vendor's lien it is not necessary to make other lienors parties. But without stopping to determine whether or not this rule is of universal application, certain it is that it does not deny to a defendant holding under a deed with covenants of general warranty of title from the plaintiff vendor, as in this case, the right to show the existence of prior liens, and to have the purchase money due from him to plaintiff applied to their discharge. *Harvey v. Ryan*, 59 W. Va. 134, 53 S. E. 7, 7 L. R. A. (N. S.) 445, 115 Am. St. Rep. 897; *Smith v. White*, 71 W. Va. 639, 78 S. E. 378, 48 L. R. A. (N. S.) 623. In such case equity will not relegate the purchaser to his remedy at law on the covenant of warranty, and leave his title affected with the incumbrance, but will see that the liens are discharged out of the purchase money in his hands.

For these reasons the decree is reversed, and the cause remanded for further proceedings.

Reversed and remanded.

(85 W. Va. 663)

**WELLS v. MARION COUNTY COURT.**  
(No. 3853.)

(Supreme Court of Appeals of West Virginia.  
March 2, 1920.)

(Syllabus by the Court.)

**1. HIGHWAYS §194—DUTY TO GUARD DANGEROUS PLACES.**

The law imposes upon a county court or other public authority in maintaining public roads and bridges the duty to so guard all dangerous places by suitable railings or barriers as to render them reasonably safe for travel thereon by day or by night.

**2. HIGHWAYS §213(4)—TEST AS TO CONTRIBUTORY NEGLIGENCE IN USING DANGEROUS HIGHWAY.**

The ordinary test as to whether one using a dangerous or defective road or bridge has been guilty of contributory negligence, precluding recovery, is whether the evidence is so clear that a verdict in his favor should be set aside as unwarranted by the evidence.

Error to Circuit Court, Marion County.

Action by Thomas V. Wells against the County Court of Marion County to recover for personal injuries. Judgment for defend-

ant, a new trial was granted, and defendant brings error. Affirmed.

Walter R. Haggerty, of Fairmont, for plaintiff in error.

Frank M. Powell, of Clarksburg, for defendant in error.

MILLER, J. On the trial of an action for personal injuries, at the conclusion of plaintiff's evidence, the court below, on motion of defendant, struck out the evidence and directed the jury to return a verdict for the defendant, which the jury did; and the court thereupon dismissed the suit and entered judgment of nil capiat for the defendant; but on a subsequent day of the same term, upon motion of plaintiff, the court set aside its previous judgment and the verdict of the jury, and awarded plaintiff a new trial. It is to this judgment awarding a new trial, pronounced February 20, 1919, that the present writ of error relates; and the only question presented for decision is whether, on the pleadings and proofs, the court erred to the prejudice of defendant in the judgment complained of.

The negligence alleged and relied upon as the basis for plaintiff's action was the failure of defendant, as a means of rendering the public road reasonably safe for travel by day and by night, to put up and maintain at or near the wing walls and abutment of a certain bridge across Paw Paw Creek in Marion County either a light or guard rails along said walls, so as to give notice, warning and protection to plaintiff and other travelers on said road of the dangers incident to travel thereon.

The evidence shows that at the time of plaintiff's injuries the road leading to the bridge between the wing walls was filled practically to the top of the walls, and that the distance from the top of the walls to the ground opposite was some ten or twelve feet; that the plaintiff had lived for about two years a short distance from this bridge, on the opposite side from that on which he was injured; that he was injured in the night time as he was returning from Fairmont by the electric railway; that on reaching the station a short distance from the bridge, the night being rainy and very dark, he alighted from the car and struck a match as he approached the bridge to aid him in locating the bridge. Plaintiff swears that he proceeded with due care feeling with his feet the stones in front of the bridge, and mistook the stone on the wing wall for the stone at the mouth of the bridge, stepped off and fell below. He further stated that he had used the bridge a number of times during his residence in its vicinity, but had never observed the absence of guard rails on the wing walls. He admitted that if he had had occasion, he could have seen that no guard rails were maintained on

the wing walls of the bridge, but that he had never had occasion to observe their absence. There was much other evidence of witnesses, among them the contractor who built the walls, as to the dangerous character of the approach to the bridge, due to the lack of guard rails. There is no pretense of any defect in the road or the approach to the bridge other than the absence of guard rails, nor of danger in travel over the same by day or by night except for the absence of those rails.

[1] That it is the duty of the county court or other public authority upon whom the law imposes the obligation to maintain suitable railings or barriers at such places when required for the safety of travelers using the public roads in the ordinary manner with due care on their part, is the established law of this state. *Pollock v. Wheeling Traction Company*, 83 W. Va. 768, 99 S. E. 287; *Whittington v. County Court of Jefferson County*, 79 W. Va. 1, 90 S. E. 821; *Rohrbough v. Barbour County Court*, 39 W. Va. 472, 20 S. E. 565, 45 Am. St. Rep. 925.

We do not understand counsel for defendant to contend that defendant was not negligent in failing to maintain railings or barriers on the walls at the bridge involved here. Their reliance is wholly on the theory of contributory negligence of the plaintiff; and counsel for both parties concur in the view that the action of the trial court in directing a verdict in the first instance was predicated on the theory of such contributory negligence, justifying as a matter of law direction of the verdict. Manifestly, however, on the motion of plaintiff to set aside the verdict and grant him a new trial, the court came to a new conclusion and was of opinion that whether or not plaintiff was guilty of contributory negligence was a question of fact which should have been submitted to the jury; and we are of opinion that in this conclusion the court below was entirely correct and that the judgment awarding plaintiff a new trial should be affirmed.

As already indicated, there was much evidence of the dangerous condition of the approach to the bridge, due to the absence of suitable railings or barriers; and that it was dangerous in its then condition, particularly to travelers at night, can not be doubted.

[2] Whether the plaintiff under the circumstances was guilty of contributory negligence is a question, of course, upon which this court can not now express an opinion. The only question presented to us is whether the plaintiff exercised due care, and that in the light of the facts and circumstances the contributory negligence of the plaintiff was so manifest and flagrant as to present a question of law for the court and not one of fact for the jury. We think it can not be said that the facts, though little controverted, present such a clear case of contributory negligence as to

deprive plaintiff of his right to a verdict by the jury thereon. The test is whether the evidence to establish contributory negligence is so clear that if the verdict of the jury should be in favor of plaintiff the court would be bound on principles of law to set it aside. Our cases hold, as applicable to the case at bar, that a traveler upon a public road or street has the right to presume, in the absence of knowledge to the contrary, that the road or street is in a safe condition for travel by day or by night. *Wilson v. City of Wheeling*, 19 W. Va. 323, 42 Am. Rep. 780; *Yeager v. City of Bluefield*, 40 W. Va. 486, 21 S. E. 752; *Rohrbough v. Barbour County Court*, supra. Generally contributory negligence is defensive matter, and the burden is upon the defendant to show such contributory negligence unless the fact thereof clearly appears from plaintiff's evidence. When the evidence is not so certain that two minds could not reasonably differ thereon, the fact is one for the jury and not for the court. In *Shriver v. County Court of Marion County*, 66 W. Va. 685, 66 S. E. 1062, 26 L. R. A. (N. S.) 377, the danger encountered was a mud hole in a public road, and two of the questions involved were: First, whether plaintiff could have chosen another and safer way; second, whether he was negligent in not getting off his wagon before attempting to drive through the mud hole and thus avoid being injured. We held in that case that where the evidence of contributory negligence was no stronger than in the case at bar, the questions presented were questions of fact for the jury. To the same effect is the holding in *Whittington v. County Court of Jefferson County*, supra. The fact much relied on and urged in support of defendant's theory of contributory negligence is that the plaintiff knew or was bound to know of the absence of the railings or barriers on the walls or abutments of the bridge, because of his use of the bridge and the fact that he had lived in close proximity thereto. As already stated plaintiff swore that he had not observed the absence of such railings or barriers, and it is not unreasonable to suppose that he had not done so. The road was otherwise safe, and few persons traveling thereon in the day time would note the absence of such railings or barriers; but whether so or not, we have laid it down as a general rule of law governing such cases that whether one has exercised such care, or knew or by the exercise of ordinary diligence could have known of such defects, are questions of fact for the jury. *Corbin v. City of Huntington*, 74 W. Va. 479, 82 S. E. 823.

It is unnecessary for us to review the numerous cases found in our books. It is sufficient to say, upon the authority of the cases cited, we think the judgment below is clearly right and ought to be affirmed.

(85 W. Va. 635)

STEWART v. WORKMAN et al. (No. 3919.)

(Supreme Court of Appeals of West Virginia.  
March 2, 1920.)*(Syllabus by the Court.)*

1. DEEDS  $\S$ 168—EQUITY WILL NOT CANCEL DEED FOR BREACH OF CONDITION SUBSEQUENT.

Equity will not entertain a suit by the grantor to cancel his deed granting land upon a condition subsequent, because of a breach thereof.

2. DEEDS  $\S$ 165, 166, 168—BREACH OF CONDITIONS DOES NOT REVEST TITLE IN GRANTOR, BUT SOME POSITIVE ACT IS NECESSARY TO DO SO.

The mere breach of any or all the conditions upon which an estate has been granted does not revert title in the grantor, for he may waive his right to declare a forfeiture. Some positive action is necessary to effect a forfeiture and revert the title.

3. DEEDS  $\S$ 168—EJECTMENT IS GRANTOR'S REMEDY FOR BREACH OF CONDITIONS WHERE HE IS NOT IN POSSESSION.

The grantor's remedy for a breach of conditions, if he is not in possession of the land, is an action of ejectment, by virtue of section 16, chapter 93, of the Code of 1913 (sec. 4142).

4. QUIETING TITLE  $\S$ 12(1), 25(3)—REMEDY PROPER TO CANCEL DEED BY GRANTEE ON CONDITIONS WHICH HAVE BEEN BROKEN, IF PLAINTIFF IS IN POSSESSION.

Where the grantee of land upon a condition has conveyed it to others, and there has been a breach of the condition, the original grantor may maintain a suit in equity to cancel such subsequent conveyances as clouds upon his title, provided he is in possession; and a bill to remove cloud, which fails to allege possession in the plaintiff, is bad on demurrer.

5. DEEDS  $\S$ 144(1)—CONDITIONS MAY BE ANNEXED TO ANY ESTATE.

Conditions may be annexed to estates of any duration, whether for years, for life, or in fee.

6. DEEDS  $\S$ 147—RESERVED RIGHT TO REVOKE VOLUNTARY DEED TO SON IF HE SHOULD BECOME A DRUNKARD, ETC., IS VALID.

A reservation, in a voluntary conveyance of land by a father to his son, of a right to revoke the deed if his son should become a drunkard, or cruel or abusive to his father or mother, or uselessly involved in debt, violates no principle of public policy, and is valid; and on a breach of any of the conditions the grantor may terminate the estate.

7. DEEDS  $\S$ 158—HOLDER OF CONDITIONAL ESTATE CAN PASS NO BETTER TITLE THAN HE HAS.

The holder of a conditional estate can pass no better title to his grantee than he himself had.

Appeal from Circuit Court, Wyoming County.

Bill by C. F. Stewart against Joe Perry Stewart, revived after his death in the name of L. S. Workman, administrator, and others. Decree in favor of defendants, First National Bank and Esther Stewart, and plaintiff appeals. Reversed and remanded, with leave to amend.

Toler & Moran, of Pineville, for appellant.  
F. E. Shannon and E. W. Worrell, both of Pineville, for appellees.

WILLIAMS, P. C. F. Stewart conveyed to his son, Joe Perry Stewart, in consideration of \$1 and love and affection, two tracts of land in Wyoming county, containing 40 acres and 86 acres, respectively. The deed contained the following conditions and reservations, namely:

"And the parties of the first part C. F. Stewart hereby reserves the right to revoke this conveyance during his lifetime for the following reasons, to wit:

"That should the party of the second part become a drunkard or uselessly involved in debt or if he should become cruel or abusive to his mother or father the parties of the first part hereto; and

"The said party of the first part C. F. Stewart, reserves the right to sell all or a part of the mineral underlying said land during his lifetime if he desires to do so; and

"That should said party of the second part die without issue the above conveyance shall revert back to C. F. Stewart, his father, if he is then living and if not then it shall revert back to Fred N. Stewart and K. A. Stewart, his half-brother, if they survive him, the said party of the second part; and

"The said parties of the first part do hereby covenant to and with the said party of the second part that they will warrant generally the title to the property hereby conveyed to the said party of the second part with all its appurtenances thereunto attached."

This deed was dated 28th of May and recorded 3d of June, 1915. Thereafter, on the 28th of December, 1917, Joe Perry Stewart, his wife joining in the deed, conveyed the land to F. E. Shannon, trustee, to secure J. M. Glenn as indorser of certain notes payable at the First National Bank of Pineville, and also to secure the payment of said notes, which were therein described, and aggregated \$725. This trust deed was recorded on the 3d of January, 1918. After executing this trust deed, he and wife executed another deed, conveying the 40-acre tract to Georgia Stewart Glenn, the consideration recited being \$700; and on the 25th of March, 1918, he conveyed both of the aforesaid tracts to George R. Stewart, the deed reciting a cash consideration of \$3,000.

At May rules, 1918, C. F. Stewart filed his bill, praying for a cancellation and annulment of all of the aforesaid deeds, charging that his son had become an habitual and con-

firmed user of intoxicating drinks, had become abusive to both his father and his mother, had been guilty of cruel and inhuman treatment toward them, and had become needlessly and uselessly involved in debt to an amount exceeding \$2,000. Joe Perry Stewart, Esther Stewart, his wife, then an infant, George R. Stewart and Goldie Stewart, his wife, Georgia Stewart Glenn and J. M. Glenn, her husband, the first National Bank of Pineville, F. E. Shannon, trustee, and Wyoming County Bank were made parties defendant. J. M. and Georgia Stewart Glenn demurred to the bill, and the First National Bank of Pineville and F. E. Shannon, trustee, answered, denying the allegations that Joe Perry Stewart had become a drunkard or was guilty of cruelty toward his father and mother, or that he had become needlessly involved in debt. Depositions were taken on behalf of the plaintiff and also on behalf of the defendants who had answered.

Pending the suit the defendant Joe Perry Stewart died, and plaintiff filed a bill of revivor against his widow and L. S. Workman, who was appointed and had qualified as his administrator. His widow, being an infant, answered both the original bill and the bill of revivor by guardian ad litem; the answer to the former being only formal. But her answer to the latter was in the nature of a cross-bill. In it she denies the averment in the bill of revivor that her husband had died without issue, and alleges that she gave birth to a child six days after the death of her husband, which lived about one hour and died; that the condition on which the estate granted to her husband was to revert to the grantor, or in case of his death to her husband's half-brother, never happened; that on the birth of her child alive it inherited the estate from its father, and on its death she, being its only heir at law, became vested with the title to the estate.

The cause was heard on the 14th of June, 1919, on the pleadings and proof taken on behalf of the respective parties, and a final decree was entered, holding that plaintiff was not entitled to relief and dismissing his original bill and bill of revivor. The demurrer was thus in effect overruled.

[1-3] Plaintiff could not maintain his bill to cancel the conveyance to his son because his remedy at law was adequate and because equity will not enforce penalties and forfeitures. For these reasons the case is not reviewable upon its merits.

[6] The grantor had a right to prescribe the conditions on which he could revoke the title to the land. A grantor may reserve in his deed the power to revoke the grant, and such reservation is not contrary to public policy, because the deed itself gives notice to creditors of, and purchasers from, the grantee of the power of revocation, and hence it cannot be attacked on the ground that it en-

ables the parties to defeat the rights of creditors. 2 Devlin on Deeds (3d Ed.) p. 1589; Nichols v. Emery, 109 Cal. 323, 41 Pac. 1089, 50 Am. St. Rep. 43; Ricketts v. Louisville, St. L. & T. R. Co., 91 Ky. 221, 15 S. W. 182, 11 L. R. A. 422, 34 Am. St. Rep. 176; Bramhall v. Ferris, 14 N. Y. 41, 67 Am. Dec. 413.

[7] Conditions may be annexed to estates of every quality or interest, whether fee, freehold, or term of years. 2 Minor's Inst. (2d Ed.) p. 235. The grantee was vested with a conditional estate in fee only, subject to be defeated by the grantor upon the happening of the conditions. The reservations were made for the benefit of the grantor, and he had a right to waive them, but by bringing his suit he has manifested his purpose to insist upon the forfeiture. 2 Warvelle on Vendors, § 810. But he has brought his suit in the wrong forum. If plaintiff was not in possession at the time he brought his suit, his remedy was by an action of ejectment. Section 16, c. 93, Code (sec. 4142); Martin v. Ohio River R. Co., 37 W. Va. 849, 16 S. E. 589, and Guffy v. Hukill, 34 W. Va. 49, 11 S. E. 754, 8 L. R. A. 759, 26 Am. St. Rep. 901. The deed itself provides that the title shall revert to the grantor, if living, in case his son should die without issue, but the birth of his child, alive, within six days after his death, may have been a fulfillment of that condition, a matter we need not determine, as in no event would it prevent the grantor from enforcing the forfeiture for a breach of any of the other conditions, in respect to which there is no express reverter or gift over provided in the deed. A breach of any of those conditions did not, ipso facto, reinvest the estate in the grantor. 1 Warvelle on Vendors, § 446; Kenner v. American Contract Co., 72 Ky. (9 Bush) 202; Guild v. Richards, 82 Mass. (16 Gray) 309; Osgood v. Abbott, 58 Me. 73; Ruch v. Rock Island, 97 U. S. 693, 24 L. Ed. 1101. At common law his remedy was by re-entry, whereupon he became reinvested with his original estate. 1 Warvelle on Vendors, § 446; and 2 Minor's Inst. p. 237.

[4, 5] It necessarily follows from the nature of the estate that the grantee could pass no better title to another than he himself had, and if plaintiff was in possession when he filed his bill he would be entitled to maintain his suit for the purpose of removing the three subsequent deeds made by his son, as constituting clouds upon his title. But the bill does not allege that he is in possession, and this averment is essential to the maintenance of such a suit. Grass v. Beard, 73 W. Va. 309, 80 S. E. 835; Custer v. Hall, 71 W. Va. 119, 76 S. E. 183; Igiano L'd & Mining Co. v. Jones, 65 W. Va. 59, 64 S. E. 640; Moore v. McNutt, 41 W. Va. 695, 24 S. E. 682. The demurrer to the bill should therefore and for this reason, but not for the reasons assigned in the demurrer, have been sus-

tained and plaintiff given leave to amend, and if he did not amend, his bill should have been dismissed without prejudice to his right to maintain an action at law to recover the possession.

The decree will therefore be reversed, and the cause remanded, with leave to plaintiff to amend his bill.

Reversed and remanded.

(85 W. Va. 658)

**SCHUSTER v. NORFOLK & W. RY. CO.**  
(No. 3905.)

(Supreme Court of Appeals of West Virginia.  
March 2, 1920.)

*(Syllabus by the Court.)*

**1. CARRIERS ⇨233—RELATION OF CARRIER AND PASSENGER IS PERSONAL IN ITS NATURE.**

The relation of carrier and passenger is personal in its nature, and neither can with impunity disregard the reciprocal rights and obligations of the other.

**2. CARRIERS ⇨391—PERSONAL EFFECTS MAY BE CARRIED AS BAGGAGE.**

The passenger may, as an incident of the contract for transportation, carry with him as baggage such personal effects as are reasonably necessary for the convenience and comfort of one in his position in life and consistent with the purpose of the journey.

**3. CARRIERS ⇨391—BAGGAGE DOES NOT INCLUDE THINGS CARRIED BY PASSENGER AS FAVOR TO ANOTHER.**

But the baggage service afforded by the carrier is only for the convenience of the passenger, and, except in rare cases, is limited to his own personal effects, and does not include those carried by him as a favor to another.

**4. CARRIERS ⇨398—OWNER OF PERSONAL EFFECTS CARRIED BY A PASSENGER CANNOT RECOVER FOR LOSS OR INJURY WITHOUT PROOF OF CARRIER'S GROSS NEGLIGENCE OR WILLFUL MISCONDUCT.**

Where a passenger, without disclosing to the carrier the true ownership thereof, carries as her own baggage the personal effects of another, a relative, but not a member of her own immediate family, and who does not accompany her on the journey, the carrier is responsible therefor only in the capacity of gratuitous bailee, and the owner cannot recover for loss or injury thereto, in the absence of proof that the carrier has been guilty of gross negligence or willful misconduct.

**5. CARRIERS ⇨400—TRUNK BEARING NAME OF OWNER OF EFFECTS CARRIED BY A PASSENGER IS NOT NOTICE THAT CONTENTS ARE NOT THOSE OF PASSENGER.**

The mere presence of the name of the owner upon the trunk is not notice to the carrier that its contents are not those of the passenger.

Error to Circuit Court, McDowell County.

Action by W. J. Schuster against the Norfolk & Western Railway Company. Judgment for defendant on appeal from a decision of a justice, and plaintiff brings error. Affirmed.

Samuel Solins, of Welch, for plaintiff in error.

F. M. Rivinus, of Philadelphia, Pa., and Sale & Tucker, of Welch, for defendant in error.

LYNCH, J. Plaintiff sued before a justice to recover the value of a trunk and its contents delivered for carriage as baggage from Anawalt to Gary, two stations on the line of defendant's railroad in McDowell county about 15 miles apart. At neither station does defendant maintain a depot building or employ a baggage agent. Denied the right to have a judgment for the property or its value by the circuit court of that county, sitting in lieu of a jury with the consent of the parties, upon appeal from the decision of the justice, plaintiff prosecutes this writ here. The facts proved and not controverted, defendant offering no testimony, are few, and require for decision only the application of what seem to be well-established legal principles.

Until about the middle of November, 1917, and for some time prior thereto, plaintiff and his wife and family resided with Mrs. Debo, their aunt, at Anawalt, when they decided to move, and did move, to Gary, and with them took all their household effects except the trunk and what it contained. These they left in the home of Mrs. Debo, who later in November also went to Gary as a passenger on defendant's train, and caused the trunk and its contents to be delivered to defendant at Anawalt for carriage to Gary, apparently as her own personal baggage, under or as an incident of the contract for her personal transportation between the two stations, without disclosing the real ownership of the property or the character of the contents of the trunk, consisting of articles usually accepted by public carriers as the baggage of a passenger. Attached to the trunk was a tag on which was written the name of the plaintiff and the destination of the trunk at the time of its delivery to defendant at Anawalt. After detailing the facts recited, Mrs. Debo says she informed the conductor in charge of the train of the destination of the trunk, and requested him to have it removed from the train at Gary, who, she says, assured her the request would be complied with, and later told her he had so directed the baggagemaster. These conversations occurred between the two stations. The instructions, if given, were disregarded by defendant's agents, and though plaintiff was at Gary to meet Mrs. Debo and receive the



trunk, it was not put off at that point, and never was delivered to him.

Apparently Mrs. Debo claimed no part of the property, and had no interest in it other than that prompted by relationship of the parties and her desire to serve her kindred. As plaintiff alone has sued, he naturally may be presumed to be the owner of the property, though the schedule of the items and estimated single and total valuation disclose, besides cutlery and tableware, the wearing apparel of his wife and their minor children, none of whom were passengers on the train that carried Mrs. Debo and the trunk to their intended destination.

[2, 3] As a general rule a common carrier assumes, as an incident of its contract for the personal carriage of a passenger, no liability for his baggage other than such as he takes with him for his own personal use while on the journey undertaken by him, that is, from the time of his departure until his return, and therefore not for the property of others which he has included with his own personal baggage. As to such other property the carrier is liable only as gratuitous bailee. 4 Michie, Carriers, §§ 3431, 3432; 2 Moore on Carriers (2d Ed.) p. 1297; 3 Hutchinson, Carriers (3d Ed.) § 1276. As said by Hutchinson in the section cited:

"Since the carriage of baggage is incidental to the contract for the transportation of the passenger, it follows that if the property accepted by the carrier as the personal baggage of the passenger does not belong to him, but to another with whom no contract for transportation has been made, the owner, in the absence of proof that the carrier has been guilty of negligence, cannot recover for its loss or injury. And although property not owned by the passenger, but accepted by the carrier as his personal baggage, has been lost or injured through some negligent act on the part of the carrier, if such property did not constitute, or was not properly a part of the personal baggage of the passenger, the carrier would not be liable to the owner, since he could not be charged with liability for property which, had he been informed of its true ownership, he would have had the right to refuse."

[1] The rule thus stated is sustained by the overwhelming weight of authority, and rests upon principles of justice and fair dealing. The relation of carrier and passenger is a personal one, with reciprocal rights and duties. It includes provision for the transportation of the latter, with such personal effects as are reasonably necessary for the convenience and comfort of one in his position in life and consistent with the purpose which prompts the journey. In no sense is it part of the agreement upon which the relation is based that the carrier will permit the passenger to carry effects not his own for the convenience of another. Such conduct is a fraud upon the carrier. The service of baggage carriage afforded by the latter is

only for the convenience of the passenger, and, except in rare cases, is limited to his own personal effects, and does not include those carried by him as a favor for another. An exception to the rule is recognized which permits members of the same family, traveling together, to carry their effects in the same trunk, or one to carry in his trunk the effects of the others. In such cases it is generally held each may recover for any loss to his baggage. 10 C. J. 1189. The closeness of the family relation and the community of property interests usually incident thereto afford ample justification for the exception. Here, however, though plaintiff and his family had resided at the home of their aunt for a short while, there was no such common family relationship as justifies a departure from the rule itself. Nor did they make the trip at the same time. Mrs. Debo followed plaintiff and his family at an interval of nearly two weeks. Whether it would have made any substantial difference if all had made the journey together we do not now decide, as that question is not presented. Nor do we decide whether, if Mrs. Debo herself had been the owner of the trunk and of its contents, they were all of such character as properly to constitute baggage for the loss of which she could recover from defendant.

[5] If she had informed the agents of defendant with regard to the ownership of the effects contained in the trunk, and the latter had accepted it with such information, a different rule might have applied. It is because of such knowledge on the part of the carrier that a salesman's samples, though the property of another, if accepted by the carrier with information respecting its character, may be carried as personal baggage. 10 C. J. 1194. But that information was not given here. The mere presence of plaintiff's name upon the trunk did not constitute notice to defendant that its contents were not owned by the passenger. The owner of a trunk may frequently permit it to be used by others.

[4] From what has been said it follows that, in so far as Mrs. Debo was carrying as baggage the effects of another, without disclosing such fact to the carrier, or without its knowledge derived from other sources, the latter stood in relation to such property only in the capacity of gratuitous bailee, and as such is liable only for injury or loss due to its gross negligence or willful misconduct. Lusk v. Bloch (Okla.) 168 Pac. 430, L. R. A. 1918C, 109; Brick v. Atlantic Coast Line R. Co., 145 N. C. 208, 58 S. E. 1073, 122 Am. St. Rep. 440, 13 Ann. Cas. 328; Becker v. Great Eastern R. Co., L. R. 5 Q. B. 241; Dunlap v. International Steamboat Co., 98 Mass. 371; Pennsylvania R. Co. v. Knight, 58 N. J. Law, 287, 33 Atl. 845; Metz v. California Southern Ry. Co., 85 Cal. 329, 24 Pac. 610,

9 L. R. A. 481, 20 Am. St. Rep. 228; 10 C. J. 1189; 5 R. C. L. p. 178; and texts cited above. There is no proof tending to show the existence of either of these elements, and they cannot be presumed to exist from the mere fact of the loss or injury. 3 Am. & Eng. Enc. Law (2d Ed.) p. 542. Hence there is no basis for a recovery by plaintiff. Judgment affirmed.

(85 W. Va. 640)

**HITE v. DONNALLY et al. (No. 3809.)**

(Supreme Court of Appeals of West Virginia.  
March 2, 1920.)

*(Syllabus by the Court.)*

**1. MORTGAGES ⇨386—EXISTENCE OF PRIOR LIENS DOES NOT ENTITLE MORTGAGEE TO RESORT TO EQUITY TO ENFORCE HIS LIEN.**

The existence of prior liens upon a piece of real estate will not of itself justify a party secured by a deed of trust thereon in resorting to a court of equity for the enforcement of his lien. In order to justify such resort on account of such prior liens, it must be shown that there is some controversy as to their validity, or uncertainty or dispute as to the amount thereof.

**2. MORTGAGES ⇨386—MORTGAGEE CANNOT ENFORCE HIS LIEN IN EQUITY WHERE PRIOR LIENS ARE CERTAIN AND UNDISPUTED.**

One secured by a deed of trust conveying real estate to a trustee may not resort to a court of equity for the enforcement of his lien because of the existence of a prior deed of trust upon such real estate, where the amount secured by such prior deed of trust is certain, definite, and undisputed, and there is no controversy as to the validity thereof.

**3. MORTGAGES ⇨386—MORTGAGEE CANNOT ENFORCE LIEN IN EQUITY WHERE PRIOR LIENS HAVE BEEN DISCHARGED.**

One secured by a deed of trust conveying property to a trustee may not resort to a court of equity for the enforcement of his lien because of the existence of a prior deed of trust upon such real estate, which has been fully paid off and discharged, and where there is no controversy as to this fact.

Appeal from Circuit Court, Marion County.

Consolidated action by John Y. Hite against Mary J. Donnally and others. Judgment for plaintiff on demurrer, and defendants appeal. Reversed and remanded.

Showalter & Frame and S. H. Butcher, all of Fairmont, for appellants.

Trevy Nutter and W. S. Meredith, both of Fairmont, for appellee.

RITZ, J. This appeal is prosecuted to review a decree of the circuit court of Marion county in the consolidated chancery causes of John Y. Hite v. Mary J. Donnally et al. and the said John Y. Hite v. Alfred H. Don-

ally et al., providing for the sale of the real estate of the defendants Donnally.

The bill in the case of Mary J. Donnally et al. alleges that the defendant Mary J. Donnally, her husband uniting therein, on the 9th day of September, 1911, executed a deed of trust to W. Scott Meredith, trustee, granting and conveying certain real estate, referred to and described in the bill, in trust to secure the payment of a certain promissory note, bearing even date with the said deed of trust, executed to the said John Y. Hite by the said Alfred H. Donnally and Mary J. Donnally for the sum of \$7,000, and due at five years from its date, with interest thereon, payable semiannually; that prior to the execution of this deed of trust the said Mary J. Donnally had executed a deed of trust conveying said parcel of land to Michael Powell, trustee, to secure to Josephine A. Skinner a debt of \$1,500, which debt is still a subsisting lien upon said real estate; that subsequent to the execution of the deed of trust to secure the plaintiff, to wit, on the 11th day of November, 1912, said Mary J. Donnally conveyed said real estate to John G. Pritchard, trustee, to secure to Charles R. Donnally a debt of \$850. The bill then alleges that it is necessary to have the intervention of a court of equity in order to fairly administer the trust, because of the prior lien upon the property in favor of Josephine A. Skinner and the subsequent lien thereon in favor of Charles R. Donnally, and avers that the land will not bring an adequate price unless the amounts of these liens are ascertained and decreed in advance of a sale, and prays that the cause be referred to a commissioner for the purpose of ascertaining the amounts of said liens, and that when such amounts are ascertained a sale be ordered in satisfaction thereof. The demurrer of the defendant Mary J. Donnally to this bill was overruled.

The bill in the second case, which is against Alfred H. Donnally et al., avers that the said Alfred H. Donnally, his wife uniting therein, on the 9th of September, 1911, conveyed a certain parcel of land owned by him, and which lies adjacent to the parcel of land owned by his wife, which was conveyed in the deed of trust referred to above, to the defendant W. S. Meredith, trustee, to secure unto the plaintiff, John Y. Hite, the sum of \$7,000, which is the same \$7,000 secured by the deed of trust executed by Mary J. Donnally referred to above; that prior to the execution of this deed of trust, to wit, on the 8th of January, 1907, the said Alfred H. Donnally had conveyed this tract of land to one William B. Cornwell, trustee, to indemnify and save harmless certain parties as indorsers on nine certain notes; that said notes have been fully paid off and discharged, and that said lien has been released by all

of the beneficiaries named in said deed of trust except William H. Nicholson, Jr., who had departed this life before the payment of said notes; that the said Alfred H. Donnally also, on the 11th of November, 1912, conveyed said piece of real estate to John G. Pritchard, trustee, to secure Charles R. Donnally the sum of \$850, which is the same \$850 secured by the deed of trust executed by Mary J. Donnally above referred to. The bill then recites that certain of the defendants recovered judgments against the said Alfred H. Donnally, one of which is a lien upon said real estate superior in dignity to the lien of the deed of trust given to secure the plaintiff, and the remainder thereof inferior to that lien. It is averred that because of these liens upon the property a court of equity should ascertain the exact amounts before allowing the property to be sold, and for that purpose the suit is brought. The demurrer of Alfred H. Donnally to this bill was overruled. The causes were then consolidated and referred to a commissioner for the purpose of ascertaining the amounts of the liens. The commissioner made a report, and upon the incoming of this report a decree was entered, directing a sale of said lands in satisfaction of the liens against the same, from which decree this appeal is prosecuted.

The ground of the demurrers is that there is no jurisdiction in equity to entertain these bills, that resort to a court of equity was without any reason, and that the plaintiff had a full and complete remedy by advertising the sale of the property under the deeds of trust. In the case against Mary J. Donnally it appears that there is a lien against her property prior to the lien of the plaintiff, and one subsequent thereto, both secured by deeds of trust, the amounts thereof being certain and definite, and there is no allegation in the bill that there is any controversy over the amount of either of these debts; neither is there any contention that there is any uncertainty or controversy as to the amount of the debt of the plaintiff. The contention is made by the plaintiff that he has a right to go into equity, because the legal title to this property was outstanding in Michael Powell, trustee in the deed of trust to secure Josephine A. Skinner the sum of \$1,500, and this is the only excuse given for resorting to a court of equity; it being insisted that, where the trustee in a deed of trust does not have full legal title vested in him, he may resort to a court of equity for the enforcement of the lien.

In the suit against Alfred H. Donnally it is averred that there is a deed of trust subsequent to the deed of trust given to secure the plaintiff, and a number of judgments creating subsequent liens against this real estate, and it is likewise shown that there is one judgment upon the real estate superior

in dignity to the plaintiff's deed of trust, and a deed of trust prior to the plaintiff's deed of trust, which it is alleged has been entirely paid off and discharged, and it is not shown that any contention is made by the beneficiaries therein that this is not the case, nor is there any contention as to the amounts or validity of the judgments, or as to the order of their priority. Resort to a court of equity in this case is attempted to be justified upon the ground that the prior deed of trust, at least as to one of the parties whom it secures, constitutes a cloud upon the title of Alfred H. Donnally, and that resort to a court of equity may be had to remove this cloud in advance of a sale.

[1, 2] It is quite well settled in this jurisdiction that a court of equity will not entertain a bill for the purpose of enforcing the lien of a deed of trust simply because there may be prior or subsequent liens upon the property. *George, Trustee, v. Zinn*, 57 W. Va. 15, 49 S. E. 904, 110 Am. St. Rep. 721; *Ware, Trustee, v. Hewett*, 63 W. Va. 47, 59 S. E. 756, and cases there cited. So far as the subsequent liens are concerned they in no wise affect the interest conveyed to the trustee. A purchaser under the deed of trust would take the property entirely free of any subsequent incumbrance thereon, so that it cannot be said that the price which the property would bring at a sale under the deed of trust would be in any wise affected by the subsequent incumbrances, whether the amounts thereof are certain or uncertain; but where there are liens prior to the deed of trust sought to be enforced, of course, the amount which the property would bring at a sale is bound to be affected by these liens. If their amount is certain and definite, there is no necessity for resort to a court of equity to determine that amount. A purchaser in bidding for the property will take that into consideration in making his bid. He knows that what he buys at a trustee's sale is what the trustee has, and if there is a prior deed of trust, or prior lien, he buys subject to that prior deed of trust or that prior lien, and pays for just what the trustee conveys to him. Of course, if the amount of these prior liens is in dispute; if the debtor claims that they have been paid off, or partially paid off; and the creditor claims that no part thereof has been paid, then it might be said that resort should be had to a court of equity to determine this dispute before a sale of the property, provided always that such dispute is bona fide and there is a basis for it. Likewise, if the debt secured by the deed of trust which it is desired to enforce is uncertain in its amount, or is disputed, it should be determined before the sale is proceeded with. In this case there is no uncertainty as to the amount of any of the liens. There is no dispute or controversy as to the amount of any of them, and no reason is perceived for re-

sort to a court of equity because of the existence of the prior or subsequent liens. Courts exist for the purpose of settling controversies between the parties, and not for the purpose of acting as their business agents, and unless there is a real controversy to be settled, ordinarily there is no jurisdiction.

[3] It is insisted, however, that the legal title to the property of Mrs. Donnally is outstanding in the trustee in the prior deed of trust, and decisions are cited which it is contended justify the resort to equity when this is the case. A review of those decisions show that they contemplate an outstanding adverse title, and not title in the trustee in a deed of trust creating a lien for a definite and fixed sum. In the case of *George, Trustee, v. Zinn*, supra, this question of the right of a trustee, or a creditor secured by a deed of trust, to resort to a court of equity for the execution of such lien is fully discussed, and after the full, complete, and exhaustive presentation of the law upon the question contained in that opinion, it is hardly necessary to do more than refer thereto as the principles there announced are controlling in this case. The cloud which it is claimed exists upon the title of Alfred H. Donnally because of the unreleased deed of trust, which it is alleged has been paid off, is not such as justifies resort to a court of equity for the enforcement of the trust deed lien. There is no dispute that it is paid off; there is no controversy for the court to settle. Donnally himself could not resort to a court of equity to remove this cloud. He would be required, if he wanted the lien released, to make a motion upon notice, as required by law, and can it be said that a man's creditors can have a remedy to remove a cloud which he himself does not have?

There is no basis in either of these bills for resort to a court of equity for the enforcement of the liens. The demurrers thereto should therefore have been sustained, and we will reverse the decree of the circuit court entered in the consolidated causes, sustain the respective demurrers to the bills, and remand the causes to the circuit court, with leave to the plaintiff to amend his bills, or to dismiss the same without prejudice.

(35 W. Va. 679)

MAYNARD v. BAILEY. (No. 3806.)

(Supreme Court of Appeals of West Virginia.  
March 2, 1920.)

(Syllabus by the Court.)

1. EVIDENCE §110—MISCONDUCT OF PARTY INTENDED TO PREVENT FAIR TRIAL ADMISSIBLE TO PROVE FALSITY OF HIS CLAIM OR DEFENSE.

Evidence of misconduct of a party to an action, having for its motive or purpose preven-

tion of a fair trial, by intimidation or corruption of a witness or otherwise, is admissible against him, on the ground of its tendency to prove the falsity or fraudulent nature of his claim or defense.

2. EVIDENCE §110, 219(2)—WITNESSES §340—PARTY'S LETTER OFFERING MONEY FOR DECLINING TO TESTIFY WAS ADMISSIBLE IN EVIDENCE AGAINST WRITER.

A letter written to a witness, by a party to an action, imploring him not to testify in the case, denying his knowledge of any material fact, offering to pay him money, if needed, after a trial unattended by him, and admonishing him of danger of arrest on a criminal charge, if he should come into the state, is admissible evidence against the writer.

3. EVIDENCE §378(1, 4) — CIRCUMSTANTIAL EVIDENCE ADMISSIBLE TO PROVE GENUINENESS OF LETTER, ALTHOUGH ORDINARILY PROVED BY HANDWRITING.

Though genuineness of a letter, a fact essential to its admission in evidence, is ordinarily proved by testimony to the handwriting of its author, circumstantial evidence is admissible for the purpose.

4. EVIDENCE §378(1)—CIRCUMSTANCES SUFFICIENT TO ESTABLISH AUTHENTICITY OR ORIGIN OF TYPEWRITTEN LETTER, SIGNED ON TYPEWRITER, STATED.

The authenticity or origin of a typewritten letter, signed in typewriting, may be established or shown by the character of the paper and envelope used, the place and circumstances of its mailing, the postmarks, the direction for its return in case of nondelivery, and manifest probability that the subject-matter of its contents was known only to the apparent writer and the person to whom it was written and mailed.

Error to Circuit Court, Mingo County.

Action by K. A. Maynard against E. L. Bailey. Judgment for plaintiff, and defendant brings error. Reversed, verdict set aside, and cause remanded for a new trial.

S. D. Stokes, of Williamson, for plaintiff in error.

Whitt & Shannon, of Williamson, for defendant in error.

POFFENBARGER, J. Plaintiff sold and delivered to the defendant a concrete mixer. Upon failure of the defendant to pay for it, this suit was instituted to recover the purchase price. The latter insists that the mixer was sold to him, under a guaranty that it would mix 50 cubic yards of concrete per day; that, after a thorough and fair trial, it was found that it would not mix nearly that quantity; that he thereupon notified the plaintiff he would not accept it, and advised him that he would make such disposition of it as plaintiff desired. Declining to have anything to do with it, the plaintiff brought this suit to recover the purchase money. The

sole issue in the case is whether there was such a guaranty.

Plaintiff's theory is that the defendant desired to purchase the machine, which was a secondhand one; that he went with him to its location; that after having examined it, they agreed upon the price; and that he then shipped it to the defendant, in accordance with their agreement. On the other hand, the defendant says that, at the time of the purchase, he asked the plaintiff about the capacity of the machine, explaining to him that he wanted one that would mix a considerable amount of concrete, as he had a large job on which he intended to use it; that the plaintiff informed him it was a machine of 50 cubic yards' capacity per day; that he thereupon advised the plaintiff that, if he would guarantee it to mix that much concrete per day, he would take it; and that the plaintiff did so guarantee it and ship it. A witness by the name of Blackburn was introduced, who testified that he was present during at least a part of the negotiations between the parties, and in his testimony he fully corroborated the defendant. With his evidence there was offered a letter, purporting to have been written by the plaintiff to the witness, while the litigation was pending, which the court refused to admit, and this action of the court is the basis of the only assignment of error.

This witness swore the letter was received by him in the ordinary course of mail, a few days after its date, in an envelope addressed to him at his post office and postmarked at Williamson, W. Va., the post office of the plaintiff, with a notation in the upper left-hand corner, directing its return after five days to the plaintiff contractor and builder, at Williamson, W. Va. The letter itself was written upon a letter head purporting to be that of the plaintiff, bearing his post office box number, and designating the business in which he was engaged. The entire letter, including the signature, was written with a typewriter. It exhorted the witness to lead a better life, and advised him that the writer was not at all mad at him, but had forgiven him for all past offenses. It also reminded him that he had promised the writer not to appear against him as a witness in this case, and informed him that, as he lived out of the state, he could not be compelled to testify. It told him that Bailey, the defendant had caused his discharge, and expressed willingness to pay the witness \$10, after the trial, if he did not appear in the case and needed the money; but he was advised to tell the truth if he should appear. It further reminded him that he knew nothing about the case, he not having heard the contract between the parties, and, in the concluding paragraph, it suggested the witness' continued absence from the state, on account of a reputed indictment against him

in the federal court at Huntington. While it does not in words say the witness would be adverse to the plaintiff, in case he should testify, its plain purpose was to prevent his attendance.

The attempt to justify the action of the court in its rejection of the letter is based upon two grounds: (1) Lack of any statement or admission therein, material to the issue involved, if it was written by the plaintiff; and (2) insufficiency of the evidence of its genuineness to justify its admission.

[1, 2] If this document is a product of the plaintiff, its materiality and relevancy are obvious. It is for the jury to determine whether it was written and mailed for immunity from damaging testimony, spiritual and civic edification and betterment of the witness, or protection of the administration of justice from impurity and contamination. If the jury should find the motive was such immunity, the plaintiff's conduct was a circumstance in the nature of an admission, because it was an effort to prevent a fair trial of a vital issue, by improper, reprehensible, and perhaps criminal means. It imports knowledge on his part of disinterested evidence condemnatory of his own testimony and corroborative of that of his adversary. If written by him, the letter reflects upon his credibility, and might have resolved the sharp conflict in the evidence against him. Subornation of a witness by a party to a suit, or his attempt to do so, is evidence of an admission of the falsity or fraudulent nature of his claim. *Egan v. Bowker*, 5 Allen (Mass.) 449; *McHugh v. McHugh*, 186 Pa. 197, 40 Atl. 410, 41 L. R. A. 805, 65 Am. St. Rep. 849; *U. S. Brewing Co. v. Ruddy*, 303 Ill. 306, 67 N. E. 799. Fabrication or suppression of evidence, by a party to an action, is admissible in evidence against him, on the same principle. *State v. Hogan*, 67 Conn. 581, 35 Atl. 508; *People v. Hane*, 108 Cal. 597, 41 Pac. 697. For both propositions, see *Jones, Ev. § 287*, citing many cases illustrating the principle.

[3, 4] Of course, authentication of a letter is always a prerequisite to its admission over a sufficient objection, but its genuineness may be shown in more than one way. Ordinarily, it is done by proof of the handwriting, but, when neither the letter nor the signature is in the handwriting of the author, it may be shown in other ways. If this were not true, there might be a failure of justice in every instance in which a controlling document has not been written or signed by the author thereof in his own handwriting, and in every instance in which it is impossible to produce a witness to the handwriting. Men might escape their obligations by mere disguises of their handwriting. Like any other material fact, the authenticity or genuineness of a letter may be established by circumstantial evidence. If its tenor, sub-

ject-matter, and the parties between whom it purports to have passed make it fairly fit into an admitted or proved course of correspondence and constitute an evident connecting link or part thereof, these circumstances justify its admission. *Loverin & Browne Co. v. Bumgarner*, 59 W. Va. 46, 52 S. E. 1000; *Capital City Supply Co. v. Beury*, 69 W. Va. 612, 72 S. E. 657; *Fayette Liquor Co. v. Jones*, 75 W. Va. 119, 83 S. E. 726; *Ramsey v. Reid*, 83 W. Va. 197, 98 S. E. 155; *Jones*, Ev. § 583.

If the signature of a letter is typewritten or stamped, the evidence afforded by its contents justifies its admission. *Wigmore*, Ev. § 2149. A letter, written for an illiterate person by another, is admissible, if it appears, from its contents, to have been written by one having knowledge reasonably attributable only to the parties between whom it passed, or at his dictation. *Singleton v. Bremer*, 1 Harp. (S. C.) 201; 10 R. C. L. Tit. Ev. § 353. Proof of the habit or custom of one from whom a letter, bearing a rubber stamp signature, purports to have come, to dictate his correspondence to an amanuensis, and have her affix his name to his letters by means of such a stamp, justifies its admission. *Deep River National Bank's Appeal*, 73 Conn. 341, 47 Atl. 675. A letter written upon a letter head of the party from whom it purports to have emanated, and bearing the same signature as that found upon other letters received from him, is sufficiently authenticated to go to the jury; the circumstances affording prima facie evidence of its genuineness. *International Harvester Co. v. Campbell*, 43 Tex. Civ. App. 421, 96 S. W. 93.

The character of the letter in question, as shown in the statement of the case, leaves no doubt of the sufficiency of the paper on which it was written, its direction, the places of its deposit in the mail and receipt therefrom, its purported authorship, and its contents, to carry the questions of its emanation and actual authorship to the jury for determination.

For the error in its rejection, the judgment will be reversed, the verdict set aside, and the case remanded for a new trial.

(85 W. Va. 673)

SNIDER v. ROBINSON et al. (No. 3954.)

(Supreme Court of Appeals of West Virginia.  
March 2, 1920.)

(Syllabus by the Court.)

1. WILLS § 684(6)—BILL BY TESTAMENTARY BENEFICIARY FOR GREATER ALLOWANCE OUT OF CORPUS CONSTRUED TO STATE A CAUSE OF ACTION.

A bill by a testamentary beneficiary of a trust for her maintenance and support for her life out of rents of real estate and interest on

invested funds, with a provision for resort to the corpus of the real estate and funds for such maintenance and support, in case of insufficiency of the rents and interest to provide for them, showing very small annual receipts from the executor, alleging utter insufficiency thereof and praying for a decree for larger allowances, states a good cause of action.

2. TRUSTS § 371(5)—ON BILL FOR MAINTENANCE BY TESTAMENTARY BENEFICIARY HELD THAT ANSWERS MIGHT BE FILED AT ANY TIME BEFORE ENTRY OF FINAL DECREE.

To such a bill filed against the executor and remaindermen and residuary legatees, answers may be filed at any time before entry of a final decree, even though there has been a failure to answer within the time allowed for answers by the court, after the court has overruled a demurrer, and, on a demand for a decree, resisted by the defendants, has refused to allow the decree and enlarged the time for answers.

3. TRUSTS § 375(1)—ENTRY OF PROVISIONAL DECREE FOR PLAINTIFF IN BILL FOR MAINTENANCE AS A TESTAMENTARY BENEFICIARY HELD BEYOND COURT'S POWER.

After issues have been made on such a bill by the filing of an answer thereto, the court cannot enter a provisional or temporary decree for payment of money to the plaintiff out of the corpus of the fund, in the absence of proof of the allegations of the bill, on the theory of apparent ultimate right to relief and power to take such allowance into consideration in the entry of a final decree in favor of the plaintiff, by way of adjustment.

4. EQUITY § 257 — EVIDENTIAL MATTER IN ANSWER MAY BE ELIMINATED ON EXCEPTION.

A court may properly eliminate from an answer merely evidential matter on exceptions thereto.

Appeal from Circuit Court, Marion County.

Suit by Martha Ellen Snider against Charles W. Robinson and others. From decrees in favor of plaintiff, defendants appeal. Reversed in part, and affirmed in part, and cause remanded.

Ira E. Robinson, of Charleston, and Harry Shaw, of Fairmont, for appellants.

Walter R. Haggerty and Charles Powell, both of Fairmont, for appellee.

POFFENBARGER, J. The principal subject of this complaint is a provisional or temporary decree for payment of money by an executor out of the estate in his hands for support of the widow of the testator, upon allegations of her right thereto under provisions of the will. Another is the elimination of certain portions of the answer to her bill upon exceptions thereto.

The provisional decree was entered in advance of maturity of the cause for submission upon issues made and proof taken, and is based in part upon notice of a motion for award thereof, supported by affidavits.

By the will the widow took a life estate in the homestead, a house and lot in the city of Fairmont, and in the household goods and effects. At her death this property goes to the granddaughter of the testator, daughter of the executor. By the fourth clause of the will the executor was required to rent another parcel of real estate of which the testator died seized, a house and lot, and pay the income therefrom to the widow for and during her life, and vested with discretionary power to sell it and invest the proceeds and pay the income therefrom to the widow in like manner. She was also given by the fifth clause the interest for life in the residue of the personal estate, valued by estimation at about \$3,000, and having an actual value of only about \$1,000. It was further provided that, in case the income from the rents and interest contemplated by the fourth and fifth clauses should be insufficient for her complete comfort, the executor should use "such part of the principal of the above fund as may be necessary to her complete comfort and support." The residue of the funds mentioned in the fourth and fifth clauses after the death of the widow goes to Chas. W. Robinson, the executor, his wife and daughter, in equal shares.

The real estate mentioned in the fourth paragraph has not been sold. The house has four rooms and a basement and rents for only \$12.50 per month. The executor owed the estate \$1,000, of which he has paid \$300, and the residue he has lately invested in government bonds. Out of the rents and interest the executor has paid the taxes on the rented property and the cost of some slight and apparently necessary repairs. According to the allegations of her bill and copies of the executor's settlements exhibited therewith, she has received only a small amount of money annually, and out of that has paid the taxes on the homestead. She alleges that what she has received has been wholly insufficient for her support, and claims she is entitled to have at least \$600 per year out of the estate. Her husband died in 1910, and this suit was instituted about eight years after the probate of his will. The date of her first complaint of the amount she received from year to year does not appear in the bill nor elsewhere in the record. Her bill charges the executor with neglect to obtain as much rent from the real estate as it should yield and wrongful expenditure of rents in the improvement of the property, with a motive of benefit to himself, his wife and daughter.

Demurrers to the bill, interposed at the May term, 1919, were overruled, and 30 days allowed for the filing of answers. No answer having been filed at the expiration of that period, there was a motion for a decree upon the bill as taken for confessed, which motion was resisted, and the court, over objection,

enlarged the time for answers by a few days. On the same day a motion for a decree awarding a temporary allowance was docketed. On the last day of the extended period allowed for answers the defendants filed their joint and separate answer. On the next day the plaintiff filed exceptions to certain parts of the answer, and the motion of the plaintiff as well as disposition of the exceptions were continued. A month later all of the exceptions save one were sustained, and the defendants granted leave to answer over. Soon thereafter the provisional decree or order was entered.

[1, 2] No good ground of demurrer to the bill is perceived. It alleges a state of facts which, if sustained, constitutes a cause of action. A court of equity has undoubted jurisdiction to enforce a trust.

The retained portions of the answer deny the construction placed upon the will by the plaintiff's bill; failure on the part of the executor to carry into effect its true intent, meaning, and provisions; his neglect, failure, or refusal to pay out of the estate sums sufficient for the comfort and support of the plaintiff, within the meaning and intent of the will; rental of the real estate for an inadequate sum; the making of unusual or extensive repairs or improvements of the property; the correctness and accuracy of the statements of the bill as to receipts and disbursements respecting the property; mismanagement of the properties mentioned in the fourth and fifth paragraphs of the will; insufficiency of the income for complete comfort of the plaintiff; necessity of payment of \$600 per year for her comfort and support; duty of the executor to pay the taxes on the homestead; unfaithfulness in the administration of the estate; administration thereof for the benefit of the remaindermen and residuary legatees; and indifference to plaintiff's complaints and unwillingness to hear them. It avers production of all the income of which the property is capable; possession under the will of a well-furnished home by the plaintiff; activity and ability on the part of the plaintiff and lack of any misfortune or other circumstance necessitating her use of \$600 per year from the estate.

Although the amounts of the annual payments are quite small and apparently insufficient for comfortable support, the answer raises issues respecting its sufficiency, dependent partly upon the construction of the will and partly upon questions of fact, none of which the trial court has passed upon finally and definitely. The provisional decree assumes that in any event the plaintiff is entitled to \$70 per month, pending the litigation, for it required payment of that amount for a period of five months, ending December 31, 1919. It adopts and proceeds upon the theory of decrees for maintenance and suit money in divorce suits, but in that

class of cases a statute specifically authorizes such orders. Code, c. 64, §§ 9 and 11. The law unconditionally gives the right and imposes the burden. Here the right is given by the will. The plaintiff has the use of the homestead and furniture and is receiving the rents and interest provided for her, less such charges and deductions as the defendants claim are legal and just. She desires a larger provision out of the corpus of the fund, which the will allows conditionally. Her bill asserts the existence of the contingency upon which such enlargement is authorized, and the answer denies it. If it be conceded, for the purposes of argument, that the plaintiff has an apparently irresistible claim, her right to informal relief in anticipation of a final decree upon a cause of action matured and established does not necessarily follow. There are many such cases, but there is no precedent for a piecemeal decree predicated upon anticipation of establishment of right to a final decree in which the provisional allowance may be taken into consideration by way of adjustment. To permit it would greatly embarrass the administration of justice in both the trial and appellate courts. If such relief can be granted in one instance, there is no reason why it could not be granted repeatedly in the same case, and appeals, with their attendant consumption of time and labor, expense, and worry, multiplied indefinitely. Besides, there is no occasion for it. If in this cause the suit had been diligently and vigorously prosecuted, it would have been ready for a final decree, no doubt, at the date of the award of provisional relief. Plaintiff's own deposition in support of her bill could have been taken in a day or two, upon proper notice, at any time after the filing of her bill. About six months elapsed between the filing thereof and the date of the motion, in which period she took no proof. Plainly the alleged delay of justice, in avoidance of which this anomalous procedure was resorted to, is not one of the law's delays. Parties deviating from the plain, speedy, and adequate course of procedure afforded by the law and endeavoring to adopt and pursue others are in no situation to complain of the law.

In England they have an informal procedure started by what is termed an "originating summons." Dan. Ch. Pr. p. 864. But under it no such question as this is cognizable. This is a controversy with the remaindermen and residuary legatees, as well as with the executor. The plaintiff asserts her right to go into the corpus of the fund and property for her support, upon the theory of inadequacy of the income, which she may do, if the income is inadequate. Her right to do so is denied upon the theory of adequacy of the income. That makes an issue that can-

not be disposed of summarily, like an allowance to an infant or cestui que trust out of his own funds. *Royle v. Hayes*, 43 Ch. Div. 18; *Conway v. Fenton*, 40 Ch. Div. 512; *Davies v. Davies*, 38 Ch. Div. 210.

[3] The cross-assignment of error based upon denial of a decree on the bill, for failure to answer within the time allowed, is not well taken. Whether the extension of time allowed by the court was proper or not, the answer came in before final decree, raising issues of fact determinable in part by matters of fact depending upon evidence, and none had been taken. In *Waggy v. Waggy*, 77 W. Va. 144, 87 S. E. 178, the plaintiff had taken and filed his depositions sustaining the allegations of his bill, and the cause could not be continued for the taking of proof by the defendants. Right to answer at any time before final decree is given by the statute, and a defendant in default as to his answer may file it within such time. *Waggy v. Waggy*. Had the motion for enlargement of time been denied, a sufficient answer to prevent a decree might have been filed immediately. Hence it cannot be safely said the motion for a decree put an end to the right to answer. To cut off that right, the decree must have been actually entered. *Ash v. Lynch*, 72 W. Va. 238, 78 S. E. 365.

[4] All material matters struck out of the answer, upon the exceptions thereto, were merely evidential; wherefore they were unnecessarily inserted and could be properly eliminated. Plaintiff's ownership of an independent and separate estate of her own is no defense. The will gives her right of maintenance from the property and funds designated in the fourth and fifth paragraphs thereof unconditionally, and without reference to her ability to obtain it from any other source. In such case her possession of other means of support constitutes no defense. In *re Knapp's Estate*, 22 App. Div. 328, 47 N. Y. Supp. 971; In *re Weaver*, 21 Ch. Div. 615; *Story Eq. Jur.* (14th Ed.) § 1773; *Lewin, Trusts*, pp. 614, 967. It may be a circumstance having some tendency to show what was meant and intended by the provisions of the will involved here. If so, it may come in by way of evidence, but the court did not err in the elimination thereof from the answer. The clause charging instigation of the demand set up in the bill by strangers is wholly immaterial for any purpose, and was properly struck out.

For the reasons stated, the decree of August 6, 1919, entered in this cause, will be reversed, and the decrees therein of May 12 and July 28, 1919, and so much of the decrees therein of June 25, 1919, as overruled the plaintiff's motion for a decree, will be affirmed. Costs in this court will be decreed to the appellants, and the cause remanded.



(85 W. Va. 645)

(102 S.E.)

WATSON-LOY COAL CO. v. MONROE  
COAL MINING CO. (No. 3878.)(Supreme Court of Appeals of West Virginia.  
March 2, 1920.)*(Syllabus by the Court.)*1. DEEDS  $\S$  94—EFFECT AS MERGING PRIOR  
AGREEMENTS STATED.

In so far as a deed varies from a prior executory contract pursuant to which it is executed, such departure is presumed to represent a change mutually agreed upon by the parties before its execution. In such form it represents the final act of the parties, and merges in it all antecedent agreements, negotiations, and conversations, and is conclusive in the absence of a showing that the variance is due to fraud or mutual mistake.

2. REFORMATION OF INSTRUMENTS  $\S$  45(4)—  
PROOF TO CORRECT VARIANCE FROM EXECUTO-  
RY CONTRACT MUST BE CLEAR AND CONVINCING.

To warrant reformation of such a deed to conform with an executory contract, evidence that the variance was due to fraud or mutual mistake must be clear and convincing.

3. CORPORATIONS  $\S$  506—RIGHT TO SUE IN  
CORPORATE NAME AFTER CONVEYANCE OF EN-  
TIRE PROPERTY STATED.

Where a corporation by deed conveys to another all of its property, real and personal, together with all of its capital stock, but reserves the privilege of using its corporate name for the purpose of bringing any suit necessary or proper to enforce rights reserved by the deed, it may properly institute such a suit in its corporate name without joining as parties the stockholders of record at the date of the deed, or indicating that it is a suit for their use. The retention of the corporate name for such purpose is in substantial conformity with the provisions of section 59, c. 53, Code (sec. 2891).

4. INTEREST  $\S$  38(2)—INTEREST IN JUDGMENT  
ON NOTE TO BE ALLOWED AS FIXED BY CON-  
TRACT.

Where a note by its terms bears interest at a rate less than 6 per cent. per annum, a decree for payment of the aggregate sum due thereon, including principal and interest at the specified rate to the date of the decree, should provide for payment of interest at the same rate upon the sum so ascertained from the date of the decree till paid; and a decree which uses the indefinite phrase, "with interest thereon," not indicating the rate, will be modified so as to specify the rate fixed by the contract.

5. COSTS  $\S$  230—AWARD TO BE MADE TO PAR-  
TY SUBSTANTIALLY PREVAILING.

Costs are awarded to the party who substantially prevails in this court.

Appeal from Circuit Court, Mineral County.

Suit by Watson-Loy Coal Company against Monroe Coal Mining Company. Decree for plaintiff, and defendant appeals. Modified and affirmed.

Wm. MacDonald, of Keyser, Henry S. Dricker, Jr., of Philadelphia, Pa., and E. H. Sincell, of Oakland, Md., for appellant.

Emory Tyler, of Keyser, for appellee.

LYNCH, J. On July 9, 1902, Watson-Loy Coal Company conveyed to Monroe Coal Mining Company, West Virginia corporations, coal properties located in part in Mineral county, this state, and in part in Garrett county, Md., separated only by the North Branch of the Potomac river, and at that time owned and operated by the grantor, including buildings and mining equipment and the shares of stock of the grantor and other personal property belonging to it; "it being the true intent and meaning of these presents to sell and convey to the said party of the second part \* \* \* all the property, both real and personal belonging to the said party of the first part," with certain unimportant exceptions. In the deed the grantor retained a lien to secure the payment of the unpaid residue of the consideration, amounting to \$50,000, for which defendant executed four notes, payable, respectively, June 2, 1903, 1904, 1905, and 1906, with interest payable annually at the rate of 5 per cent. from June 2, 1902, the date the preliminary oral agreement for the transfer was made. These installments defendant paid as and when they became due, except the fourth, and the interest on it to June 2, 1905. To enforce a sale of the land in satisfaction of the balance of the principal and interest due on the last note is the purpose of this suit, and the right to this relief defendant controverts because of alleged defects in the title of the properties conveyed.

By one of the assignments defendant below, now appellant, complains of the non-compliance of the deed with the preliminary written contract between the parties, dated June 10, 1902, pursuant to which it was to be executed, in that while the language of the contract did not specifically designate the character of the covenant, it was broad enough to require a general warranty clause, but the deed contained only a special warranty of title. For the failure to comply with the original agreement in this respect, however, appellant has but little, if any, cause for complaint.

[1] In so far as the deed departs from the prior executory contract, such departure is presumed to represent a change mutually agreed upon by the parties before its final consummation. In such form it represents the final act of the parties and the merger of all antecedent agreements, negotiations, and conversations. *Koen v. Kerns*, 47 W. Va. 575, 35 S. E. 902; *Home Gas Co. v. Window Glass Co.*, 63 W. Va. 236, 61 S. E. 329.

[2] To warrant its reformation because of such variance, proof that its execution was

induced by fraud or mistake must be clear and convincing. *Jarrell v. Jarrell*, 27 W. Va. 743; *Koen v. Kerns*, supra; *Isner v. Nydegger*, 63 W. Va. 677, 60 S. E. 793.

Whether, through its representatives, appellant protested and signified its disapproval of the deed because of the departure from the provisions of the contract, as its counsel say, is uncertain when tested by the proof offered upon that phase of the case. There can be no doubt that appellant knew of the variance at the time it accepted the deed. But respecting any protest made by its representatives on that account, or any fraudulent assurance on the part of appellee to induce appellant to accept the conveyance in that form, the evidence of the latter is not direct or positive. It lacks the element of certainty, while appellee's evidence to the contrary is clear and emphatic. It leads to the conviction of the truth of the fact that no such objection was made or such fraudulent assurance given when the deed was prepared and accepted, and this is the conclusion reached by the circuit court upon the question. Though the original draft of the deed was prepared by counsel for appellee, defendant's counsel practically rewrote it because of dissatisfaction with some of its terms; and, as originally drawn and so redrafted, it contained the special warranty provision, and defendant accepted it with knowledge of its contents, without serious protest or objection, if any, as to the form of the covenant, and without complaint until the date it filed its answer to the bill, which occurred nearly four years afterwards. The proof shows that at the time the deed was presented officers of appellant and its attorney discussed together the advisability of accepting a covenant of special warranty, and that the attorney, who had devoted a month or more to an examination of the title to the property, advised them that he could find no defects in it. To aid him in his investigation, appellee permitted him to inspect its muniments of title and papers relating thereto, and in this manner defendant acquired, or had ample opportunity to acquire, all the knowledge possessed by appellee before the conveyance was made. The reliance placed upon the examination of the title made by its attorney, the redraft of the deed and its execution, delivery, and acceptance in its final form, with the special warranty therein written, clearly indicate a willingness on defendant's part to accept the deed as prepared and delivered, and tend strongly to exonerate appellee from the imputation of an intention to induce defendant to accept a dubious title while assuring it to be good and valid. *Cork v. Cook*, 56 W. Va. 51, 58, 48 S. E. 757. The character of the proof offered to show that the variance between the deed and the preliminary contract was induced by fraud or mistake is

not sufficiently clear and convincing to warrant reformation of the former.

Having thus waived the right to demand a covenant in the form impliedly stipulated for in the contract, appellant's rights are to be measured and determined by the covenant contained in the deed. There is therefore no real necessity for further discussion of the defects alleged to exist respecting title. But as in oral argument and in the briefs counsel have dealt with the question, a few observations relative to it may not be amiss. The only ground relied on by way of impeachment is the so-called Kerfoot claim, not definitely defined, a mere squatter's right, resting solely on adverse possession of a small parcel of a larger tract known as "Stony Ridge." For this parcel the claimant sued appellant, but for years failed to prosecute it, and neither party attempted to speed a trial thereof or urge an adjustment of the controversy. *J. C. Watson*, the principal stockholder of the appellee corporation and its active agent, purchased the Kerfoot claim at the comparatively insignificant sum of \$40, and took an assignment thereof in his own name. Technically this assignment did not directly inure to the benefit of appellant, it is true; but when considered in connection with the grant of the "Stony Ridge" tract, and with the general grant of "all the right, title, and interest and estate of the party of the first part of, in, and to all the property hereinbefore mentioned and described and hereby conveyed," how or by what way appellant can suffer any loss because of that claim is not apparent. It is too fictitious to be dangerous or harmful. The only other defects alleged, if defects they are, relate to small deficiencies in quantity. But as the deed imports a sale in gross, a conveyance of all the property possessed by appellee, minor deficiencies of that character are not material. *Newman v. Kay*, 57 W. Va. 98, 49 S. E. 926, 68 L. R. A. 908, 4 Ann. Cas. 39. Had the covenant been general instead of special, it would not afford protection against such discrepancies, as its office is not to warrant quantity but title. *Burbridge v. Sadler*, 46 W. Va. 39, 32 S. E. 1028; *Adams v. Baker*, 50 W. Va. 249, 40 S. E. 356. No eviction occurred, no disturbance by paramount title of peaceful enjoyment of the estate vested in appellant, and until one of these events happens a general warranty covenant remains intact and unbroken, and does not warrant an abatement of the purchase price on that account. *McKinley Land Co. v. Maynor*, 76 W. Va. 156, 85 S. E. 79.

[3] Another ground relied on for reversal questions the right of plaintiff to prosecute this suit to enforce the lien retained in the deed, the contention being that the corporation should sue for the use of its stockholders as the parties beneficially interested in the result of the litigation; otherwise, it says, a de-

(102 S.E.)

cree in favor of appellee would not be res adjudicata or prevent a similar suit for the same purpose by the stockholders. The basis of this contention is that the conveyance, including, as it did, all the stock of the appellee corporation, in effect dissolved and extinguished it, wherefore none but the shareholders to be benefited by the decree entered in the cause could sue. The deed of conveyance, however, expressly provided for the retention and use of the corporate name to prosecute suits such as this. After reserving a lien in favor of the grantor to secure the payment of the principal and interest evidenced by the notes, the deed has this further provision:

"But it is agreed and understood that the right is reserved to the party of the first part to use its name for the use of the present stockholders for the purpose of bringing any suit that may be necessary or proper in enforcing \* \* \* any \* \* \* legitimate right belonging to the said party of the first part which is reserved in this deed."

The obvious import of this reservation was to save to plaintiff the corporate power to do what by this suit it is attempting to accomplish, namely, to foreclose the lien retained in the deed, and thereby enforce payment of the obligations assumed by defendant as part of the consideration for the property sold. The object to be accomplished and the right to be exercised defendant questions only in one respect. That objection, as we understand the argument of counsel, is that the former owners of the stock in the plaintiff corporation should maintain the suit or plaintiff should do so for their use and benefit. It is undoubtedly true, as a general rule, that a suit must be instituted by the parties beneficially interested in the relief sought. But treating the conveyance as in effect a dissolution of the Watson-Loy Coal Company, so far as its stockholders' interests were concerned, there is nothing to prevent them from designating in that instrument, executed by their duly authorized agents, the name in which suit may be maintained for breach of the duties therein imposed. Such provision the deed made, by and with the knowledge, consent and approval of appellee's stockholders. The words, "may use its name for the use of the present stockholders," does not require that suit shall be maintained "for the use of," but merely connotes the ultimate destination of any recovery thereby obtained. Moreover, it is a rule of equity, long established, that a party having no substantial interest in a controversy cannot in a court of equity maintain a suit in his name for the benefit of the party beneficially interested. *McClaskey v. O'Brien*, 16 W. Va. 791, pt. 18, syl.; *Grove v. Judy*, 24 W. Va. 294; *Kellam v. Sayre*, 30 W. Va. 198, 3 S. E. 589; *Bank v. Cook*, 55 W. Va. 220, 46 S. E. 1027; *State v. Flanagan*, 77 W. Va. 505, 87 S. E.

878; *County Court v. Cottle*, 81 W. Va. 469, 94 S. E. 948. Whether, if we regard the corporate name as one no longer having material substance behind it, the parties could provide for the institution and maintenance of a suit in its name "for their use," we express no opinion. Here they have already provided for the retention and use of the corporate name alone in suits to enforce duties under the contract—the name in which the deed was executed, and which defendant frequently has recognized since as one proper for it to deal with. Moreover, in providing for the retention of the corporate name, the contract merely conforms with the provisions of section 59, c. 53, Code (sec. 2891), which says:

"When a corporation shall expire or be dissolved, \* \* \* suits may be brought, continued or defended, \* \* \* and all lawful acts be done, in the corporate name, in like manner and with like effect as before such dissolution or expiration; but so far only as shall be necessary or proper for collecting the debts and claims due to the corporation, \* \* \* [and] prosecuting and protecting its rights. \* \* \*"

Appellee admits a clerical error in the calculation of interest, whereby the court below entered a decree in its favor for \$24,300.33. Three several deeds of release, filed as part of the record before this court, show that interest on the final note was paid to June 2, 1905. A calculation of interest on \$12,500, the face of the note, from that date to April 19, 1919, the date of the decree, at the rate of 5 per cent., discloses an aggregate of \$21,175.34, principal and interest, as of the latter date. The amount by which the decree exceeded that sum appellee voluntarily released in the manner prescribed by section 5, c. 134, Code (sec. 4979); and to that extent we also modify the decree. Section 6, c. 134, Code (sec. 4980); *Watkins v. Angotti*, 65 W. Va. 193, 63 S. E. 969; *Morris v. Baird*, 72 W. Va. 1, 3, 78 S. E. 371, Ann. Cas. 1915A, 1273.

[4] Appellant further contends that the sum decreed to appellees should bear only 5 per cent. interest from its date, the rate agreed upon by the parties, whereas the decree is silent respecting the rate, and provides merely that it shall bear interest. The rate contended for by appellant is the correct one, for, where a note by its terms bears interest at a rate other than 6 per cent. per annum, a decree for payment of the aggregate sum due, including the principal and interest at the specified rate to the date of the decree, should provide for payment of interest thereon at the same rate from that date till paid. *Shipman v. Bailey*, 20 W. Va. 140; *Pickens v. McCoy*, 24 W. Va. 344. See, also, *Morris v. Baird*, 72 W. Va. 1, 78 S. E. 371, Ann. Cas. 1915A, 1273. The contract rate must govern until the end; and instead of using the words "with interest

thereon," thus leaving room for doubt and uncertainty as to the proper rate, the decree should have been more specific. To that extent we modify it, and fix the rate at 5 per cent.

[5] The error of more than \$3,000 in the computation of interest, noted above, is not merely technical, within the rule laid down in *Conklyn v. Shenandoah Milling Co.*, 68 W. Va. 567, 70 S. E. 274; *Hoppe Natural Gas Co. v. Shriver*, 75 W. Va. 401, 83 S. E. 1011; and *Freeman v. Swiger*, 98 S. E. 440; but is substantial, in that the decree, though amendable, is wrong in amount, and to be relieved to that extent this appeal was necessary. The release of the excess in the lower court by the voluntary action of appellee did not occur till after this appeal had been awarded, and the case was nearly ready for submission to this court, and therefore cannot defeat the award of costs to appellant. We modify the decree, and as modified affirm it, with costs to appellant.

(85 W. Va. 508)

G. ELIAS & BRO. v. BOONE TIMBER CO.

(Supreme Court of Appeals of West Virginia.  
Feb. 10, 1920. Rehearing Denied March 24,  
1920.)

*(Syllabus by the Court.)*

1. DEPOSITIONS  $\S$ 56(6)—DEFECTIVE NOTICE TO TAKE MAY BE AMENDED TO CONFORM TO FACT.

Where a return of service of a notice to take depositions is deficient in its averments, and amendable, it is proper to amend it to accord with the facts; and for that purpose it is not improper to take and consider proof showing the fact of service, for the purpose of sustaining the return, and, if sufficient, to admit the depositions as evidence, regardless of such defect.

2. CORPORATIONS  $\S$ 507(10)—REMOVAL TO ANOTHER COUNTY AND FAILURE TO APPOINT ANOTHER AGENT TO ACCEPT SERVICE CONTINUES FORMER APPOINTEE'S AUTHORITY.

Though section 24, c. 54, Code 1913 (sec. 2917), providing for the appointment of attorneys in fact for resident domestic corporations, requires the appointment of "some person residing in the county \* \* \* where its [corporate] business is conducted, \* \* \* upon whom service may be had of any process or notice," and due appointment is made of such person, but who later removes to some other county in which the corporation maintains no office and conducts no business, by its failure to appoint another resident of the proper county to act in his stead, it acquiesces in the continuance of the former appointee in that capacity until his successor is appointed. The person first appointed continues to represent the corporation in a de facto, if not a de jure, capacity, and the corporation cannot lawfully complain that a plaintiff, who desires to sue it or serve notices upon it, and is unable to find any of its officers

or a properly appointed representative in the county where it conducts its business upon whom to serve process, serves it upon him as attorney in fact for that purpose.

3. CORPORATIONS  $\S$ 507(10)—VALIDITY OF SERVICE HELD NOT TO BE DISPUTED BECAUSE SERVED ON DE FACTO OFFICER.

The validity of the service of a legal notice in such case cannot be disputed on the ground that the same was served upon a de facto officer.

4. EVIDENCE  $\S$ 174(4)—DULY AUTHENTICATED CARBON COPIES OF LETTERS, TELEGRAMS, ETC., ADMISSIBLE AS DUPLICATE ORIGINALS.

Duly authenticated carbon copies of letters, telegrams, or other documents, identified as resulting from the same operation of the typewriter by the use of carbon sheets properly adjusted, are admissible as duplicate originals, and constitute primary, rather than secondary, evidence of the facts they recite or contain, without accounting for the nonproduction of the originals or demanding their production, where the latter are in the possession of the party objecting to their introduction.

5. SALES  $\S$ 418(2, 4)—MEASURE OF DAMAGES FOR BREACH OF CONTRACT TO DELIVER PROPERTY STATED; WHERE NO LOCAL MARKET, NEAREST SOURCE OF SUPPLY FIXES BASIS OF DAMAGES.

The measure of damages for the breach of a contract for the sale and delivery of property readily obtainable in the open market is the difference between the contract price and the market price of such goods at the time when and place where the contract is broken. But if no local market exists at the place where delivery was due, the buyer may seek the nearest available source of supply to meet the exigencies of his demands.

6. SALES  $\S$ 418(7)—ON FAILURE TO DELIVER, EXPENSE IN OBTAINING PROPERTY AT LOCAL MARKET AND TRANSPORTING IT TO DELIVERY POINT MAY BE ADDED TO DAMAGES.

When, under such circumstances, the buyer purchases in a market remote from the place agreed upon by the parties for delivery of the property contracted for, the expenses necessarily incurred in obtaining and transporting the property to such delivery point are to be added; but where, as here, the seller has agreed to pay the transportation charges on the shipment, it is proper to include in the damages allowed full transportation charges from the place of repurchase to the shipping destination named in the contract.

7. SALES  $\S$ 85(3), 168(4), 200(3)—WHERE CONTRACT SO PROVIDES, INSPECTION IS CONDITION PRECEDENT TO PASSING TITLE; SELLER REFUSING TO FURNISH GOODS CONFORMING TO CONTRACT IS LIABLE FOR DAMAGES.

Where a contract for the sale of lumber, fully completed by offer and acceptance, provides for "final inspection to be made at the [defendant's] mill," such inspection does not necessarily constitute a condition precedent to the existence of a binding contract, but merely to the passing of title to the subject-matter thereof; and where the seller refuses to furnish goods conforming to the specific requirements

of the contract, as determined by a fair and honest inspection on the part of the buyer and the verdict of a jury, the seller is liable for the damage so caused.

#### Error to Circuit Court, Logan County.

Action in assumpsit by G. Elias & Bro., a corporation, against the Boone Timber Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Chafin & Bland, of Logan, and A. M. Prichard, of Charleston, for plaintiff in error.

E. L. Hogsett, of Logan, for defendant in error.

**LYNCH, J.** In this assumpsit action plaintiff, a corporation, sues to recover damages resulting, the special counts aver, from the failure and refusal of defendant, also a corporation, to furnish lumber pursuant to a contract entered into between the parties to the action November 11, 1915. The errors assigned by counsel for defendant for reversing the judgment against his client are the denial of his motion to suppress the depositions of plaintiff's witnesses, Fravel and Valkwitch, taken at Buffalo, N. Y., October 11, 1918, nearly four months before the date the motion was made, rulings upon the admissibility of carbon copies of letters and telegrams as evidence of the contract, and to show the basis of plaintiff's claim for damages, without sufficient notice of a demand upon defendant to produce the originals, and of proof to show the amount of expenses incurred by plaintiff in the inspection of the lumber contracted for but not delivered to plaintiff, and of the lumber purchased by it of other manufacturers, and additional transportation charges necessitated by defendant's breach of the contract, and upon the motion for a new trial.

The only order entered in the proceeding, except the filing of the bills of exceptions, shows, first, a motion to quash the process to answer and the return thereon; the ruling of the court holding the return insufficient; the amendment of the return over the objection of the defendant; a demurrer to the declaration, sustained; the amendment of the declaration and the filing of an additional count; the ruling upon the declaration and each count thereof as so amended; the motion to suppress the depositions "on the ground that there was not proper notice of the time and place of taking the same and for other reasons appearing on said notice and the return thereof," including in the bill of exceptions the legal qualification of Leftwich, the person upon whom service of the notice was made; the overruling of such motion; the motion for a more particular statement of the bill of particulars and for a continuance; defendant's plea of

non assumpsit; the impaneling and verdict of the jury; the motion for a new trial, overruled; and judgment on the verdict.

[1] The first ground of error assigned is that, although the return of service of the notice to take depositions recites that the notice was executed "by delivering a copy thereof to F. C. Leftwich, attorney in fact to accept service of and for said Boone Timber Company," yet it fails to show by whom such person was appointed attorney in fact, or that he was appointed, if at all, pursuant to law, or in what county and state the notice was served. The statute governing the appointment of attorneys in fact is section 24, c. 54, Code (sec. 2917), which provides:

"Every resident domestic corporation, unless otherwise specifically and expressly provided, shall, within thirty days after its first election of officers, by power of attorney duly executed, appoint some person residing in the county in this state wherein its business is conducted, to accept service on behalf of said corporation, and upon whom service may be had of any process or notice; the said power of attorney shall be recorded in the office of the clerk of the county court of the county in which the attorney resides, and filed and recorded in the office of the secretary of state, and the admission to record of such power of attorney shall be deemed evidence of compliance with the requirements of this section; any corporation failing to comply with said requirements within twelve months from the date of its incorporation, shall by reason of such failure, forfeit its charter to the state. \* \* \*"

Although the return may have failed to state facts showing the place of service and the residence and due appointment of the person upon whom it was had (*Frazier v. K. & M. Ry. Co.*, 40 W. Va. 224, 21 S. E. 723), yet it might properly have been amended to show such facts (*Hopkins v. B. & O. R. Co.*, 42 W. Va. 535, 26 S. E. 187; *Hoopes v. Devaughn*, 43 W. Va. 447, 27 S. E. 251), and its deficiencies, if any, were fully supplied by the proof offered at the bar of the court upon the question of its sufficiency at the hearing of the motion to suppress, if such proof was admissible for that purpose. We are of opinion that it was. It is the fact of proper service, and not the return showing the fact, which gives to a court jurisdiction or depositions validity as legal evidence. Where the return is deficient in its averments, the better course is by amendment to make it speak the necessary facts; but the court also has the right to take evidence upon the fact of service for the purpose of sustaining it, and if found to be legal and proper, then to admit the depositions as evidence, regardless of the defective return. *Jones v. Gunn*, 149 Cal. 687, 87 Pac. 577; *Morrissey v. Gray*, 160 Cal. 390, 395-397, 117 Pac. 438; *Id.*, 162 Cal. 638, 124 Pac. 248; *Kipp v. Fullerton*, 4 Minn. 473 (Gil. 366);

*Vigers v. Mooney*, 3 N. J. Law, 909; 32 Cyc. 514. Before the court, not only were all the facts requisite to warrant amendment of the return so as to make it speak truly and fully of the mode of service, but there was also present at the same time and place the person who served the notice. It seems to us beyond the limit of bearable technicality to suppress depositions for this cause in such circumstances. If amended under the direction of the court, as it might and should have been, the defect would have been cured, and the objection based upon that ground removed.

[2, 3] The evidence of Hogsett, who served the notice, not objected to, showed that Leftwich had been appointed attorney in fact to accept service for defendant at a time when he was living in Boone county; that for five years preceding this action he had resided in Cabell county, and that the notice was served upon him in the latter county; that the chief office of the defendant company is at Clothier, Boone county, wherein and in Logan county it transacts part of its business, but does no business in Cabell county. There was no proof showing that another attorney in fact had been appointed to represent the company in that capacity after the removal of Leftwich to Cabell county. The statute, it is true, requires the appointment of "some person residing in the county in this state where its [the corporation's] business is conducted, \* \* \* upon whom service may be had of any process or notice." At the time of his appointment Leftwich was a resident of such county and therefore properly appointed. Upon his removal therefrom it was incumbent upon the corporation to appoint, from among the residents of the county in which its business was conducted, another to act in his stead, and by its failure to do so, so far as the record discloses, it acquiesced in the continuance of the former appointee in that capacity, no matter into what county of the state he might move. The statute contemplates no hiatus or gap between appointments, and if the corporation desires to protect itself against the service of process or notice upon a distant attorney in fact, it should comply with the requirements of the statute and make a new appointment. Upon its failure to pursue that course it cannot be heard to complain that a plaintiff who desires to institute suit against it, but is unable to find any of its officers or a properly appointed representative residing in the county in which its business is conducted upon whom to serve process, adopts the only course remaining to it, and has process served upon the person last designated as attorney in fact. Until his successor was appointed, Leftwich remained the representative of the Boone Timber Company, in a de facto, if not a de jure, capacity. The validity of the service of

a legal notice cannot be disputed on the ground that the same was effected upon an officer de facto. *Constantineau on the De Facto Doctrine*, § 318. See also *Tomblin v. Peck*, 73 W. Va. 336, 80 S. E. 450; *Allen v. Linger*, 78 W. Va. 277, 88 S. E. 837. For these reasons the motion to suppress was properly overruled.

[4] Were the carbon copies of the letters and telegrams comprising the correspondence between the parties relative to the matters constituting and arising out of the timber contract improperly admitted to the jury as evidence without notice for the production of the originals? Such demand plaintiff did make while the trial was proceeding, but defendant declined to comply therewith because of inability to obtain them on such short notice from its office, some 15 miles distant from the courthouse. Regarding the questions so raised the decisions are not harmonious, but the weight of authority sustains the admissibility of duly authenticated carbon copies of such papers, not as secondary, but as primary, evidence of the facts they recite or contain, and that, too, without accounting for the nonproduction of the originals or demanding their production when the latter are in the adversary possession. *International Harvester Co. v. Elfstrom*, 101 Minn. 263, 112 N. W. 252, 12 L. R. A. (N. S.) 343, 118 Am. St. Rep. 626 11 Ann. Cas. 107; *De Michele v. London, etc., Fire Ins. Co.*, 40 Utah, 312, 120 Pac. 846, Ann. Cas. 1914D, 1076, and note; *Cole v. Ellwood Power Co.*, 216 Pa. 283, 65 Atl. 678; *Chesapeake, etc., Ry. Co. v. Stock*, 104 Va. 97, 51 S. E. 161; *Virginia-Carolina Chemical Co. v. Knight*, 106 Va. 674, 56 S. E. 725; *Rudolph Wurlitzer Co. v. Dickinson*, 247 Ill. 27, 93 N. E. 132; *Pittsburgh, etc., R. Co. v. Brown*, 178 Ind. 11, 97 N. E. 145, 98 N. E. 625; *Hay v. American Fire Clay Co. (Mo.)* 162 S. W. 666. If identified as resulting from the same operation of the typewriter by the use of carbon sheets between paper properly adjusted, no impression can differ in substance or materiality, and one is as much an original as another. Wherefore each of them is admissible, where any one or more of them would be for the same purpose. As said in *Cole v. Ellwood Power Co.*, *supra*, speaking of the carbon copy of an original made by the same impression:

"As both were contemporary writings, the counterparts of each other, one of which was delivered and the other preserved, they may both be considered as originals, and the one which was preserved may be received in evidence without notice to produce the one which was delivered."

Not only did these letters and telegrams constitute the contract between the parties regarding the lumber, but also they comprised the entire correspondence relating to

it, and bore on their face evidence of their relation to but one subject-matter. Their immediate and uncontroverted relevancy to the entire transaction seems impossible of refutation. Indeed, so far as appears, there was but the one negotiation to which they could have referred; each party writing or wiring the other, as indicated by the correspondence itself.

[5-7] Of the admissibility of the evidence introduced, over defendant's objection, to show the expenses incurred by plaintiff on account of the inspection of lumber, which defendant contracted but refused to furnish plaintiff, and payment of freight, we likewise entertain no doubt. While the true standard for the measurement of damages for the breach of a contract for the sale and delivery of property readily obtainable on the open market is, as stated by Williston on Sales, § 599, "the difference between the contract price and the market price of such goods at the time when and place where the contract is broken," and cases cited by the author, yet that standard is not always preclusive. Its application does not always put the buyer in as good a position as he would have been in had the breach not occurred. The plaintiff is not limited to the local market, if none exists at the place where delivery was due, but may seek the nearest available source of supply to meet the exigencies of his demands. When that necessity exists, and he buys in a market remote from the place agreed upon for delivery of the property purchased, and where the contract is repudiated or broken, the expense so unavoidably incurred in obtaining and transporting the property to the place fixed by the parties for delivery is to be added. Williston on Sales, § 599. And where, as here, the seller has agreed to pay the transportation charges on the shipment, it is proper to include in the damages allowed full transportation charges from the place of repurchase to the destination named in the contract. The expense of inspection, being a consequential or special element of damage, was properly added. Williston on Sales, § 614; 24 R. C. L. p. 75.

Defendant relies also for reversal upon the alleged requirement for an inspection to be conducted jointly by its own agents in conjunction with the agents of plaintiff, and to sustain its claim in that regard it cites the first letter written by its agent to plaintiff, a phrase of which says: "Final inspection to be made at the [defendant's] mill." It is defendant's contention that until an agreement was reached at such inspection no binding contract to deliver existed. The inspection may have been, and probably was, a condition precedent to the passing of title under the contract, but not to the existence of the contract, for that was fully closed by offer and acceptance. The term

"final inspection" does not signify joint action. The qualifying words are not alike in meaning. They do not convey the same idea. If, however, such meaning may be attached to them, that right was not denied to defendant. It did not request or make known its desire for joint participation in inspecting the lumber, and such participation was not denied to it. After an examination of the lumber pointed out by defendant as being intended for the purpose of fulfilling the contract, plaintiff's inspector refused to accept it, because, he says, it did not meet the specific requirements of the contract of sale. But he saw in the mill yard other similar lumber which, he said, did comply with its terms; but that lumber defendant denied him the right to have or take, and with that colloquium the matter then ended, but later was resumed by plaintiff with the same result, and this action followed. The good faith of plaintiff's inspector was presented in substance to the jury by defendant's instruction No. 3, and we see no reason to disturb its finding.

There is no substantial merit in the next and final assignment, namely, the refusal to grant a new trial. As there was some, though but little, conflict in the testimony, that conflict, we think, the jury rightly solved in plaintiff's favor.

Judgment affirmed.

(85 W. Va. 553)

FIRST NAT. BANK OF SALEM v. JACOBS.  
(No. 3845.)

(Supreme Court of Appeals of West Virginia.  
March 2, 1920.)

(Syllabus by the Court.)

1. EXECUTORS AND ADMINISTRATORS ⇐99--  
EXECUTOR MAY RENEW TESTATOR'S NOTE.

An executor may, in the exercise of a reasonable discretion consistent with the diligent and careful administration of the estate, the creditor consenting, postpone payment of an indebtedness created by the testator in the form of a negotiable note, and for that purpose renew such note to afford opportunity to pay it out of the assets of the estate.

2. EXECUTORS AND ADMINISTRATORS ⇐99--  
EXECUTOR MAY RENEW TESTATOR'S NOTE BY  
SIGNING IN REPRESENTATIVE CAPACITY AND  
THUS AVOID PERSONAL LIABILITY.

In the renewal of such a note the executor may, in order to avoid personal liability for the debt, sign the note in his representative character, and if in so doing he discloses by appropriate terms the name of the testator or estate for which he assumed to act, the estate, not the executor personally, is bound thereby.

3. BILLS AND NOTES ⇐123(1)—MAKER IN  
REPRESENTATIVE CAPACITY NOT PERSONALLY  
LIABLE.

Under the provisions of section 20 of the Negotiable Instruments Law (chapter 98A, Code

[sec. 4191]], where an instrument contains, or a person adds to his signature, words indicating that he signs in a representative capacity, he is not personally liable thereon if he was duly authorized to execute it.

Error to Circuit Court, Marion County.

Action by the First National Bank of Salem against Winnie M. Jacobs. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Harry Shaw, of Fairmont, for plaintiff in error.

James A. Meredith, of Fairmont, for defendant in error.

LYNCH, J. To reverse a judgment for plaintiff in an action on a promissory note holding defendant primarily liable, though she signed it in her representative character as executrix of the will of her deceased husband, defendant prosecutes this writ. The note was given in renewal of a joint and several note executed by deceased and four others during his lifetime, and, as the correspondence between the parties shows, was executed by her in her representative capacity with the consent of the plaintiff. The note reads:

"\$5,000.

"Salem, West Virginia, January 19, 1916.

"Ninety days after date, we or either of us promise to pay to the order of the First National Bank of Salem five thousand dollars, without offset and for value received.

"Winnie M. Jacobs,

"Exec. of Geo. M. Jacobs, deceased."

The comakers of the former note likewise joined in the execution of the renewal note; their signatures following hers.

To support her contention that she is not liable personally on the instrument, defendant cites section 20, c. 98A, Code (sec. 4191), which provides:

"Where the instrument contains, or a person adds to his signature words indicating that he signs for or on behalf of the principal or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent or as filling a representative character, without disclosing his principal, does not exempt him from personal liability."

[2] Since defendant in signing the note has disclosed the person or estate which she represents, she clearly comes within the description of the first half of the section, and therefore, whatever may have been the common-law rule upon the subject, is not liable personally on the instrument, provided she "was duly authorized" to execute it. The question of her authority as executrix to execute a note in renewal of one executed by her deceased husband during his lifetime is the determining point of the case. If she pos-

sessed such authority, the statute declares that she is not liable thereon personally.

The will confers upon her no express authority in this regard. There is, however, a provision requiring that she "shall within a reasonable time after my decease sell a sufficient amount of my property, either personal property or real estate, or both, to pay off and discharge all my just debts"; thereby charging her with the care and discharge of his obligations. In connection with such general authority, does there also exist any implied duty or power sufficient to warrant her in executing a renewal note in lieu of one which the deceased himself had made?

[1] It may be conceded at the outset that there is in general no authority to create new debts against the estate, and if the representative executes a note creating a new obligation he or she is liable thereon personally. But here there was created no new debt—merely the execution of a note to represent an already existing obligation. The duty of discharging his debts imposed by the will carries with it by implication, if not by express words, the privilege of exercising some discretion with respect to the time and manner of payment. The representative is expressly authorized by the will to obtain funds sufficient to meet and discharge his obligations by the sale and disposal of his real and personal property; and this duty the law itself imposes in the absence of express testamentary provision. This necessarily accords to the representative a certain discretionary power to continue and renew such debts till satisfactory arrangement can be made for the accumulation of funds sufficient to meet them. If no such power existed, forced sales to meet maturing obligations frequently would be necessary, and at times possibly when serious loss to the estate might be suffered as a result. Of course this power to renew and continue the indebtedness of the deceased is not without its limitation, for reasonable diligence consistent with careful administration of the estate must be exercised. But when the creditor is willing to extend time by renewal, and the representative in the honest and diligent administration of her trust thinks it best to renew a debt, she may do so by an instrument signed in her representative capacity and disclosing the estate intrusted to her care, without personal liability thereon. Such renewal note does not create a new indebtedness against the estate, but merely continues an existing obligation until more advantageous time for payment arrives. In accordance with this view it has been held that where a personal representative executes a note for the purpose of acknowledging an indebtedness of the estate, he may show this, by other than parol evidence, in exoneration of his liability. *Stirling v. Winter*, 80 Mo. 141. And the rule is laid down broadly in



*Brown v. Farnham*, 55 Minn. 27, 56 N. W. 352, that if the executor contracts to do what it is his duty to do in his representative capacity he is not personally bound. See, also, *Woerner*, Amer. Law of Administration (2d Ed.) \*757.

[3] Having discussed the implied authority of a representative of the deceased to execute notes in renewal of those executed by the latter during his lifetime, let us turn to the question of the personal liability of the representative thereon. That the estate of the deceased remains liable for the obligation is clear. *Crim v. England*, 46 W. Va. 480, 33 S. E. 310, 76 Am. St. Rep. 826. In that case the court said (point 5 of the syllabus):

"If there is a valid demand binding assets of a decedent, it is not discharged merely by reason of the fact that the executor gives a note therefor signed by him, with the addition to his name of the words, 'Executor of —, deceased.'"

Whatever the liability of the representative may have been at the common law, the provisions of section 20, c. 98A (secs. 4172-4368), commonly designated the Negotiable Instruments Law, relieve him from personal liability if he signs in a representative capacity, disclosing his principal or the estate represented, and possesses the authority to execute the instrument.

In construing the identical section the Supreme Judicial Court of Massachusetts said in *Jump v. Sparling*, 218 Mass. 324, 105 N. E. 878:

"Under the law previous to the enactment of the Negotiable Instruments Act, the defendant corporation would not have been held on this note. It would have been, not the note of the corporation, but simply the personal note of the two individuals who signed. \* \* \* A change in the law in this respect has been wrought by that act. \* \* \* These words [of the section] plainly imply that if the person signing a promissory note adds to his signature words describing himself an agent or as occupying some representative position, which at the same time discloses the name of the principal, he shall be exempted from personal liability; while if he omits the name of the principal, although adding words of agency, he will be held liable personally, and the words of agency will be treated simply as descriptive persons. In this respect the common-law rule of this commonwealth, whereby agents bind themselves by a form of signing a note such as the one at bar, even though acting with authority, \* \* \* is abrogated."

For decisions to the same effect see: *Chelsea Exch. Bank v. First United Presbyterian Church*, 89 Misc. Rep. 616, 152 N. Y. Supp. 201; *New England Electric Co. v. Shook*, 27 Colo. App. 30, 145 Pac. 1002; *Wilson v. Clinton Chapel, etc., Church*, 138 Tenn. 398, 198 S. W. 244; *Bank of Corning v. Nimnich*, 122 Ark. 316, 183 S. W. 756, Ann. Cas.

1917D, 566; *Chatham Nat. Bank v. Gardner*, 31 Pa. Super. Ct. 135; *Brannan's Negotiable Instruments Law* (3d Ed.) § 20, p. 69, and cases cited.

Though evidently not necessary to be considered in view of the express language of the statute, yet the correspondence between the plaintiff and defendant's comakers of the note concerning its renewal and deferment of payment and the character of the signature to be attached by defendant, and the act of plaintiff in retaining the note having the signature of the testator thereto and the reason given for such retention, disclose a purpose on the part of the bank not to forego its right to hold the estate liable for the debt and not defendant personally liable therefor. The first letter advised the bank of the approaching maturity of the note renewed and of the death of the testator, and requested the privilege of renewal for an additional period, with the suggestion that Mrs. Jacobs would sign the renewal "as executrix." To this letter the bank promptly replied:

"Under the circumstances we will accept renewal this time with the understanding that the note will be reduced considerably at maturity. Please have Mrs. Jacobs sign as executrix of Geo. M. Jacobs, deceased, and forward renewal to us at your earliest convenience, and oblige."

In answer thereto the same joint maker wrote:

"Inclosed find \$5,000 note in renewal of note of George M. Jacobs, myself and others, due to-day. Mrs. Jacobs has signed same as executrix of her husband."

To which the bank again replied:

"We are in receipt of renewal of the George M. Jacobs note for \$5,000 and we would prefer to pin the old note to the renewal in order to show that the note signed by Mrs. Jacobs was issued in lieu of the original note. Trusting this will be satisfactory to all parties concerned, we remain," etc.

The same note was renewed the second time by the same parties under the same signatures and with like addition to the name of the executrix, with a similar request as to the form of her signature and for the liberty of retaining in its possession, and for the same reason, the note carrying the signature of the decedent. It is upon this renewal the action was brought. The verdict upon which judgment against Mrs. Jacobs stands was directed virtually by the court in an instruction requested by the bank. This, we think, was such palpable error as necessitates a reversal of the judgment and remand of the case for such further proceedings as the parties may elect in conformity with what we have said.

Reversed and remanded.

(85 W. Va. 687)

**FAIRMONT WALL PLASTER CO. v. NUZUM et al. (No. 3808.)**(Supreme Court of Appeals of West Virginia.  
March 2, 1920.)*(Syllabus by the Court.)*

1. MUNICIPAL CORPORATIONS  $\S$ 456(1)—SPECIAL PAVING ASSESSMENT AGAINST CITY LOT NOT COMPLYING WITH CHARTER THEN IN FORCE INVALID.

A special assessment against a city lot for cost of paving, made agreeably to the provisions of a repealed charter and substantially variant from the requirements of a new or amended charter in force at the time of the improvement and assessment, is fatally defective and unenforceable.

2. STATUTES  $\S$ 64(4)—UNCONSTITUTIONALITY OF SEPARABLE PROVISIONS OF MUNICIPAL CHARTER STATUTE DO NOT WHOLLY INVALIDATE IT, OR DENY EFFECT TO CLAUSE REPEALING FORMER CHARTER.

Unconstitutionality, if any, of clearly separable provisions of a municipal charter statute, do not wholly invalidate it, nor deny effect to a clause thereof repealing the former charter.

3. MUNICIPAL CORPORATIONS  $\S$ 46, 48(2) — NEW OR AMENDED CHARTER STATUTE, IN SO FAR AS CONSTITUTIONAL, IS LAW OF MUNICIPALITY, THOUGH JUDICIAL PROCEEDINGS ARE PENDING TO TEST ITS CONSTITUTIONALITY.

Such new or amended charter, in so far as it is constitutional and valid, is the law of the corporation, notwithstanding the pendency of judicial proceedings to prevent it from going into effect, on the ground of unconstitutionality.

4. CONSTITUTIONAL LAW  $\S$ 70(1), 77 — NEITHER COURTS NOR OFFICERS CAN PROLONG LIFE OF REPEALED STATUTE.

Neither the courts nor individuals acting as officers can prolong the life of a repealed statute.

5. OFFICERS  $\S$ 40—STATUTES  $\S$ 1—ACTS OF DE FACTO OFFICERS VALID; THERE CANNOT BE A DE FACTO LAW IN TERRITORY OF UNDISPUTED SOVEREIGNTY.

Though there may be de facto officers whose acts are valid, there can be no such thing as a de facto law in territory under the jurisdiction of an undisputed sovereignty.

6. OFFICERS  $\S$ 104—ACTS OF DE FACTO OFFICERS TO BE VALID MUST COMPLY WITH APPLICABLE LAW.

To be valid, the acts of de facto officers must comply with the requirements of applicable law, to the same extent and in the same manner as valid acts of de jure officers.

*(Additional Syllabus by Editorial Staff.)*

7. STATUTES  $\S$ 264—THERE IS A PRESUMPTION AGAINST LEGISLATIVE INTENT TO GIVE A STATUTE RETROACTIVE EFFECT.

While curative acts are necessarily retroactive, there is a presumption against a legislative intent to give a statute retroactive ef-

fect and operation in the absence of the use of terms indicating it, even in the case of purely remedial statutes.

8. STATUTES  $\S$ 245 — TAXING STATUTES ARE STRICTLY CONSTRUED.

Taxing statutes imposing burdens on citizens against their will in favor of the public and framed by the public authorities are generally construed with a degree of strictness, and, though not always falling within such rule of construction, the intention of the Legislature to impose the tax in question in any case must be disclosed by the terms of the taxing act.

9. MUNICIPAL CORPORATIONS  $\S$ 405—TECHNICALLY "SPECIAL ASSESSMENT" IS A TAX AND POPULARLY IT IS A LIEN ON PROPERTY IMPOSED BY LAW.

Technically a "special assessment" is a tax or an imposition in the nature of a tax, and in the popular sense it is a lien on property imposed by law.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Special Assessment.]

**Appeal from Circuit Court, Marion County.**

Bill by the Fairmont Wall Plaster Company against Ernest C. Nuzum and others. Bill and amended bill dismissed on demurrer, and defendant Ernest C. Nuzum appeals. Decree affirmed.

Harry Shaw, of Fairmont, for appellant.  
Trevy Nutter and W. S. Meredith, both of Fairmont, for appellee.

POFFENBARGER, J. The bill and amended bill dismissed on demurrer by the decree complained of sought enforcement of an alleged lien for street paving on a certain lot in the city of Fairmont. The court below held the assessment void because on its face it appears to have been made under a paving provision of a charter that, in the opinion of the court below, had been repealed before the paving was ordered or done and before the assessment was made. The controversy is a result of the Fairmont Charter Act of 1915 (Acts 1915, c. 10), referred to in *Anderson v. Bowen*, 78 W. Va. 559, 89 S. E. 677.

Notwithstanding the adjudication of the validity of the passage of the Charter Act of 1915 made in that case June 1, 1916, the authorities of that city in office at the time on August 7, 1916, ordered the paving of a certain street therein, East Park avenue between Morgantown avenue and Speedway street, under the provisions of the Charter Act of 1913 (Acts 1913, c. 81), which the act of 1915 purported to repeal, and between that date and January 22, 1917, caused the work to be done and paving certificates therefor to be issued in accordance with the provisions of said act of 1913. The ordinance ordering the paving and the certificates based on the

assessment recite the paving provision of the act last above mentioned. The assessments made on all of the properties affected amounted to over \$7,000, but those made against the property involved here aggregate only \$124.20. The work was let to contract, and the contractor partly paid in assessment certificates, and he assigned those purporting to bind the property of the appellee to the appellant in this cause.

A demurrer to the bill disclosing these facts having been sustained, the bill was amended by allegations of the award of an injunction by the United States District Court for the Northern District of West Virginia restraining the board of affairs of the city from holding an election under the act of 1915, dissolution of the injunction, and pendency of an appeal from the decree of dissolution in the Supreme Court of the United States. A demurrer interposed to the bill so amended was sustained, and both bills dismissed.

[1-4] Such grounds of invalidity of the act of 1915 as would have wholly defeated it, if they had been tenable, were distinctly disposed of adversely to the assailants of the act, in the decision above referred to, and that decision was rendered before the work in question was ordered or performed, as has been shown. That decision also impliedly held that the constitutional infirmity, if any, in the provisions of the Charter Act of 1915, respecting the mode of election of officers and qualifications of voters, did not wholly invalidate the charter. That they did not is clearly manifest. There was no constitutional impediment to a change of the name of the governing body from "board of affairs" to "board of directors," nor to a change in the number of its members. Whether all of the provisions were valid or not, the act continued or created a municipal corporation having numerous and extensive powers of the kind usually conferred upon such corporations, including that of street improvement and imposition of special assessments for part payment of the cost thereof, about the validity of which no question ever arose. Efforts wholly to defeat and annul municipal charters on the ground of invalidity of clearly separable provisions thereof are never sustained by the courts. Authority of the Legislature to make the slight changes in the paving sections of the Charter Act of 1913 found in that of 1915 was never questioned and could not have been with any degree of plausibility. They amounted to no more than the reduction of the assessments from entire cost of the work to two-thirds thereof, and requirement of publication of notices of assessments in all of the daily papers of the city instead of such publication in two of them. Of the constitutionality of all of the basic provisions of the Charter Act of 1915, other than one or two relating to the mode of election and

the qualifications of voters, which are obviously separable and displaced by general laws, if invalid, and the validity of the repealing clause and the paving and assessment provisions, there is not the slightest doubt in our minds. To invalidate the repealing clause, substantially all, if not all, of the act would have to be unconstitutional. *Lewis' Suth. Stat. Con.* § 245; *Ely v. Thompson*, 3 A. K. Marsh (Ky.) 70; *State v. Blend*, 121 Ind. 514, 23 N. E. 511, 16 Am. St. Rep. 411; *Randolph v. Builders*, etc., 106 Ala. 501, 17 South. 721; *State v. Thomas*, 138 Mo. 95, 39 S. W. 481; *McAllister v. Hamlin*, 83 Cal. 361, 23 Pac. 357. In the main this act is valid.

Nor has there ever been any final adjudication to the contrary, if such an adjudication would affect the question now under consideration. The decree in *Anderson v. Bowen* predicated upon that theory was reversed by this court, and the order of the federal court awarding an injunction against the holding of an election was merely interlocutory. It simply restrained action of the city authorities pending determination of the question, and was later set aside. The appeal from the order of dissolution accomplished no more than a provisional reinstatement of the injunction for the purpose of inquiry by the appellate court as to the validity of the act.

Nonconformity in substantial respects with the only law in force in the city of Fairmont at the dates of the paving and assessment, namely, a charge of the entire cost of the work instead of two-thirds thereof, and publication of the notice of the assessments in two papers instead of all of the daily papers, renders the assessment and certificates here involved necessarily void, unless the Charter Act of 1913 was kept in force by means of the litigation to which reference has been made, as a de facto law, or the assessment has been validated by the Charter Act of 1919.

[5] There may have been de facto officers at the dates of the paving and assessment, but there could have been no such thing as a de facto paving law. Repeal of the Charter Act of 1913 completely terminated its force and effect. All efforts to continue it in force were obviously futile. *Lewis' Suth. Stat. Con.* 285. That repeal was an exercise of clear and unquestionable legislative authority. In a state whose sovereign powers are undisputed and whose legislative will is unhampered and untrammelled, it is beyond the power of courts or individuals to nullify laws authoritatively enacted by it, or to arrest their operation. Under such circumstances, it is repeated, there can be no such thing as a de facto law. A repealed law is no longer a law. It is a mere relic, resorted to sometimes on questions of interpretation.

It is a dead law susceptible of resurrection only by a proper exercise of legislative power, and the courts cannot, by any action of theirs, keep life or vitality in it for a minute after the repealing act becomes effective. *Curran v. Owens*, 15 W. Va. 208; *Moore v. McNutt*, 41 W. Va. 695, 24 S. E. 682. It is certainly as valueless as an unconstitutional law, which has been declared to be no law. *Norton v. Shelby Co.*, 118 U. S. 425, 6 Sup. Ct. 1121, 30 L. Ed. 178; *Cooley, Const. Lim.* p. 259. As regards unconstitutional acts, there are possible exceptions, but no court has ever noted any in the case of a repealed statute containing no saving clause.

[6] The refusal of the officers of the city to provide for the election of new officers to fill the places provided for by the new charter and the interposition of judicial powers to prevent such election may have resulted in the existence of de facto officers, but such officers, if any, could validly exercise the powers of the city only by procedure authorized and defined by the corporate laws in force at the time. If they had caused the improvement to be made and assessed the cost agreeably to the provisions of the new act, the assessment might have been valid as an act of de facto officers, but they did not do so. They may have wrongfully held the offices, but, if so, they held them only for execution of valid laws, not for administration of repealed or dead laws.

[7] The saving clauses found in sections 140 and 141 of chapter 22, Acts of 1919, Municipal Charters, make no specific reference to special assessments. The former continues in force all valid ordinances previously passed and still effective. These are not of that class. The latter continues in full force and effect all contracts entered into by the city or for its benefit prior to the taking effect of the act. It also provides for continuance and perfection of all public work previously commenced and for completion of public improvements initiated under laws in force when the act became effective. To validate a void assessment, it is necessary to pass in some form a curative statute. Such statutes usually disclose their nature and purpose by some terms used in them. The irregularity or departure working the infirmity is ordinarily mentioned or referred to in some way. Such statutes are

necessarily retroactive, and there is a presumption against legislative intent to give a statute retroactive effect and operation, in the absence of the use of terms indicating it, even in the case of purely remedial statutes. *Harrison v. Harman*, 76 W. Va. 412, 85 S. E. 646. If given retroactive effect to the extent of validation of this assessment, section 141 of the Charter Act of 1919 would validate or impose a tax. *City of Elkins v. Harper*, 82 W. Va. 377, 95 S. E. 1033; *Heavner v. Elkins*, 69 W. Va. 255, 258, 71 S. E. 184, 52 L. R. A. (N. S.) 1035, Ann. Cas. 1913A, 653.

[8] Taxing statutes impose burdens upon citizens against their will in favor of the public, and the public authorities frame them, wherefore they are generally interpreted and construed with a degree of strictness. Though they do not always fall within the rule of strict construction, perhaps the intention of the Legislature to impose the tax in question in any case must be disclosed by the terms of the taxing act. *Cooley, Tax.* pp. 452 to 464. Here there is no reference to taxation or any assessments. Contracts are mentioned and continued in force and effect, and assessments may be incidents, attendants, or consequences of contracts for street improvements, but they are not contracts between the city and the abutting property owner, within the ordinary meaning and acceptance of the term "contract."

[9] Technically a special assessment is a tax or an imposition in the nature of a tax. In the popular sense it is a lien on property imposed by law. To make the terms of the statute include it, the term must be stretched beyond both its technical or popular meaning. Nor is there a word in the section importing intent to validate a void contract. To treat it as a validating act, it is necessary not only to give its terms an unwarranted scope, but also to give it retroactive effect in the absence of words indicative of intent to do so. Power and authority in the Legislature to validate the assessment, by provision for a reassessment or otherwise, is not here denied, but the assertion that it has been validated rests largely, if not entirely, upon surmise and conjecture.

For the reasons stated, the decree complained of will be affirmed.

(179 N. C. 684)

**RICHTER v. WHITE et al. (No. 217.)**

(Supreme Court of North Carolina. March 24, 1920.)

**TRUSTS ¶44(1)—EVIDENCE SUFFICIENT TO INGRAFT PAROL TRUST ON CONVEYANCE OF LAND.**

In an action to ingraft a parol trust upon land conveyed by a man to his wife, evidence held sufficient to sustain findings that it was orally understood and agreed that the wife would hold the title for herself for life and then for certain grandchildren in equal shares.

Appeal from Superior Court, Sampson County; Daniels, Judge.

Action by Eliza White Richter against Mrs. Eliza F. White and others. Judgment for plaintiff, and defendants appeal. No error.

This is an action to ingraft a parol trust upon land conveyed by Oliver P. White to his wife, the defendant; the plaintiff alleging that at the time of the execution of the conveyance it was understood and agreed between the parties that the defendant would hold the title to the property for herself for life and then for the plaintiff, Eliza White Richter, their grandchild, and the defendant Minnie Willaims, another grandchild, in equal shares. There was a verdict and judgment for the plaintiff, and the defendant appealed.

Butler & Herring and Faircloth & Fisher, all of Clinton, and Oates & Herring, of Fayetteville, for appellants.

Grady & Graham, Henry E. Faison, and Fowler & Crumpler, all of Clinton, and Barker & Robinson, for appellee.

**PER CURIAM.** The arguments of counsel for plaintiff and the defendants have been earnest and able and the briefs filed full and satisfactory, both in the statements of fact and the discussion of the law; but, at last, the real question in controversy is whether there is evidence fit for the consideration of the jury to establish the parol trust alleged in the complaint, and, after a careful consideration of the record and of the authorities, we are of opinion the case could not have been withdrawn from the jury.

The evidence of the witness Hall, the justice of the peace who took the probate of the deed, to the effect that at the time the deed was signed the grantor, O. P. White, spoke to his wife and pointing to the land said this part down this way is to go to one, naming her, and this piece to go to the other, naming her, and that his wife, the grantee, replied that the children would be taken care of all right, permitted the inference that the deeds were executed pursuant to a previous agreement and understanding, and this is strongly corroborated by the evidence of Paul White, who was living with Mr. and Mrs. White, who

testified that immediately after the deeds were signed Mrs. White came out of the room and told him that Mr. White gave her everything to do as she pleased with in her lifetime and that after her death it was to be divided between the two grandchildren.

There is much other evidence sustaining the contentions of the plaintiff, all of which was submitted to the jury under full, fair, and accurate instructions.

In our opinion, the evidence meets the requirements of the law, and it is not necessary to enter into a discussion of the authorities. No error.

(179 N. C. 691)

**QUELOH et al. v. FUTCH et al. (No. 298.)**

(Supreme Court of North Carolina. March 24, 1920.)

**EJECTMENT ¶50 — ACTION PROPERLY DISMISSED AS TO DEFENDANT'S WIFE, MADE A PARTY AFTER FINAL JUDGMENT.**

Where, in an action of ejectment, plaintiffs, after final judgment, issued a summons against defendant's wife, and she filed an answer from which it appeared that she had equities, and raised issues between herself and her husband, her motion to dismiss the action as to her was properly granted, without prejudice to the right to bring a new action.

Appeal from Superior Court, New Hanover County; Bond, Judge.

Action by J. P. Quelch and others against D. K. Futch and others. From an order dismissing the action as to defendant Hannah T. Futch, plaintiffs appeal. Affirmed.

This action was brought against D. K. Futch and not against Hannah T. Futch. The cause came to this court and the final decree entered. 174 N. C. 395, 92 S. E. 899; 175 N. C. 694, 94 S. E. 713. After the final judgment was entered the plaintiff issued the summons against Hannah T. Futch, wife of D. K. Futch, seeking to continue the action of ejectment and to recover a judgment against her. The defendant respondent Hannah T. Futch moved to dismiss the action as to herself because she had been brought in after the final decree had been entered, and that the plaintiff's remedy was by bringing a separate action against her, whereupon the court made the following order:

"This cause coming on to be heard before his honor, Oliver H. Allen, judge presiding, at the October term, A. D. 1919, of the superior court of New Hanover county, and at the conclusion of the reading of the pleadings in this cause the plaintiffs made a motion to dismiss the action as to D. K. Futch upon the ground that the action was at an end as to him, for the reason that a final judgment had heretofore in this cause been entered as to him, from which judgment he appealed to the Supreme Court, and

upon the appeal the Supreme Court affirmed the judgment of the lower court, and that upon the coming down of the opinion from the Supreme Court the judgment was entered against D. K. Futch according to the certificate from the Supreme Court, as appears of record in this cause, and for judgment striking out the defendant Hannah T. Futch's answer, and for judgment against her for the failure to file a defense bond as required by the statute, and for judgment against Hannah T. Futch on the pleadings because as a matter of law Hannah T. Futch was bound by the judgment against her husband, D. K. Futch, heretofore entered in this cause, and the defendant Hannah T. Futch having made a motion to dismiss this action as against her because the plaintiff had filed no prosecution bond as required by law, and that upon her answer on the record it appeared that she had been made a party defendant to this action after the action had finally terminated, it having originally been brought against her husband, and upon the further ground that from the defendant's answer it appeared that she had equities and raised issues between herself and her husband, and that Hannah T. Futch was wrongfully made a party defendant to this action; and the court being of opinion, at the conclusion of all the argument and readings of the record in this cause, that Hannah T. Futch was improvidently made a party to this action, and that the action should be dismissed as to her, and that it would be more conducive to an orderly trial of all the matters in dispute between the parties if this action is dismissed as to Hannah T. Futch, without prejudice to the rights of any of the parties hereto to bring and prosecute a new action if the plaintiffs so desire:

"It is therefore ordered, adjudged, and decreed by the court that this action be and the same is hereby dismissed as to Hannah T. Futch, without prejudice to the rights of the plaintiffs to bring a new action against the said Hannah T. Futch and her husband, D. K. Futch, if they so desire, or against either one or the other of them; and that the defendant Hannah T. Futch and D. K. Futch recover of the plaintiffs the costs of this action incurred since the said Hannah T. Futch was made a party hereto.

"It is further ordered and adjudged by the court that the said Hannah T. Futch may, if she so desires, bring and prosecute her action against her said husband without being prejudiced by this order, and this judgment is to be entered as a final judgment in this case, and the case is ordered stricken from the docket of this court. Defendant's motion was made first and allowed; plaintiff's motions were not passed on. Plaintiff allowed to file prosecution bond.

"O. H. Allen, Judge Presiding."

From the foregoing judgment, the plaintiff, having excepted, appealed to the Supreme Court.

Wright & Stevens, of Wilmington, and McClammy & Burgwin, of Wilmington, for appellants

E. K. Bryan, of Wilmington, for appellee Hannah T. Futch.

PER CURIAM. The order of his honor, Judge Allen, is itself a full statement of the point at issue.

We think the order made by his honor is entirely correct, and the same is affirmed.

(179 N. C. 686)

ROE et al. v. JOURNEGAN. (No. 267.)

(Supreme Court of North Carolina. March 24, 1920.)

EVIDENCE §—273(4)—DECLARATION OF GRANTEE THAT HE DID NOT ACCEPT LAND FROM FATHER HELD NOT ADMISSIBLE.

In an action for the recovery of land, involving a dispute as to whether a deed from plaintiff's grandfather, conveying the land to their father for life, with remainder to plaintiffs, was ever delivered, the declaration of plaintiff's father that he did not accept the property was not rendered admissible as a declaration against interest by evidence that he was not his father's sole heir, and that he moved from the land in controversy and bought other land.

Appeal from Superior Court, Franklin County; Guion, Judge.

Action by Bennie Roe and others against James Journegan. From a judgment for defendant, plaintiffs appeal. New trial.

Wm. H. & Thos. W. Ruffin, and W. M. Person, all of Louisburg, for appellants.

W. H. Yarborough, Jr., of Louisburg, for appellee.

PER CURIAM. The facts are fully stated in the report of the first appeal in this action. 175 N. C. 261, 95 S. E. 495.

On the second trial the court admitted the same declaration of W. S. Roe, which the court formerly held to be incompetent, and the plaintiff, having excepted, again appealed.

This ruling of the judge was upon the idea that, the defendant having introduced evidence that W. S. Roe was not the sole heir of his father, and that he moved from the land in controversy and bought other land, this met the requirements of the court in the former opinion, but, while these circumstances were properly considered, they do not meet the burden cast by law on the defendant of showing "that the declaration was against the interest of the declarant, that he had no probable motive to falsify the fact declared" (Smith v. Moore, supra [142 N. C. 277, 55 S. E. 275, 7 L. R. A. (N. S.) 684]), and that there was 'a total absence of interest to pervert the fact.' Smith v. Moore, quoting from Lord Ellenborough."

New trial.

(179 N. C. 326)

## IN RE WIGGINS' WILL.

## Appeal of LITTLE.

(No. 262.)

(Supreme Court of North Carolina. March 17, 1920.)

## 1. WILLS §812 — SPECIFIC GIFTS DO NOT ABATE IN FAVOR OF PECUNIARY LEGACY.

Articles given specifically in a residuary clause do not abate in favor of a pecuniary legacy.

## 2. WILLS §756—GIFT OF PERSONAL PROPERTY A GENERAL LEGACY.

A gift of "every species of personal property I may possess at my death not named in my will" is a general legacy.

## 3. WILLS §756, 807—GENERAL LEGACY HELD TO ABATE IN FAVOR OF PECUNIARY LEGACY.

Five hundred pounds of meat owned by deceased at his death did not pass under a general legacy of personal property, and was properly applied to pecuniary legacies.

## 4. WILLS §756, 807—BEQUEST OF ALL MONIES HELD A GENERAL LEGACY.

A provision in a will, "I give and bequeath to my daughter, J. all moneys, if any, after paying as above directed [debts and funeral expenses] to her and her alone," was a general legacy, and the residue of such fund was properly applied to pecuniary legacies in a codicil.

Appeal from Superior Court, Franklin County; Guion, Judge.

In the matter of the will of Perry Wiggins. On exceptions to the trial account of Jennie Wiggins, executrix. From a judgment construing the will, Lucy Little appeals. Affirmed.

Perry Wiggins devised in the second clause of his will to his daughter Lucy Little a certain tract of land, duly described, containing 50 acres. He appointed his daughter, Jennie Wiggins, his executrix, and in clause 6 of said will he provided that if there was not a sufficiency of money on hand to pay his debts and funeral expenses she was authorized to sell such personal property as was necessary, and gave to his daughter Jennie Wiggins "all the moneys, if any, after paying as directed above, to her and to her alone. I also give her all the debts owing to me at my death, also all other property of whatsoever kind, including household and kitchen furniture of every kind and description, cattle, stock and farming implements, horses, mules, in fact every species of personal property that I may possess at my death, not named in this will." He had specifically devised a bed and furniture to a grandson and his real estate to parties named.

By a codicil to said will he revoked the devise of the tract of land by clause 2 to his daughter, Lucy Little, above recited, and he "gives and devises to my daughter Lucy Little, \$900 to her only use to do as she pleased with." In addition to the lands and personal property given to my daughter, Jennie Wiggins in items I and VI I give and bequeath to my daughter, Jennie Wiggins \$100 to her only use forever.

The final account of the executrix as filed showed a balance for distribution under the codicil of \$247.71. She applied nine-tenths thereof on the pecuniary legacy to Lucy Little and held one-tenth as due herself under the codicil. She also retained all the household and kitchen furniture, cattle, stock, farming utensils, horses, mules, and 500 pounds of meat. By consent the meat was valued at \$150. The personal property mentioned in item VI of the will was retained by Jennie Wiggins as specifically devised. The court adjudged that these articles were a specific legacy and as such not liable to abatement in payment of the pecuniary legacies given in the codicil, and adjudged that \$150, the value of the meat on hand at the death of the testator, being the only property not specifically devised, is subject to the payment of said pecuniary legacies, and adjudged that Lucy Little was entitled to nine-tenths of the "value of the meat and nine-tenths of the \$247.71, balance for distribution after payment of the debts and funeral expenses," and held that the articles devised in said item VI to Jennie Wiggins were not subject to abatement in payment of the pecuniary legacies in the codicil. To the judgment that said articles in item VI were a specific legacy to Jennie Wiggins, and not liable to payment of the pecuniary legacies, Lucy Little excepted and appealed.

G. M. Beam, of Louisburg, and N. Y. Guile, of Wake Forest, for appellant.

Wm. H. and Thos. W. Ruffin and Ben T. Holden, all of Louisburg, for Jennie Wiggins.

CLARK, C. J. [1] It is true that item VI was a residuary clause, but the articles therein given specifically to Jennie Wiggins do not abate in favor of a pecuniary legacy. In *Young v. Young*, 56 N. C. 217, the court held that a devise almost in the exact terms of this was a specific legacy, and therefore did not abate in payment of a pecuniary legacy. In *Heath v. McLaughlin*, 115 N. C. 402, 20 S. E. 519, the court held that the bequest of two shares of capital stock in the Columbia Manufacturing Company was a specific legacy.

In *Robinson v. McIver*, 63 N. C. 645, a case almost exactly on all fours with this, the court held:

"General pecuniary legacies are not chargeable upon, or to be preferred to, specific devises of land, although the latter be found in a residuary clause which also includes personalty."

These cases merely recognize the well-established rule that "specific legacies do not abate with, or contribute to, general legacies. There are exceptions, as where the whole estate is given in specific legacies and a pecuniary legacy is given, or where an intention that the specific legacies shall abate appears in the will." *Heath v. McLaughlin*, supra. This last is not the case here, for the codicil expressly confirms the devise of the property given to Jennie Wiggins by items I and VI, and indicates no intention to reduce it in favor, or subject it to the lien of the pecuniary legacy to Lucy Little.

[2-4] In this case the last clause of item VI, which provides, "In fact every species of personal property I may possess at my death not named in my will," is a general legacy. The testator died leaving a considerable quantity of meat, to wit, 500 pounds. This meat is not bequeathed specifically, and was properly applied to the pecuniary legacies in the codicil.

The second sentence in item VI of said will, "I give and bequeath to my daughter, Jennie Wiggins all moneys, if any, after paying as above directed [debts and funeral expenses] to her and her alone," was another general legacy, and the residue of said fund was properly applied to the pecuniary legacies in the codicil.

There being general and specific legacies in the will, the latter do not abate in payment of the pecuniary legacies.

Affirmed.

(179 N. C. 341)

**MERCHANTS' NAT. BANK OF RALEIGH  
v. ANDREWS. (No. 257.)**

(Supreme Court of North Carolina. March 24, 1920.)

**1. BILLS AND NOTES §493(3)—DEFENDANT ADMITTING EXECUTION HAS BURDEN TO ESTABLISH WANT OF CONSIDERATION, AND PLAINTIFF NEED NOT PROVE ADMISSION OF EXECUTION.**

Where, in an action on a note, defendant in his answer admitted the execution of the note and pleaded want of consideration as a defense, the burden was on him to establish his defense, and it was not necessary for plaintiff to introduce the part of the answer admitting execution of the note.

**2. PLEADING §8(4)—ALLEGATION THAT NOTE WAS WITHOUT CONSIDERATION A CONCLUSION.**

In an action on a note, an allegation of the answer that the note was executed without consideration was a mere conclusion, where no facts were stated showing that there was no con-

sideration, and defendant's examination before the clerk did not disclose facts sufficient to overcome the presumption of consideration.

**3. BILLS AND NOTES §493(4)—EVIDENCE INSUFFICIENT TO OVERCOME PRESUMPTION OF CONSIDERATION.**

In an action on notes, evidence held insufficient to overcome the presumption arising from defendant's admission of the execution of the notes that they were supported by a consideration.

Appeal from Superior Court, Wake County; Guilon, Judge.

Action by the Merchants' National Bank of Raleigh, N. C., against Wm. J. Andrews. From a judgment for plaintiff, defendant appeals. No error.

This is an action on two notes, one for \$1,500, and the other for \$12,000, dated April 8, 1919, due 90 days after date with interest after maturity. The defendant admitted the execution of the notes, and alleged that they were without consideration. The plaintiff introduced evidence tending to prove the execution of the notes by the defendant, and also the following part of paragraph 3 of the answer:

"The defendant admits, in answer to paragraph 3, that he executed a note for the amount and of the tenor of the copy set forth in paragraph 3 of the complaint."

The defendant introduced the examination of himself taken by the plaintiff before the clerk as follows:

"His name is William Johnston Andrews, age 48 years, residence, 105 E. North street, Raleigh, N. C. Plaintiff's attorney handed witness a paper, which was identified and marked 'Plaintiff's Exhibit A.' The defendant stated that he signed the said paper, it being the note for \$12,000. Plaintiff's attorney handed witness another paper, marked 'Plaintiff's Exhibit B,' which was a note for \$1,500, and witness stated that he signed the same. Witness states that Exhibit A calls for an amount of \$19.30. Witness stated that he signed the same. Plaintiff offers Exhibit A and Exhibit B, both being dated the 8th of April, 1919. Defendant was asked if he drew a check on the Citizens' National Bank of Raleigh on the 8th day of April, 1919, payable to the order of the plaintiff or its cashier for the payment of interest on said Exhibit A and Exhibit B, aggregating \$227.20. Defendant stated: That he did not draw a check for \$227.20. That he drew two checks on the 8th day of April, 1919, payable to the Merchants' National Bank, check No. 2003 for \$30.40, and check No. 2004 for \$205.20. These checks were given for the payment of some papers that he had, some of his papers and some of Monitor Graphite Company's papers. That he could not say that the check for \$205.20 was given for the interest on the two notes for the reason that Mr. Drake said that he needed so much and the witness drew the check for that amount. They were working to-



gether, and he said, Draw a check for so much, and defendant drew it. He does not deny that he paid the discount upon the two notes. He thinks the check for \$30.40 was given to cover his own personal papers. That he did not think that he had any papers in the Merchants' National Bank, but he had others that were handled through the Merchants' Bank. That he had some at Apex that were handled through the bank. That some other transaction must have taken place between the witness and the Merchants' Bank on the 8th day of April, 1919, other than relating to the falling due of the two notes above referred to, as will be seen by check for \$30.40 of that date. Witness was educated at Chapel Hill and Cornell, and took a degree of Mechanical Engineering at Cornell. When he signed the two notes offered in the evidence, he saw that each one of them was due in 90 days, and that the interest was due after maturity. He has had considerable experience with banks; has given notes, paid notes, drawn notes and checks on banks. His own individual business is done with the Citizens' National Bank of Raleigh. He could not ascertain, from examining his checks and accounts, what those two checks covered, as the only recollection he has of it was going in there, and Mr. Drake said he wanted some money to cover interest on the two papers, and he supposed that was what it was for. He gave Mr. Drake the two checks, as Mr. Drake said that to witness. Witness means simply to say that he did not make any calculation himself. States that he does not know that Mr. Drake said it was for interest on the two notes.

"Q. You just said it was for interest on these papers? A. I think that is right in interest and stamps.

"Q. The interest on \$13,500 for 90 days is \$202.50? Witness calculates and answers 'Yes,' and adds that interest and stamps on \$13,500 for 90 days. He had other notes out, but he could not tell you what the amounts were, on the 8th day of April, 1919. No other notes for that exact amount at said bank at that time nor called to witness' attention since.

"The Merchants' National Bank did not pass to his credit so far as he has heard on the 8th day of April, 1919, the sum of \$12,400. He did not get from the bank on that day \$13,500. He did not pay the sum of \$19.30 on 5-20-19 on the \$12,000 note. He did not authorize it to be paid. Mr. Drake was handling the finances of the company, and if it was paid, it was undoubtedly paid by him out of some money that he had. The bank did not notify him how it acquired the \$19.30, and he does not know of his own knowledge. Mr. Drake filled up the \$12,000 note and the \$1,500 note. The Merchants' National Bank did not pay to anybody at his request on the 9th day of April, 1919, \$13,500.

"He was at one time president of the Raleigh Electric Company, county chairman of one of the great political parties. He was president of the Monitor Graphite Company, of which Mr. Drake was vice president. When he was president of the Raleigh Electric Company there were about 30 men under him. Was three years at Cornell, and my degree from that college ranks with the best in the country. It takes four years to get it usually."

The defendant, after objection by plaintiff, offered the following part of paragraph 2, not offered by the plaintiff:

"But that the said note was executed by him without any consideration whatever, and, except as herein admitted, the allegations of paragraph 2 are untrue and are denied."

At the conclusion of the evidence, his honor instructed the jury to answer the issues in favor of the plaintiff if they believed the entire evidence, and the defendant excepted.

There was a verdict and judgment for the plaintiff for the amount of the notes sued on, and the defendant appealed.

Manning, Kitchin & Mebane, of Raleigh, for appellant.

Robert W. Winston, of Raleigh, for appellee.

ALLEN, J. [1] The introduction of a part of the answer of the defendant by the plaintiff which made it possible for the defendant to introduce the remainder of the paragraph, and which raises the only question debatable on the appeal, was unnecessary because the defendant, having admitted the execution of the notes and having pleaded as a defense the want of consideration, the burden was on him to make good the defense, and if he had declined to introduce evidence the plaintiff would have been entitled to judgment on the pleadings.

[2] This is not, however, fatal to the plaintiff, as the statement in the answer that the notes were executed without consideration, when considered in connection with the examination of the defendant, is but a mere conclusion.

[3] The defendant states no facts in the answer showing why he alleged that there was no consideration for the notes, and when he was examined, instead of swearing that they were without consideration, he states the facts connected with the transaction and upon which he relied to show want of consideration, and these are not sufficient, in our opinion, to meet the burden cast upon him by the law upon the admission of the execution of the notes. See *Piner v. Brittain*, 165 N. C. 401, 81 S. E. 462, and *Revisal*, § 2172. He says upon his examination:

"The Merchants' National Bank did not pass to his credit so far as he has heard on the 8th day of April, 1919, the sum of \$13,500."

Certainly not, because the defendant kept his account with the Citizens' National Bank, and not with the Merchants' National Bank. He says, again, he "did not get from the bank on that day \$13,500," and, again, "The Merchants' National Bank did not pay to anybody at his request on the 9th day of April, 1919, \$13,500." These statements may all be true, and still they do not prove the defense. In the first place, the defendant

confines his statement to one particular day and to the payment of the whole amount on that day, when the money might have been paid on another day or in different amounts on different days, or the notes sued on may have been given in renewal of obligations of the defendant, or of notes of the Monitor Graphite Company of which he was president, and the latter seems to have been the real transaction, because he admits that he gave checks on the Citizens' National Bank payable to the Merchants' National Bank on the 8th day of April, 1919, one for \$30.40 and the other for \$205.20, the last amount being the discount on the two notes sued on for 90 days, and he says:

"Those checks were given for the payment of some papers that he had, some of his papers and some of the Monitor Graphite Company's papers."

"He thinks the check for \$30.40 was given to cover his own personal papers."

If so, the check for \$205.20, the discount of the two notes in action, must have been for the Monitor Graphite Company's papers. It is inconceivable that the defendant, educated at Chapel Hill and Cornell, and having a decree from the latter institution which "ranks with the best in the country," president of the Raleigh Electric Company and president of the Monitor Graphite Company, should have executed two notes aggregating \$13,500, and have paid the discount on these for 90 days out of his own money, when there was no consideration for the notes, and he should at least be held to swear upon his examination that there was no consideration, or state facts which would exclude the reasonable probability of a consideration; and, having failed to do so, he has not offered evidence rebutting the presumption raised by the admission of the execution of the notes.

No error.

(179 N. C. 322)

**HARRIS v. TURNER et al. (No. 260.)**

(Supreme Court of North Carolina. March 17, 1920.)

**1. EVIDENCE ¶588—JURY NEED NOT ACCEPT AS TRUE ALL TESTIMONY OFFERED.**

Jurors are not bound to accept as true all the testimony offered by the plaintiff or the defendant, but can accept a part and reject the remainder, being the sole judges of the testimony and what it tends to prove, including the credibility of the witnesses.

**2. APPEAL AND ERROR ¶216(2)—PARTY DESIRING SPECIFIC INSTRUCTIONS MUST REQUEST SAME AT TRIAL.**

If a party desires fuller or more specific instructions than those given by the court, he

must ask for them, and not wait until the verdict has gone against him, and then for the first time complain that an error was committed.

**3. TRIAL ¶139(1)—COURT CANNOT INSTRUCT JURY TO ANSWER QUESTION OF FACT IN A PARTICULAR WAY.**

No matter how strongly the evidence supports the view of one party, the court cannot in view of Revisal 1905, § 535, forbidding giving opinion on the facts, instruct the jury to answer a question of fact in a particular way; such party's remedy being a request to the court that the verdict be set aside as being against the weight of the evidence.

**4. APPEAL AND ERROR ¶977(3)—DECISION, SETTING ASIDE VERDICT AS AGAINST EVIDENCE, NOT REVIEWABLE.**

Decision of trial court, setting aside a verdict as being against the weight of the evidence, is not reviewable.

Appeal from Superior Court, Franklin County; Guion, Judge.

Action by J. N. Harris against J. A. Turner and others, and by J. A. Turner against J. N. Harris, consolidated. From a judgment for only part of the relief demanded, J. A. Turner and others appeal. No error.

Plaintiff brought an action against defendant to recover \$1,000, the balance of a salary of \$2,000 alleged to be due him as drummer for the defendant, who had a tobacco warehouse in Loulsburg. Defendant J. A. Turner sued plaintiff, in another action, to recover \$3,114.77 which they allege he owed them on his "pin hook" account, that is, not on any business done for them, but on his own account, during the year 1915 and 1916 by purchasing leaf tobacco for himself and selling it in the defendant's warehouse, the latter advancing money to the amount of \$24,158.49 to aid him in these personal transactions. Plaintiff paid on this amount in cash \$20,043.72, which together with the \$1,000 of the salary due the plaintiff left a balance of \$3,114.77, which this suit was brought to recover.

The two actions were consolidated and tried together; the balance of salary being treated as plaintiff's claim, and the balance due of the "pin hook" account as defendant's counterclaim, plaintiff denying the latter, and averring that he owed nothing upon it, as it was not his account, but that of the defendant. There was evidence on the question whether what is called the "pin hook" account was the personal account of the plaintiff, or the account of the defendant, based on transactions exclusively theirs. This question was submitted to the jury, and the following verdict was returned:

"Is the plaintiff indebted to J. A. Turner upon the counterclaim pleaded in this action; if so, in what amount? Answer: \$1,000."

The court charged the jury as follows:

"Defendants, while admitting this unpaid account, contend that plaintiff is indebted to Turner and the warehouse company in the sum of \$3,840.67, as limited by his complaint, over and above the sum so due him on salary account, and contends that this issue should be answered in his favor for tobacco bought on personal account of J. N. Harris. Therefore you are relieved of considering the question of amount due plaintiff, Harris. The question you are to consider is, Does plaintiff, Harris, owe defendant warehouse company this money advanced on personal account of Harris in payment of tobacco purchased by him for his personal use and benefit? If defendants have satisfied you by the greater weight of the evidence that the tobacco was bought by Harris on his own account, inquire and say how much was paid out on such purchases by the company, and answer the issue in such amount as you may find was paid. If defendants have failed so to satisfy you by the greater weight of the evidence, or, on the other hand, if you shall find that the tobacco was bought by Harris for Turner and the warehouse company, and accepted by the company and paid for by it under such purchases, then answer the issue 'Nothing.'"

There was no prayer for instructions. Judgment on the verdict. Defendants appealed, and assigned this single error:

"The defendants except to the refusal of the court to grant their motion to set aside the verdict upon the ground that the same is inconsistent with any or all of the evidence, for that if the defendants are entitled to recover anything upon their counterclaim they are entitled to recover the full amount thereof, and in no view of the evidence could the jury have found consistently with any or all of the evidence that the defendants were entitled to recover the sum of \$1,000 and no more, the plaintiff having not denied specifically the purchase by him of any particular lot of tobacco, but contending that all of the tobacco was bought for the warehouse, and none for his own account and risk."

B. T. Holden, W. H. Yarborough, and White & Malone, all of Louisburg, for appellants.

Wm. H. & T. W. Ruffin and W. M. Person, all of Louisburg, for appellee.

WALKER, J. (after stating the facts as above). [1] We do not see how there can be any error in the judge's charge, and none is alleged. The case was left with the jury upon the evidence as to the terms of the contract between the parties and as to the damages. The jurors were not bound to accept as true all the testimony offered by the plaintiff or the defendants, but could accept a part and reject the remainder, as they were the sole judges of the testimony and what it tended to prove, which, of course, included the credibility of the witnesses. They might, for instance, have found that plaintiff had not promised to pay as much as the defendants

claimed, or had not bought, for himself, as much leaf tobacco as alleged.

[2-4] The objection of the defendants is not to the judge's charge, but to the verdict, which is the only object of his attack—not to what the judge said, but to what the jury found. The judge left the question of damages entirely to the jury, for he could not decide it as a matter of law. We cannot agree with the defendant's contention, in a legal sense, "that the verdict is inconsistent with any or all of the evidence," and, if defendants were entitled to recover \$1,000, they were entitled, as a matter of law, to recover all of their claim. There was no request for an instruction to that effect, and there is no exception to the charge of a like nature. If the proposition be true, the point of the objection is, not that the jurors decided contrary to the instruction of the court, for the court gave no such instruction, but it was that the jury failed to instruct themselves as to the law. When the judge left the amount paid by the defendants for the jury to find, defendants were silent, and therefore assented to this treatment of the question. If the defendant desired a special instruction to guide the jury, they should have asked for it. *Simmons v. Davenport*, 140 N. C. 407, 53 S. E. 225; We there held that if a party desires fuller or more specific instructions than those given by the court in the general charge, he must ask for them, and not wait until the verdict has gone against him, and then, for the first time, complain that an error was committed. We repeated this rule in *Davis v. Keen*, 142 N. C. at p. 502, 55 S. E. 361, in these words:

"Any omission to state the evidence or to charge in any particular way should be called to the attention of the court before verdict, so that the judge may have opportunity to correct the oversight. A party cannot be silent under such circumstances, and, after availing himself of the chance to win a verdict, raise an objection afterwards. He is too late. His silence will be adjudged a waiver of his right to object," where the instruction of the court is not itself erroneous.

This has been approved in many cases, and very lately in several. *Baggett v. Lanier*, 178 N. C. 132, 100 S. E. 254; *Futch v. Railroad Co.*, 178 N. C. 282, 100 S. E. 436; *Sears v. Railroad Co.*, 178 N. C. 285, 100 S. E. 433; *State v. Stancill*, 178 N. C. 683, 100 S. E. 241. It can make no difference how strongly the evidence supports the defendant's view, it is still a question of fact to be settled by the jury. In such a case, the remedy is a request to the court that the verdict be set aside as being against the weight of the evidence, the decision upon which is in the discretion of the judge, and it is not reviewable. It would have been an invasion of the province of the jury if the judge had instructed them to answer a question of fact in a particular way. *Revisal of 1905*, § 535; *Withers v. Lane*, 144

N. C. 184, 56 S. E. 855; State v. Rogers, 173 N. C. 755, 91 S. E. 854, L. R. A. 1917E, 857; State v. Windley, 178 N. C. 670, 100 S. E. 116.

The plaintiff denied any liability to the defendants on the alleged "pin hook" account, or that he owed the amount claimed, raising thereby an issue for the jury.

No error.

(179 N. C. 290)

**SOUTHERN STOCK FIRE INS. CO. OF GREENSBORO v. RALEIGH, O. & S. RY. CO. et al. (No. 101.)**

(Supreme Court of North Carolina. March 10, 1920.)

**1. ACTION  $\S$ 57(2) — SEPARATE ACTIONS BY INSURERS AGAINST PERSON CAUSING LOSS MAY BE CONSOLIDATED.**

The court can consolidate separate actions against the party negligently burning property brought independently by the several insurers who have paid their policies thereon.

**2. ACTION  $\S$ 53(2)—OBJECTION TO SPLITTING CAUSE OF ACTION WAIVED BY ANSWER TO MERITS.**

Objection to splitting cause of action against wrongdoer burning insured property is waived, where at the same time there are brought against him separate actions, one by the owner for the amount of loss above the insurance, and one by each of the insurers for the amount of insurance it had paid, and defendant, instead of objecting by plea or motion, answers to the merits.

Appeal from Superior Court, Harnett County; Connor, Judge.

Action by the Southern Stock Fire Insurance Company of Greensboro against the Raleigh, Charlotte & Southern Railway Company and another. From an adverse judgment, plaintiff appeals. Reversed.

This is an action by an insurance company to recover the amount of the insurance paid by the plaintiff to the Elm City Lumber Company on account of loss by fire alleged to have been caused by the negligence of the defendant.

(1) On November 11, 1912, a fire occurred, which destroyed lumber owned by the Elm City Lumber Company, amounting in value to upwards of \$20,000.

(2) On December 3, 1914, the Elm City Lumber Company and N. McLaughlin commenced an action against the defendant, returnable to the January term, 1915, the plaintiffs therein suing for \$8,165.83, \$4,971.12 of which was claimed by N. McLaughlin and \$3,194.71 by the Elm City Lumber Company.

(3) At the January term, 1917, during the trial of the McLaughlin-Elm City Lumber Co. Case, which is reported in 174 N. C. 182, 93 S. E. 748, the plaintiffs therein were al-

lowed to file an amended complaint, in which is set up the amount of insurance which had been paid to the Elm City Lumber Company, to wit, \$11,678.49 by several insurance companies; and the plaintiffs also in said amended complaint of January, 1917, alleged that the total value of the lumber was a great deal in excess of \$20,000, the total value of the lumber at the plant at the time of the burning being alleged to be greatly in excess of \$22,000, and the unburned portion being alleged to be of the value of \$2,009.15.

(4) At said January term, 1917, the Elm City Lumber Company recovered judgment against the defendant for \$7,500, and after appeal to this court (174 N. C. 182, 93 S. E. 748), where the judgment of the lower court was affirmed, the defendant paid said judgment in full.

(5) At no time prior to the November term, 1919, has the plaintiff sought any relief except through the medium of its independent action.

(6) The summonses in this and the other three insurance company cases and in the Elm City Lumber Company case against this defendant were all issued December 3, 1914. The actions by the other insurance companies were like this to recover insurance paid to Elm City Lumber Company.

At November term, 1919, the plaintiff in this action moved to consolidate all of the actions by the insurance companies, alleging that in the action by the Elm City Lumber Company against the defendant no recovery was sought or had on account of the insurance paid, and that the damages assessed was the difference between the insurance and the value of the property.

The judge was of the opinion that he had no right to consolidate this case with the other three cases named, and refused to grant the motion made by plaintiff's counsel. The plaintiff excepted.

The defendant then moved to dismiss the action on the ground that the complaint does not state a cause of action, in that from said complaint it appears:

(a) That the title to the lumber destroyed by fire was in the Elm City Lumber Company.

(b) That the amount of insurance which plaintiff paid to said Elm City Lumber Company on account of said lumber destroyed was \$2,975.75.

(c) That the value of the lumber destroyed was \$20,000.

This motion was allowed, and the plaintiff excepted and appealed.

Godwin & Williams and E. F. Young, all of Dunn, and R. W. Winston, of Raleigh, for appellant.

H. McD. Robinson, of Fayetteville, and R. N. Simms, of Raleigh, for appellees.

(103 S.E.)

ALLEN, J. [1] His honor was in error in holding that he did not have power to consolidate the several actions brought by the insurance companies. See Insurance Co. v. Railway Co., 102 S. E. 417, at this term, opinion by Walker, J., where the precise question is fully discussed and decided.

The same case also holds that the Elm City Lumber Company may be made a party, and that this would not change the character of the action. If, however, the lumber company is not made a party, we are of opinion the consolidated action may be maintained, although the loss exceeds the insurance, if, as alleged and so far not denied, the parties have in effect divided the action, and this follows naturally from the decision in Powell v. Water Co., 171 N. C. 290, 88 S. E. 426, Ann. Cas. 1917A, 1302. It was held in that case:

"(1) That the right of action to recover damages from the wrongdoer is in the insured, and that this right of action is one and indivisible.

"(2) That upon payment of the insurance the insurer is subrogated to the rights of the insured as against the wrongdoer.

"(3) That if the insurance is equal to or exceeds the loss, this right of subrogation extends to the whole right of action in the insured, and operates as an equitable assignment, and the action may thereafter be prosecuted in the name of the insurer.

"(4) That if the insurance is less than the total loss, the right of subrogation still exists; but, as the right of action is indivisible, and as the insurer has only paid a part of the loss, and is not entitled to an assignment of the whole cause of action, the action must be prosecuted in the name of the insured.

"(5) That a release by the insured does not extinguish the right of subrogation."

Also that the insured is a trustee first for reimbursement of his own loss in excess of the insurance, and then for the insurer to the extent of the insurance paid, and the court adds:

"They [the authorities] also seem to establish the proposition that if the insurance is less than the loss, and the insured has settled the difference between the insurance and the total loss with the wrongdoer, leaving unsettled only the amount of damages, measured by the insurance, that the cause of action for this damage would be in the insurer, for the reason that the insured has parted with all beneficial interest in the right of action, and, while the cause of action was indivisible, it has been divided by the act of the parties."

[2] This recognizes the principle that, while the right of action in the insured is one cause of action, and indivisible against the will of the parties, it can be divided by the agreement or act of the parties, and it is also true that the rule against the splitting of causes of action is for the benefit of the defendant, for the purpose of protecting him

against a multiplicity of suits and unnecessary expense and costs, and may be waived by him.

If so, and it is made to appear that the Elm City Lumber Company, the insured, brought its action to recover its damages in excess of the insurance, and on the same day the insurance companies commenced their actions against the same defendant to recover the amount of the insurance paid by them, thus dividing the action in so far as they were able to do, and the defendant, instead of objecting to this division of the action by plea or motion, answered to the merits, it must be held to have acquiesced in and to have assented to the course taken by the several plaintiffs.

In Fort v. Penny, 122 N. C. 232, 29 S. E. 362, in which objection was made in the superior court to dividing a cause of action in order that actions might be commenced before a justice of the peace, it was held, "If the proofs had shown as matter of fact that the two demands appearing in the two summonses were one and the same transaction, and therefore indivisible," the defendant must file plea in abatement, and upon failure to do so the objection was waived; and upon the same principle this action may be maintained.

Reversed.

(175 N. C. 314)

GULF REFINING CO. v. McKERNAN.  
(No. 97.)

(Supreme Court of North Carolina. March 17, 1920.)

1. MANDAMUS ⇐71—PERFORMANCE OF MINISTERIAL DUTY ENFORCEABLE.

The performance of a mere ministerial duty on the part of a public official, when arbitrarily refused, may be enforced by mandamus.

2. MANDAMUS ⇐87—ISSUANCE OF BUILDING PERMIT MAY BE ENFORCED.

Under the statutes the issuance of a building permit, when arbitrarily refused, may, under some conditions, be compelled by mandamus.

3. MANDAMUS ⇐10—PERFORMANCE OF UNLAWFUL ACT NOT TO BE ENFORCED.

Writ of mandamus will not be issued to enforce the performance of an unlawful act or one in furtherance of an unlawful purpose.

4. MUNICIPAL CORPORATIONS ⇐78—BUILDING REGULATIONS SUBJECT TO POLICE POWER.

Building regulations prescribed by Revisal 1905, § 2986 et seq., are of general application, to be followed and allowed only when the business to be conducted in the building is lawful, and are subject to the police powers conferred on municipal corporations for the public good.

5. MANDAMUS ⇐10—ISSUANCE OF PERMIT FOR BUILDING TO BE USED IN VIOLATION OF ORDINANCES NOT COMPELLED.

Under Revisal 1905, § 2986, a writ of mandamus will not be issued to compel building in-

spector to issue building permit to construct buildings to be used for selling and distributing kerosene oil, gasoline, etc., where the use of the buildings for such purpose would be in violation of city ordinances, notwithstanding that the ordinances were enacted subsequent to the institution of the mandamus suit.

**6. MUNICIPAL CORPORATIONS — 616—MAY ENACT ORDINANCES REGULATING SALE OF OIL, ETC.**

Cities and towns may enact ordinances regulating the selling and distribution of oil, gasoline, and other petroleum products.

Appeal from Superior Court, Lee County; Connor, Judge.

Mandamus by the Gulf Refining Company against J. T. McKernan. Writ issued, and defendant appeals. Reversed.

The application is for a writ commanding the building inspector of the town of Sanford to issue a permit to plaintiff to erect certain structures in said town for the purpose of carrying the business of distributing and selling kerosene oil, gasoline, and greases, and other petroleum products, etc.

On a former appeal, the cause was remanded for further findings of fact, more especially in reference to the existence of certain ordinances of the town of Sanford deemed relevant to the inquiry. S. C., 178 N. C. 82, 100 S. E. 121. Pursuant to that opinion, the court, on a further hearing, finds that the following ordinances of the town were passed and are now in force on the subject, in terms as follows:

"Be it resolved by the board of aldermen of the town of Sanford, N. C.:

"Section 1. That it shall be unlawful for any person to install, build, construct, or erect, alter or repair any tanks, buildings or other structures in which gasoline, oil, kerosene, or any other highly inflammable substance is stored for distribution and sale, nearer than a thousand feet from any dwelling or in any residential section within the corporate limits of the town of Sanford, North Carolina. Provided, however, nothing in this ordinance shall apply to underground tanks built in the earth, or located inside mercantile establishment from which gasoline, oil and kerosene or any other oils are sold or retailed. Any person violating any of the provisions of this ordinance shall, upon conviction before the mayor, be fined fifty dollars (\$50), and each day said structures remain or are used shall constitute a separate offense hereunder.

"Sec. 2. This ordinance shall be in force from and after its passage.

"Passed July 15, 1919.

"Be it ordained by the board of aldermen of the town of Sanford, N. C.:

"Section 1. That it shall be unlawful for any person to store gasoline or other highly inflammable, combustible or explosive oils or substances in tanks or other structures situate nearer than 1,000 feet from any dwelling, residence, or building used as such, within the corporate limits of the town of Sanford. Pro-

vided, however, that this ordinance shall not apply to underground tanks, or tanks inside of mercantile establishments in which gasoline, kerosene or other oils are sold or retailed.

"Sec. 2. Any person violating any of the provisions of this ordinance shall, upon conviction before the mayor, be fined \$25. Provided, however, each day such structure or tank shall be used for storage purposes shall constitute a separate offense hereunder.

"Sec. 3. That this ordinance shall be in force and effect from and after October 1, 1919."

And that the proposed structures to be used for the company's business will be within the distances as prescribed and prohibited by the ordinances, but there is nothing in the structures themselves or the plans and specifications therefor which violates any law or ordinances of the state or town of Sanford. The court thereupon gave judgment that the writ issue, setting forth his conclusion and the reasons therefor as follows:

"Upon the foregoing facts the court is of the opinion that no discretion is vested in the defendant as building inspector of the town of Sanford, as to the issuance of the permit for the erection of said structures, but that the issuance of said permit is a ministerial act to be performed by the defendant in accordance with the provisions of section 2986 of the Revised.

"The court is further of the opinion that the issuance of such permit will not authorize or empower the plaintiff, or any other person, to occupy or use the structures on the said lot in violation of law or in violation of any ordinance now in force or hereafter enacted by the board of aldermen of the town of Sanford.

"Thereupon, upon the motion of attorneys for the plaintiff, it is ordered, considered, and adjudged that the defendant issue, or cause to be issued to the plaintiff, a permit, permitting him to erect on the lot described in the application the structures therein specified."

Defendant excepted and appealed.

Williams & Williams, of Sanford, for appellant.

Sinclair & Dye, of Fayetteville, and Hoyle & Hoyle, of Sanford, for appellee.

HOKE, J. From the admissions in the pleadings and findings of fact made by his honor it appears that plaintiff is a corporation engaged in distributing and selling kerosene oil, gasoline, and other petroleum products and for the purpose and with the intent of carrying on its business within the corporate limits of the town of Sanford, on June 14, 1919, applied to the building inspector for a permit to erect in said town, on the corner of the Southern Railway right of way and Weatherspoon street, certain described surface structures, including "3 steel tanks on brick piers," 20x40 frame warehouse offices, pump house, etc., together with all pumps, engines, pipe lines, fences and equipment

necessary for the conduct of the company's business. That, owing to the fact that the city government was at the time examining into the matter with a view of determining whether this was a proper business to be carried on within the corporate limits, etc., the application was not then given. Whereupon, on July 3, 1919, plaintiff instituted this proceeding for a mandamus to compel performance of the alleged duty. Pending the suit, the board of aldermen, having in their judgment ascertained by inquiry of the state insurance commissioner, the officials of adjoining towns where such structures had been erected and used, and others, that the proposed business and buildings, etc., would be highly inconvenient and annoying to adjacent owners and citizens generally, and import menace to lives and property, passed the ordinances hereinbefore set out.

In reference to the ordinances, the court finds that the business and structures on the site as designated will come within the distances prescribed and prohibited by the ordinance, but, finding also that there is nothing in the plans and specifications of the buildings themselves that are violative of the general state and municipal regulations as to buildings, and, being of opinion, therefore, that there was a ministerial duty permitting no discretion on the part of the inspector, gave judgment that the writ issue and defendant, the inspector, appealed.

[1-3] It is undoubtedly true that performance of a mere ministerial duty on the part of a public official, when arbitrarily refused, may be enforced by mandamus and, under some conditions, the issuance of a building permit, under our statutes appertaining to the subject, may come within the principle. *County Board of Education v. State Board*, 106 N. C. 81, 10 S. E. 1002; *Hartman v. Collins*, 106 App. Div. 11, 94 N. Y. Supp. 63. But it is also fully recognized that the writ of mandamus will not be issued to enforce the performance of an unlawful act, nor one in furtherance of an unlawful purpose. *Betts v. Raleigh*, 142 N. C. 229, 55 S. E. 145; *Godwin v. Carolina Telephone Co.*, 136 N. C. 258, 48 S. E. 636, 67 L. R. A. 251, 103 Am. St. Rep. 941, 1 Ann. Cas. 203; *Hall v. Steele*, 82 Ala. 563, 2 South. 650; *Chicot County v. Kruse*, 47 Ark. 80, 14 S. W. 469; *State ex rel. Ry. Co. v. Latrobe*, 81 Md. 223, 31 Atl. 788; *State ex rel. Matheny v. County Ct. Wyoming*, 47 W. Va. 672, 35 S. E. 959.

In *Godwin v. Telephone Co.*, the application was to compel the installation of a telephone in a bawdyhouse, and it was held that the writ must not lie, and the present Chief Justice, delivering the opinion, said:

"But while it is true that there can be no discrimination where the business is lawful, no one can be compelled, or is justified, to aid in unlawful undertakings."

[4] And in the annotations of this case appearing in 1 Ann. Cas. p. 203, the general principle is stated as follows:

"It is well settled that mandamus will not lie to compel the performance of acts which are illegal, contrary to public policy, or which tend to aid an unlawful purpose"—citing numerous authorities.

These building regulations, appearing chiefly in our statute on Towns (Rev. c. 73, § 2986 et seq.), are of general application, to be followed and allowed only when the business to be conducted therein is lawful, and are subject in this respect to the police powers conferred by this and other laws on municipal governments for the public good. *State of Mo. ex rel. Gas Co. v. Murphy*, 170 U. S. 78, 18 Sup. Ct. 505, 42 L. Ed. 955.

[5] In this instance, it appears that the avowed and only purpose of erecting these structures is to carry on the business of selling and distributing kerosene oil and gasoline and other petroleum products; a purpose not only evidenced by the character of the building, but so expressly stated in the complaint.

[6] The subject is well within the governmental powers ordinarily possessed by this and other cities and towns (*Hadacheck v. Los Angeles*, 239 U. S. 394, 36 Sup. Ct. 143, 60 L. Ed. 348, Ann. Cas. 1917B, 927; *Reinman v. Little Rock*, 237 U. S. 171, 35 Sup. Ct. 511, 59 L. Ed. 900); and the municipal authorities of Sanford, having formally passed ordinances by which the proposed business is made unlawful, under the principle of the decisions heretofore cited, we are of opinion that the application for mandamus should be denied. And such a defense is available though it may have arisen since the institution of the suit.

The act having become unlawful, the position may be made effective at any time pending the proceedings when it is properly brought to the attention of the court. *Williams v. Hutton*, 164 N. C. 216, 80 S. E. 257; *Brinson v. Duplin Co.*, 173 N. C. 137, 91 S. E. 708; *Wikel v. Commissioners*, 120 N. C. 451, 27 S. E. 117; *Hall v. Steele*, 82 Ala. 563, 2 South. 650.

On the facts present, we are of opinion that the application must be denied; and it is so ordered.

Reversed.

(179 N. C. 359)

**HAMMER LUMBER CO. v. SEABOARD  
AIR LINE RY. et al. (No. 290.)**(Supreme Court of North Carolina. March 24,  
1920.)**1. CARRIERS ⇐100(3), 197(3)—DIVERSION TO  
NEW CONSIGNEE DOES NOT DEPRIVE CARRIER  
OF LIEN FOR CHARGES FOR WHOLE TRANSIT.**

When the consignor of goods changes destination or diverts them to a new consignee, the reconsignment does not break the connection, but the new destination is regarded as the original one, and the carrier has a lien on the goods to secure the payment of freight and charges in the nature of demurrage accruing during the whole transportation.

**2. CARRIERS ⇐100(3), 197(1)—CARRIER HAS  
LIEN ON SHIPMENT TO SECURE FREIGHT AND  
CHARGES.**

A common carrier has a lien on the goods to secure the payment of freight and charges in the nature of demurrage accruing during its transportation.

**3. CARRIERS ⇐197(5)—CARRIER PAYING  
CHARGES OF PRECEDING CARRIER IS SUBRO-  
GATED TO ITS RIGHTS.**

When one carrier pays the charges of a preceding carrier, it is subrogated to the rights of such carrier, and may demand the entire charges, its own and the first carrier's, before surrendering the shipment.

**4. CARRIERS ⇐100(3), 197(3)—CARRIER EN-  
TITLED TO LIEN FOR DEMURRAGE CHARGES  
AND TO PAYMENT OUT OF PROCEEDS OF SALE.**

A carrier of goods by rail was entitled to a lien for demurrage charges, war tax, etc., accruing between the date when the goods were attached by the consignee, which had refused them under its contract with the consignor, down to the date when they were sold, also to payment out of the proceeds of the same, the demurrage not having been caused by any default on its part; though a carrier cannot enforce collection of storage charges arising from its wrongful refusal to deliver to the consignee, nor hold the goods for lien for back freight on other goods.

Appeal from Superior Court, New Hanover County; Allen, Judge.

Action by the Hammer Lumber Company against the Seaboard Air Line Railway and others. From judgment for plaintiff against the railway and Walker D. Hines, Director General, such defendants appeal. Reversed.

The judge, by consent, found the facts as follows:

The Easton Machinery Company had shipped to it at Allentown, Pa., from Utica, N. Y., two carloads of boilers, the subject of this controversy. At Allentown, Pa., the said Easton Machinery Company, without paying said charges and without unloading, reshipped the said two cars of boilers on bills of lading from Allentown, Pa., to Wilmington, N. C., to

its own order "Notify Hammer Lumber Company" (the plaintiff), which bills of lading came with a draft on the Hammer Lumber Company for \$800 attached, payable to the order of Easton Machinery Company, which when presented was duly paid by the plaintiff. Said draft was a part of the purchase money of \$1,400 agreed to be paid for said boilers, and the balance of \$600 was to be paid, provided the boilers stood a certain agreed test at Wilmington and were accepted by plaintiff. They did not come up to the agreement, and were rejected by plaintiff after they were subjected to the test at Wilmington. No part of this agreement was known to the railway company. The said boilers arrived at Wilmington August 25, 1919, and on September 9th the plaintiff caused a warrant of attachment to be levied thereon as the property of the defendant Easton Machinery Company; it having refused to refund to plaintiff the said sum of \$800 which had been paid on their draft under the agreement to refund if the boilers failed to stand the agreed test. The plaintiff tendered to the agent of the carrier at Wilmington the freight and all charges from Allentown, Pa., to Wilmington, N. C., up to and including September 23, 1919, together with the bills of lading above mentioned, but the defendant railroad company refused to receive the same unless the plaintiff would also pay the "advance charges from Utica, N. Y., to Allentown, Pa., of \$236.36"; said sum being shown on the waybill as advance charges, but no notice of same being shown on the bill of lading.

The Hammer Lumber Company recovered judgment against the Easton Machinery Company for \$1,453.29, and it was further adjudged that the plaintiff pay into court the sum of \$236.36, the amount shown on the waybill as advance charges, to wait the further order of the court, and, further, that the plaintiff pay to the carrier the sum of \$416.93, being the freight and charges from Allentown to Wilmington, admitted by the plaintiff to be due, and directed the sheriff to sell the said boilers, and after paying into court the charges for demurrage accrued against said shipment since September 23, 1919, amounting to \$267.80, and costs of sale, to pay over the balance to the Hammer Lumber Company.

The court further held, as a matter of law, that the defendant S. A. L. Railway Company and Walker D. Hines, Director General, are not entitled to recover the said sum of \$236.36, due for advance charges from Utica, N. Y., to Allentown, Pa., as marked on the waybill. The defendants Seaboard Air Line Railroad and Walker D. Hines, superintendent, excepted to the judgment that they were not entitled to recover the said advance charges out of the proceeds of the sale



of the boilers, nor the \$267.80 demurrage charges up to the sale.

John D. Bellamy & Son, of Wilmington, for appellants.

J. A. McNorton, of Wilmington, for appellee.

CLARK, O. J. The shipper of the machinery was the Easton Machinery Company, at Allentown, Pa., who reshipped on the same cars this freight which it had received from Utica, N. Y. The bill of lading to the plaintiff carried only the charges on the freight from Allentown to Wilmington, but the waybill showed that there were "advance charges" from Utica to Allentown, and the freight came through without having been taken off the cars at Allentown. There was an agreement between the plaintiff and the shipper that if the freight did not come up to a certain test, which it did not do, the plaintiff could return it. The carrier had no knowledge of this agreement.

When the boilers were rejected by the plaintiff, it tendered payment of the freight and charges from Allentown to Wilmington, and attached the boilers for the \$800 which it had advanced on a draft from the consignor and for which it claimed the return and for the freight paid. The carrier contended that it had a lien upon the freight for the entire transit charges from Utica, N. Y., to Wilmington, N. C., which the plaintiff denied, but paid the freight and charges on the goods from Allentown to Wilmington, and, under the order of the court, paid into the court the charges from Utica to Allentown, to abide the judgment of the court.

[1-3] We think the court was in error in holding that the carrier was not entitled to his lien upon the freight for the advance charges from Utica to Allentown. In *Hutchinson on Carriers* (3d Ed.) § 660, it was held that the shipper of goods may at any time countermand the directions as to consignment and require the carrier to redeliver to himself, and that when the consignor changes the destination or diverts the goods to a new consignee the reconsignment does not break the connection (*Trading Co. v. Railroad*, 178 N. C. 182, 100 S. E. 316), but the new destination is regarded as the original one (quoting *Myers v. Railroad*, 171 N. C. 190, 88 S. E. 149).

The carrier has a lien on goods to secure the payment of freight and charges in the nature of demurrage accruing during its transportation. *Hutchinson on Carriers* (3d Ed.) § 862. The freight charges are a lien on the goods transported, and when one carrier pays the charges of a preceding carrier it is subrogated to the rights of that carrier, and may demand the entire freight charges before surrendering the shipment. *Railroad*

*v. Pearce*, 192 U. S. 179, 24 Sup. Ct. 231, 48 L. Ed. 397.

The bill of lading in this case showed that the shipment was from the Easton Machinery Company to itself, as consignee, with order "Notify Hammer Lumber Company." When the plaintiff took up the bill of lading, paying the \$800, and later attached the goods for a breach of agreement between itself and the Easton Machinery Company, it was only entitled to take the goods subject to any lien thereon which the Easton Machinery Company owed thereon, which included the "advance charges" for the shipment from Utica, N. Y., to Allentown, Pa.

As between the purchaser, the Hammer Lumber Company, and the Easton Machinery Company, the former owed only the purchase price plus the freight from the point of shipment, expressed or implied, i. e., from Allentown; but as between the Easton Machinery Company and the carrier, the shipment being to the Easton Machinery Company as consignee, that company could only receive the boilers upon payment of all the charges due the carrier thereon by the Easton Machinery Company, i. e., from Utica to Wilmington, and the plaintiff was not entitled to demand the delivery of the boilers, nor to subject them to the debt due it by its vendor, until the payment of all the charges thereon due by the Easton Machinery Company. The judgment must be reversed and entered directing payment to the carrier of the sum deposited in court, \$236.36, and the costs attending the controversy over said matter.

[4] The carrier also excepted because the court adjudged that \$267.80, the demurrage charges, war tax, etc., accruing between September 23, 1919, when the boilers were attached, down to October 23, 1919, when they were sold, should be paid to the carrier. The carrier was entitled to a lien for said charges and payment thereof out of the proceeds of the sale of the goods; the demurrage not having been caused by any default on its part.

A carrier cannot enforce collection of storage charges arising from its wrongful refusal to deliver goods to consignee (*Hockfield v. Railroad*, 150 N. C. 419, 64 S. E. 181, 134 Am. St. Rep. 945), nor hold the goods for a lien for back freight on other goods. But the demurrage charges here were caused by the failure to pay the rightful charges due upon these identical goods which were due by the consignor, who had shipped them to the order of itself as consignee, and the carrier could not be deprived of such lien by a delay to deliver caused by the controversy between the vendor and vendee and the failure of the plaintiff to pay the rightful charges.

Reversed.

(179 N. C. 686)

**ELLINGTON v. RICKS. (No. 270.)**

(Supreme Court of North Carolina. March 24, 1920.)

**1. NEGLIGENCE ¶32(2)—PERSON INSTALLING MACHINE ON PURCHASER'S PREMISES HELD AN INVITEE.**

One sent to install a machine on the purchaser's premises is an invitee to whom the owner owes the duty of keeping the premises covered by the invitation in a reasonably safe condition.

**2. NEGLIGENCE ¶136(15)—INVITEE'S DEPARTURE FROM SCOPE OF INVITATION HELD FOR JURY.**

In an action for injuries to an invitee, whether he departed from the scope of his invitation when he stepped from the house, in which he was installing an acetylene gas generator, 12 or 15 feet from the door and to one side to look at an old generator which exploded, *held* for the jury.

**3. NEGLIGENCE ¶32(3) — INVITEE ENTITLED TO PROTECTION ONLY WHILE REASONABLY WITHIN INVITATION.**

While, if an invitee goes to out of way places on the premises, wholly disconnected from the business in hand and is injured, there is no liability on the part of the owner, a slight departure by an invitee in the ordinary aberrations of travel does not change the rule of liability, and he is protected by the law while lawfully upon that portion of the premises reasonably embraced within the object of his visit.

**Appeal from Superior Court, Wake County; Guion, Judge.**

Action by J. H. Ellington against R. H. Ricks. Judgment for plaintiff, and defendant appeals. No error.

This is an action to recover damages for personal injury inflicted while the plaintiff was engaged in the installation of an acetylene gas generator on the premises of the defendant.

The defendant lived about 5 miles from Rocky Mount in Nash county. He had in use an acetylene gas generator, which furnished light for his home. It had been used about 13 years and was located in a small brick house about 25 feet from the residence. The brick house was not used for any other purpose. It had one door but no windows. The gas generator was placed in front of the door, a few feet inside the house. J. B. Colt & Co. sold to defendant a new generator and was to have it installed; the defendant agreeing to pay the cost at a stipulated price per hour. There were in the state several men who made it a business of installing these generators, one of whom was the plaintiff, and the state manager sent the installing contract of the machine sold Mr. Ricks to the plaintiff. The plaintiff and his helper, Mr. Maynard, proceeded, after the

generator had been received at Mr. Ricks', to the defendant's to install the generator. They reached there about 11 o'clock of the day. Mr. Bozeman, the farm superintendent and general manager of Mr. Ricks, met them, and they went to the gas house. The new generator had to be uncrated; the old machine to be disconnected and removed from the gas house.

The plaintiff testified in his own behalf as follows:

"An acetylene gas generator furnishes gas for lights for homes, stores, or for cooking or ironing. The gas is made by water coming in contact with carbide in the machine and is conducted from the machine by pressure of one and a half pounds to the square inch. The gas drops in the carbide and that comes under a bell, and as it goes out it lowers and feeds more carbide. It works automatically by a bell. That he was doing work for Mr. Williams at Red Oak and this paper came to him. He went to Mr. Ricks' place, 5 miles from Rocky Mount. One of Mr. Ricks' hands met him at Dortch's store and carried him over in a buggy to Mr. Ricks' home. When he got there Mr. Bozeman was not at home, but his wife sent for him, and he came up and said that they were ready for the installation to be made, and they went in and looked at the old machine that was then in use. That he told Mr. Bozeman that that make of machine was new to him. That he did not know anything about it, and did not know where the carbide was in the chambers, and asked Mr. Bozeman to remove the carbide from the old machine, and he said he would do it; that witness went and uncrated the new machine, which was 50 yards from the outhouse where the old machine was, and when he got through that work of uncrating, Mr. Bozeman said he had the carbide removed from the old machine, and witness asked Mr. Maynard, his helper, to disconnect the machine for him.

"The old machine was in a little brick house almost opposite from where the witness was working. The brick house was used only for these gas generator machines. It was about 20 or 25 feet from the main residence. He went to work about 12 o'clock, and it took him 15 or 20 minutes to uncrate his machine. Mr. Bozeman said he had the carbide removed and they had to tilt the machine to get it out of the house. Mr. Bozeman had some colored men to help him get it out and directed the work of removing the old machine. The only thing witness did was to put his hands on the old machine when it was tilted over to be moved out of the house. The machine was 7 or 7½ feet tall. Mr. Bozeman had the direction and control in the removal of the old machine. It took 15 or 20 minutes to remove the old machine out of the house after witness got back from uncrating his machine and they set it 12 or 15 feet from the door. Witness and his helper had to build a brick foundation right up there in the same house to put the new machine on; but after they got the foundation built they set up their machine, and while it was being filled with water Mr. Maynard called him and said, 'Who is this machine made by?' and the witness said he saw some inscrip-

tion on the side, and that he walked up to the side of the old machine next to Mr. Maynard and saw the nameplate on it, and he said it was made by some Chattanooga firm, and he said he saw some printing matter on one side, and he walked around to the opposite side of the machine, and Maynard walked toward the door and just as he got near the door and when witness got on the other side and saw the printed [matter] and stooped over to get his face up even with it, the old machine exploded and threw him 12 or 15 feet from the machine. It was sitting a little to the left of the house from which it was taken, and from 12 to 15 feet from the door. It was something like 2½ feet in diameter, and from the base to the top was something like 7 feet, I believe, and was made out of galvanized iron. Mr. Bozeman gave him no warning about the old machine. He did not know there was any danger from the old machine as he stood by it. The machine was in a dilapidated condition, and after Bozeman told witness that he had removed the carbide that he (witness) could not understand there would be any danger from what he understood about the carbide system, and that he knew that some of the water had been poured out and practically all of it. But on the way to Rocky Mount after the explosion Mr. Bozeman told me and Maynard that he had not removed all the carbide.

"It required 10 or 15 minutes for the water to run into the new tank installed by him. During that time he had nothing else to do, and Mr. Maynard called him and asked by whom the old tank was made, and he walked out to where Maynard was. That he had charge of the contract, and Mr. Maynard was his helper. That he brushed off the name plate with his cap. That, if the man who removed the carbide from the tank had taken all that there was in the main receptacle, there was no place where the carbide could have stuck in the wall to have caused the explosion if it had been shaken up. The cause of the explosion was because the carbide was in the water."

At the conclusion of the evidence there was a motion for judgment of nonsuit, which was denied, and the defendant excepted.

There was a verdict and judgment for the plaintiff, and the defendant appealed.

Battle & Winslow, of Rocky Mount, and Manning, Kitchin & Mebane, of Raleigh, for appellant.

R. N. Simms, of Raleigh, for appellee.

**PER CURIAM.** [1] There are several exceptions in the record, but all of them are covered by the exception to the refusal to nonsuit, and on this it is conceded, and properly so, that the plaintiff was an invitee on the premises of the defendant, and as such entitled to hold the defendant to the duty of keeping the premises covered by the invitation in a reasonably safe condition in order that he might not be subjected to injury.

It is also not contended by the defendant that there is no evidence that the part of the premises where the plaintiff was when

he was injured was unsafe, but the position insisted upon in the able and learned brief of the defendant and on oral argument is that the plaintiff when injured was on a part of the premises where he was not expected to go.

[2] In other words, we are asked to hold as matter of law that the plaintiff, by stepping outside of the little room in which the new tank was being installed, which was 6 by 12 or 14 feet, while waiting for the tank to fill with water and walking 12 or 15 feet to look at the old tank, from which Bozeman, the superintendent and manager of the defendant, had told him the carbide, the cause of the explosion, had been removed, departed from the terms of his invitation, and must be treated as a trespasser or licensee at the time of his injury, and as such the defendant owed him no duty except to refrain from willful injury.

"The authorities are entirely agreed upon the proposition that an owner or occupant of lands or buildings who directly or by implication invites or induces others to go thereon or therein owes to such persons a duty to have his premises in a reasonably safe condition and to give warning of latent or concealed perils" (20 R. C. L. 55), and that "the owner or occupant of premises is liable for injuries sustained by persons who have entered lawfully thereon only when the injury results from the use and occupation of that part of the premises which has been designed, adapted, and prepared for the accommodation of such persons" (20 R. C. L. 67).

[3] If an invitee goes "to out of the way places on the premises, wholly disconnected from and in no way pertaining to the business in hand," and is injured, there is no liability (Glaser v. Rothschild, 221 Mo. 180, 120 S. W. 1, 22 L. R. A. [N. S.] 1045, 17 Ann. Cas. 576), but a slight departure by him "in the ordinary aberrations or casualties of travel" do not change the rule or ground of liability, and the protection of the law is extended to him "while lawfully upon that portion of the premises reasonably embraced within the object of his visit" (Monroe v. Railroad, 151 N. O. 377, 66 S. E. 318, 27 L. R. A. [N. S.] 193; Pauckner v. Waken, 231 Ill. 282, 83 N. E. 205, 14 L. R. A. [N. S.] 1122).

As said by Winslow, C. J., in Charron v. Fuel Co., 149 Wis. 240, 134 N. W. 1048, 49 L. R. A. (N. S.) 162, Ann. Cas. 1913C, 939, speaking of a similar question as applied to an employé:

"The law aims to be reasonable. It recognizes that it has to deal with imperfect human beings, and not with faultless and unerring automations, and that its rules should be shaped accordingly. It must recognize the fact that men employed in hard physical labor require and habitually take some brief respite at times during the work as opportunity offers; and it must also recognize the fact that such a respite,

if only of the ordinary and usual nature, cannot rightly be called a leaving of the employment. In the present case the plaintiff had just carried a plank, doubtless of considerable weight, to the top of the structure. In returning he stopped for a minute or two at a convenient stopping place, stepped perhaps eight feet from his line of travel, and gazed at the operations upon and about the vessel and the harbor below, which were doubtless interesting and attractive. We do not feel that we are obliged to hold or ought to hold as matter of law that this brief and very natural break in the plaintiff's routine labor divested him of his character as an employé."

The tank which caused the injury was close to the course of travel from the little house where the new tank was being installed to the dwelling; it was within 12 or 15 feet of the little house, and it was on that part of the premises being used in the installation of the new tank, because it was necessary to place it there in the proper performance of the duty, and this was done under the direction of the manager and superintendent of the defendant.

The plaintiff and Bozeman were in fact using in their work the part of the premises where the plaintiff was standing at the time of his injury.

We do not think under these conditions it can be said as a legal conclusion that there was such a departure by the plaintiff from the scope of his invitation as to bar a recovery.

No error.

(113 S. C. 345)

GRAY v. SEABOARD AIR LINE RY. CO.  
(No. 9990.)

(Supreme Court of South Carolina. June 24, 1918.)

1. CARRIERS  $\S$ 119 — ACCEPTOR OF GOODS WITH KNOWLEDGE OF WASHOUTS MUST NOTIFY SHIPPER OR STIPULATE AGAINST CONSEQUENCES.

If a carrier accepts goods for shipment with full knowledge of floods and washouts on its line and the lines of connecting carriers, it should notify the shipper of the same, or stipulate against the consequences, and if it fails to do so it should not be heard to offer as an excuse that delay in shipment was caused by an act of God.

2. CARRIERS  $\S$ 132—IN ACTION FOR DELAY IN SHIPPING PERISHABLES CARRIER HAS BURDEN TO SHOW EXTENT OF DAMAGES WHEN SHIPPER SHOWED ERRONEOUS MEASURE UNDER CONTRACT.

In an action against a carrier for damages to shipment of melons, where defendant invoked as a defense a stipulation in the contract fixing the market value of the melons at the "place and time of shipment," the burden was upon the defendant, the plaintiff having established a market price or value which was not in ac-

cordance therewith, to show the correct one, if prejudiced by the estimate of the plaintiff.

Appeal from Common Pleas Circuit Court of Hampton County; Mendel L. Smith, Judge.

Action by J. J. Gray against the Seaboard Air Line Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The judgment of the circuit court, referred to in the opinion, was as follows:

The contention of the defendant is, however, with regard to these shipments made between July 16, 1916, and July 28, 1916, that any delay that may have resulted in these shipments was due to an act of God, namely, floods and washouts on its line and that of its connecting carriers which rendered such delay unavoidable.

[1] According to the testimony, the conditions relied upon to constitute this defense existed "during the month of July," and must, then, have been within the knowledge of the defendant. And if the carrier accepts goods for shipment with full knowledge of conditions which will probably result in delay, he should notify the shipper of the same or stipulate against the consequences, and, if he fail to do so, he should not be heard to offer as an excuse this very condition.

Applying the well-recognized principle of law relating to the defense of an act of God, the record fully sustains the conclusion of the magistrate.

The defendant also contends that the plaintiff has failed to establish any damages under the stipulations of the contract of shipment, in that he failed to show the market value of the melons at the "place and time of shipment."

[2] It will be observed that the defendant invoked this stipulation of the contract as one of the "defenses" set up in the answer, and if the plaintiff established a market price or value which was not in accordance therewith, it was incumbent upon the defendant to show the correct one, upon well-recognized principles of judicial procedure, if it were prejudiced by the estimate of the plaintiff. Certainly the plaintiff should not fail altogether, because his testimony shows the wrong amount of damage. If he shows too little, then the defendant should not complain, and if he shows too much, then the defendant has, in its pleadings, assumed the burden of showing the correct amount.

Without attempting to discuss the particular exceptions further, the court is satisfied, after a careful consideration of the entire record, and in exercise of the power given by section 407 of the Code of Civil Procedure, that all of the said exceptions should be overruled.

J. W. Manuel, of Hampton, and Lyles & Lyles, of Columbia, for appellant.

W. D. Connor, of Brunson, for respondent.

GARY, C. J. For the reasons therein assigned, the judgment of the circuit court is affirmed.

HYDRICK, WATTS, FRASER, and GAGE, JJ., concur.

(113 S. C. 448)

(102 S.E.)

**WALKER v. ATLANTIC COAST LINE R. CO. et al. (No. 10379.)**

(Supreme Court of South Carolina. Feb. 23, 1920.)

**ARMY AND NAVY §31 — COMPENSATION THROUGH WAR RISK BUREAU NOT INTENDED FOR SOLDIER INJURED AT RAILROAD CROSSING WHILE TRAVELING AS MEMBER OF PUBLIC.**

Circular No. 4 of the Director General of Railroads, providing that injured officers and enlisted men of the army, injured or killed in railroad accidents, will be remitted to their claim for compensation through the War Risk Bureau, and will not receive any payment through the Railroad Administration, applies only to soldiers actually traveling on trains under orders of the government, or while engaged in actual military duty, and does not apply to a soldier killed in a collision between a train and the automobile in which he was traveling as a member of the public.

Appeal from Common Pleas Circuit Court of Charleston County; R. W. Memminger, Judge.

Action by Elizabeth Parke Walker, as administratrix of Walter H. Walker, deceased, against the Atlantic Coast Line Railroad Company and another, to recover damages for the death of plaintiff's intestate in a collision between defendant's train and the automobile in which he was riding. From an order striking out portions of the answer defendants appeal. Affirmed.

Circular No. 4 mentioned in the opinion was as follows:

United States Railroad Administration, Division of Law.

Washington, October 25, 1918.  
Circular No. 4.

Attention is directed to the act of Congress entitled "An act to amend an act entitled 'An act to authorize the establishment of a Bureau of War Risk Insurance in the Treasury Department,' approved September 2, 1914, and for other purposes, approved October 6, 1917, Public Document No. 90, Sixty-Fifth Congress (H. R. 5723).

This act establishes a system for compensating officers and enlisted men and women nurses of the Army and Navy Corps, when employed in active service under the War and Navy Departments of the government.

In case of railroad accidents, in order to avoid confusion and to effectuate a proper and uniform handling of the compensation claims of such injured and disabled persons who are entitled to receive compensation under the War Risk Act, upon the happening of any accident causing death, disablement, or of injury to any officer, enlisted man, or member of the Army or Navy Nurse Corps (female), occurring on any line of railroad under federal control, the General Solicitor will immediately notify J. H. Howard, Manager, Claims and Property Section, Division of Law, Southern Railroad Build-

ing, Washington, D. C., giving the name and emergency address of the dead or injured person, his or her number, rank, and routing, and in the case of injured persons, his or her present address.

Such injured officers and enlisted men and members of the Army and Navy Nurse Corps (female) will be remitted to their claim for compensation through the War Risk Bureau, and will not receive any payment through the Railroad Administration.

No claims for damages for injuries occasioning death or disablement of such persons should be recognized or entertained. The circumstances surrounding accidents should be investigated as heretofore and report filed.

The General Solicitor will notify general claim agents of this circular, who will in turn notify all claim agents.

John Barton Payne, General Counsel.

Approved:

W. G. McAdoo,  
Director General of Railroads.

FitzSimons & FitzSimons, of Charleston, for appellants.

Logan & Grace, of Charleston, for respondent.

WATTS, J. This is an appeal from an order of Judge Memminger striking out certain portions of appellant's answer; said order filed June 25, 1919.

The exceptions are six in number. Exceptions 1, 2, and 3 are sustained. Respondent's attorney concedes that they must be sustained, under *Castle v. Railway Co.*, 99 S. E. 848, manuscript decision of this court. The remaining exceptions make the point under the circular known as No. 4, issued by Mr. McAdoo, the Director General of Railroads. Plaintiff was remitted exclusively to the Bureau of War Risk Insurance for compensation, and cannot claim compensation from railroad defendant.

If these exceptions are sustained, it ends the case; if overruled, the case can be amended and trial had. As the parties ask the decision of this question, we will do so, even though the Director General is not bound thereby; he not being before the court.

These exceptions must be overruled. Circular No. 4 never intended to apply to a case such as the one at bar, but was intended to be effective where men in uniform were killed or injured while actually traveling on railroad trains under orders of government, or while engaged in actual military duty—such as being transported from one camp to another. It does not apply to any soldier where he was traveling as a member of the general public.

It is inconceivable that it should be attributed to the patriotic, distinguished Director General that by his circular he intended such a glaring injustice to a soldier not traveling actually in railroad trains under orders of

the government or while engaged in actual military duty. Such a decision would stigmatize the Director General as having made an arbitrary and unjust discrimination against a soldier, a man in uniform, as compared to a citizen. To relegate him to insurance which he carried and paid for would be a glaring and outrageous injustice, and neither the spirit nor words of the circulars, relied on as being issued by the Director General, warrants any such unjust and preposterous inference.

There is absolutely no merit in appellant's exceptions, and the order appealed from is affirmed.

GARY, C. J., and HYDRICK, FRASER, and GAGE, JJ., concur.

(113 S. C. 453)

**MCKENZIE v. SOUTHERN RY. CO. et al.**  
(No. 10375.)

(Supreme Court of South Carolina. Feb. 23, 1920.)

**1. CONTINUANCE ¶7—WITHIN DISCRETIONARY POWER OF TRIAL COURT.**

Disposition of motion for continuance rests largely in the discretion of the trial court.

**2. JUDGMENT ¶630—JUDGMENT AGAINST ONE TORT-FEASOR NOT ACQUITTAL OF OTHERS.**

Where the administrator of a passenger in an automobile who was killed in a collision with a train sued the owner of the automobile and the railroad company, complaint being in three counts, one against the railroad company, one against the owner of the automobile, and one against the two as joint tort-feasors, a verdict against the owner of the automobile, while referable only to the second count, does not have the legal effect of acquitting the railroad company.

**3. TORTS ¶22 — SEPARATE AND JOINT SUIT IMPROPER.**

Joint tort-feasors cannot be sued both separately and jointly.

**4. PLEADING ¶369(3)—PLAINTIFF REQUIRED TO ELECT BETWEEN INCONSISTENT CAUSES OF ACTION.**

Where plaintiff sued tort-feasors separately and jointly, he may on seasonable motion be required to elect between the inconsistent causes of action.

**5. JUDGMENT ¶891—TORTS ¶22—PLAINTIFF SUING TORT-FEASORS SEPARATELY CAN HAVE BUT ONE RECOVERY.**

Where an accident was the result of the negligence of two different persons, plaintiff may sue both joint tort-feasors in separate actions, but he is entitled to a single satisfaction, though having two separate judgments.

Hydrick, J., dissenting in part.

Appeal from Common Pleas Circuit Court of York County; Ernest Moore, Judge.

Action by Daniel L. McKenzie, as administrator of the estate of Mrs. Belle Phillips, deceased, against the Southern Railway Company and others. From a judgment for plaintiff against the named defendant, it appeals. Affirmed.

McDonald & McDonald, of Winnsboro, for appellant.

Wilson & Wilson, of Rock Hill, and Stan-cill & Davis, of Charlotte, N. C., for respondent.

GARY, C. J. This is an action for damages on account of injuries sustained by plaintiff's intestate from which she died, as the result of the wrongful acts of the defendants.

Plaintiff's intestate was a passenger in an automobile owned by the defendants Holler & Hailey which came in collision with the train of the defendant Southern Railway Company at a railroad crossing.

The case was tried four times. On the first and second trials the jury failed to agree upon a verdict. On the third trial the jury rendered the following verdict: "We find for the plaintiff against the defendants Holler & Hailey in the sum of \$4,250. We fail to agree as to the Southern Railroad." On the fourth trial the jury rendered a verdict against the Southern Railway Company in the sum of \$7,500.

The following statement appears in the record:

"Before the case was called for trial against this defendant, and on due service of notice in writing, the defendant, Southern Railway Company, moved for a continuance of the case until the final determination of the appeal to the Supreme Court by the defendants Holler & Hailey. This motion was overruled.

"Thereafter, and before the jury was drawn, counsel for the defendant Southern Railway Company offered in evidence before the court the verdict rendered against the defendants Holler & Hailey, and thereupon moved the court for a construction of said verdict for the following reasons, to wit:

"(a) Because the third cause of action set forth in the complaint was a joint cause of action against the defendant Southern Railway Company and the defendants Holler & Hailey as joint tort-feasors, and if the verdict against the defendants Holler & Hailey was upon said third cause of action, then its only legal effect was to determine that there was no joint tort established by the evidence, because no verdict, except a joint verdict, could be rendered on said third cause of action if a joint tort was established by the evidence.

"(b) That the said verdict, as a matter of law under the pleadings, could only be referred to the second cause of action, which was a separate cause of action against the defendants Holler & Hailey, for the reason that such ver-

dict was responsive only to the allegations of said second cause of action, and that therefore the only legal effect of such verdict was to acquit the defendant Southern Railway Company, of any negligence, willfulness, or wantonness alleged in the first and third causes of action to be the proximate cause of the death of plaintiff's intestate.

"This motion was also overruled, but the court held that the plaintiff was entitled to proceed to trial against the Southern Railway Company on the first and third causes of action set forth in the complaint.

"As part of its evidence counsel for the defendant offered in evidence the verdict of the jury against Holler & Hailey rendered on a previous trial. His honor excluded it, so far as it was intended to be submitted to the jury as evidence, but stated that it would be admitted for the consideration by the court, if the court desired to consider it thereafter. At the close of all of the testimony counsel for the defendant Southern Railway Company made a motion to direct a verdict in its favor as to both actual and punitive damages, upon several grounds which are hereinafter fully set forth. This motion was overruled by the court upon all of the grounds stated.

"After the rendition of the verdict against the defendant Southern Railway Company, its counsel moved for a new trial upon the minutes of the court upon several grounds hereinafter fully set forth. This motion was overruled by Judge Moore in an order, which is hereinafter fully set forth. Thereafter in due time notice of appeal to this court was served upon attorneys for the plaintiff."

The first question that will be considered is whether there was error on the part of his honor the presiding judge in refusing the motion for a continuance.

[1] Such motions pertain to the conduct of the trial, and necessarily must be left in large measure to the discretion of the presiding judge, which, it has not been made to appear, was erroneously exercised.

[2-5] The next question that will be considered is presented by the following exceptions:

"Because his honor erred in refusing this defendant's motion for a construction of the verdict against Holler & Hailey before proceeding to trial, and erred in overruling the grounds upon which this defendant requested such construction of said verdict, the error being that the verdict against Holler & Hailey could not be referred to the third cause of action, because no separate verdict could be rendered in a joint action against joint tort-feasors without thereby finding that there was no joint tort established, and further the said verdict was responsive only to the allegations of the second cause of action, and the legal effect thereof was a verdict in favor of the defendant Southern Railway Company."

We fully agree with the appellant's attorneys in their proposition:

"That the said verdict, as a matter of law, under the pleadings, could only be referred to the second cause of action, which was a separate cause of action, against the defendants Holler & Hailey, for the reason that such verdict was responsive only to the allegations of said second cause of action."

But we cannot concur in their conclusion that the only legal effect of such verdict was to acquit the defendant Southern Railway Company of any negligence, willfulness, or wantonness alleged in the first and third causes of action. Of course a recovery under the second cause of action against Holler & Hailey bars a recovery under the third cause of action, for the reason that joint tort-feasors cannot be sued both separately and jointly. The two actions are inconsistent; and if the defendant had made a motion to require the plaintiff to elect whether he would rely upon the first and second causes of action (which were against the defendants separately), or upon the third (in which they were sued jointly), the motion would have been granted. *Cartin v. Railway Co.*, 43 S. O. 221, 20 S. E. 979, 49 Am. St. Rep. 829.

While the plaintiff had the right to sue both tort-feasors in separate actions, he is only entitled to a single satisfaction, although having two separate judgments.

There is no prejudicial error in the remaining exception, and the court deems it unnecessary to assign any other reason why they cannot be sustained.

Affirmed.

WATTS, FRASER, and GAGE, JJ., concur.

HYDRICK, J. I concur in part and dissent as to result. I agree that there was no error in refusing the motion for a continuance, and that the verdict against Holler & Hailey is referable to the second cause of action, and that it did not have the legal effect of acquitting the railroad company of liability under the first cause of action. But I think the court erred in ruling that plaintiff could proceed against the railroad company on both the first and third causes of action, and in submitting the case to the jury on both of said causes of action. Such is the logical result of the conclusion that "a recovery, under the second cause of action against Holler & Hailey bars a recovery under the third cause of action." If that is so, how can we say there was no error in allowing plaintiff to proceed against the railway company under the third cause of action? The decision is inconsistent with itself. The error pointed out was prejudicial and calls for reversal.

(113 S. C. 333)

**NATIONAL CITY BANK v. HUEY & MARTIN DRUG CO. et al. (No. 10636.)**

(Supreme Court of South Carolina. Jan. 26, 1920. On Petition for Rehearing March 29, 1920.)

**1. APPEAL AND ERROR ¶1046(1) — RULING THAT ISSUES WERE TRIABLE BY JURY HARMLESS WHERE NONE WERE SUBMITTED.**

Preliminary ruling that certain issues were triable by jury was harmless; no issue having been submitted to the jury.

**2. FRAUDULENT CONVEYANCES ¶47—SALE IN BULK OF STOCK WITHOUT ATTEMPT TO COMPLY WITH STATUTE CONCLUSIVELY FRAUDULENT.**

Under Bulk Sales Law, sale in bulk of a merchant's stock without any attempt to comply with the law is unlawful, and voidable at the instance of a creditor of the seller injured thereby, without regard to intention of the parties thereto; it being only where there is an attempt to comply with the statute, and a failure in some particular, that there is a rebuttable prima facie presumption of fraud.

On Petition for Rehearing.

**3. FRAUDULENT CONVEYANCES ¶47—AMOUNT OF RECOVERY WHERE GOODS AND STORE FIXTURES WERE SOLD TOGETHER.**

It is unnecessary to decide whether the words "stock of merchandise," in Bulk Sales Law, include the store fixtures, sold along with the merchandise, where both parties to the transaction have considered the price to be paid for both as a single fund applicable to payment of the claims of all the seller's creditors and the greater part of it has been so applied.

**4. FRAUDULENT CONVEYANCES ¶181(1)—LIABILITY OF BUYER IN BULK NOT LIMITED TO PURCHASE PRICE.**

By the provisions of Bulk Sales Law, in case of a sale in violation thereof, liability to creditors of the seller is not limited to the agreed price; but the goods, if still in the buyer's hands, are liable, and, if he has withdrawn them, he is liable for "the value" of the goods so received by him and thus withdrawn.

Gary, C. J., dissenting in part.

Appeal from Common Pleas Circuit Court of York County; Frank B. Gary, Judge.

Action by the National City Bank against the Huey & Martin Drug Company and the Calhoun Drug Company, based on indebtedness of the Huey & Martin Company to plaintiff and sale by that company to the Calhoun Company without compliance with the Bulk Sales Law. Verdict for plaintiff for \$689.12 was directed against both defendants, and from a judgment entered thereon the defendants appeal. Affirmed.

The sections of the Code of Laws of 1912, requested to be set forth in the report of the case by Gary, C. J., are as follows:

Sec. 2434. It shall be unlawful for any merchant or corporation engaged in the buying and

selling of merchandise, while he or it is indebted to any person or corporation, to sell his or its entire stock of merchandise in bulk, or to sell the major portion thereof, otherwise than in the ordinary course of trade, in the regular and usual prosecution of the seller's business, and with the intention of ceasing to conduct said business, in the same manner and at the same place as he or it has heretofore conducted the same, without first making a full and complete inventory of the merchandise so proposed to be sold, in which inventory the values shall be extended at the ruling wholesale price thereof; and without further making a full, true and correct schedule of all persons or corporations to whom he or it is indebted, stating therein the post office address of each of said creditors, and the amount owing to each of them; to which inventory and schedule there shall be attached the oath of the seller that the same is true and correct; or if the seller shall assert that he or it is not indebted to any person or corporation, he or it shall make affidavit to that effect and deliver the same to the purchaser, with the inventory, as hereinafter provided. The seller shall deliver said inventory and schedule to the proposed purchaser, and shall retain exact copies thereof in his or its own possession; the seller and the purchaser shall each preserve such inventory, schedule and affidavit for the period of six months after such sale and purchase, and the same shall be open to the inspection of the creditors of the seller. Ten days before such sale shall be consummated, and before the purchaser take possession of the merchandise so proposed to be sold, the seller and proposed purchaser shall join in giving written or printed notice of the proposed sale and purchase of such merchandise to each of the creditors named in such schedule; such notice may be delivered in person to such creditors, or transmitted to them by registered letter through the United States mail, by being deposited in the United States post office at the place where the seller has heretofore conducted business or nearest thereto, properly addressed to the respective creditors at the post office address given in such schedule, with proper postage affixed; such notice shall state the aggregate value of the merchandise proposed to be sold as shown by such inventory, the consideration to be paid therefor, and the time and manner of making such payment. If said seller shall fail to make such inventory of such merchandise, or if such inventory shall fail to state the true value of said goods as above required, or if said seller shall fail to make such true schedule of creditors as hereinafter provided, and the purchaser shall have knowledge of that fact, or in event the seller shall assert that there are no debts against him or it, if the purchaser shall fail to require the affidavit above provided, or if the seller and purchaser shall fail to give each of said creditors named in said schedule the notice above required in the manner above provided, or if such notice shall not correctly state the amount of such merchandise proposed to be sold, and the consideration to be paid therefor, and the time and manner of making the same, then and in either of such events such sale shall prima facie be presumed to be fraudulent and void



as against the creditors of such seller, and the merchandise in the hands of the purchaser, or any part thereof, if it shall be found in his or its hands, shall be liable to such creditors, and in event the same, or any part thereof, shall be withdrawn by said purchaser, then the purchaser himself or itself personally shall also be liable to said creditors of such seller to the extent of the value of the merchandise so received by him or it and thus withdrawn.

Sec. 2435. Whenever a notice, as provided in section 1488, is sent by registered mail, the creditor or person to whom the notice is mailed shall be presumed conclusively to have received the notice, and the time of the notice shall be dated from the time of the mailing and registration, or actual service of said notice.

Sec. 2436. Except as expressly provided in the preceding sections, nothing therein contained, nor any act thereunder, shall change or affect the present rules of evidence or the present presumption of law.

J. H. Foster and Wm. J. Cherry, both of Rock Hill, for appellants.

Dunlap & Dunlap, of Rock Hill, for respondent.

HYDRICK, J. [1] I think the judgment is right and ought to be affirmed. There was no prejudicial error. If it be conceded that the issues were all equitable, and therefore triable by the court, they were so tried. The preliminary ruling that certain issues were triable by jury was not prejudicial, because no issue was in fact submitted to the jury.

[2] The statute starts out by denouncing as unlawful certain sales, without compliance with its provisions, which are in the main: (1) The making of a complete inventory; (2) a true schedule of the seller's creditors, or an affidavit of no indebtedness; and (3) the giving of joint notice by seller and purchaser to each creditor of the proposed sale. It then goes on to provide that, if the seller shall fail to make such inventory, or if the same shall fail to state the true value of the goods as required, or if the seller shall fail to make such true schedule of his creditors as required, and the purchaser shall have knowledge of that fact, or if the seller asserts that he owes no debts and the purchaser fails to require the affidavit of that fact, or if the joint notice is not given to each creditor, or if the same be incorrect as to the amount and consideration of the sale and the time and manner of payment therefor, "then and in either of such events, such sale shall prima facie be presumed to be fraudulent and void as against the creditors of such sellers," etc.

The intention of the Legislature was that, if a sale within the terms of the statute be made without any attempt to comply with the provisions thereof, it should be held to be unlawful, and voidable at the instance of a creditor of the seller who may be injured thereby, without regard to the intention of the parties to the sale. But if the parties at-

tempt to comply with the provisions of the statutes, and fail in some particular or particulars, such failure shall not necessarily have the effect of making the sale void, but it shall only have the effect of raising a presumption that it is fraudulent. The difference lies in the failure to make any effort at all to comply with the provisions of the statute, and in making an effort which falls short of a legally sufficient compliance. In the first case, the sale is unlawful. In the second, it is only presumptively so—the presumption being slight or strong, according to the nature and extent of the failure and the circumstances of it. For example, notwithstanding the exercise of reasonable care and diligence, errors or omissions may occur in making the inventory, or the schedule of creditors, or in complying with other requirements of the statute. In such cases the act creates only a prima facie presumption of fraud which may be rebutted by showing the good faith of the parties to the sale and honest and diligent efforts to comply with the statute. No doubt the provision was intended to prevent fraudulent evasions of the statute, and to stimulate the parties to make an honest effort to comply substantially with its provisions.

But where, as in this case, the statute is utterly ignored, and no attempt whatever is made to comply with its provisions, to hold that only a prima facie presumption of fraud is raised, which may be rebutted by proof of the good faith of the parties, would practically nullify the statute.

Judgment affirmed.

WATTS, FRASER, and GAGE, JJ., concur.

GARY, C. J. (dissenting). The complaint herein contains two causes of action—one to set aside the sale in bulk by the defendant Huey & Martin Drug Company to the defendant Calhoun Drug Company of its stock of merchandise, etc., on the ground that such sale was in violation of sections 2434, 2435 and 2436 (which will be set out in the report of the case); and the other on the ground that the sale was fraudulent under the statute of Elizabeth. At the conclusion of the testimony his honor the presiding judge made the following order:

"This action having been brought on for a hearing before the court and a jury, and the evidence being all in, and a motion having been made by plaintiff's counsel for a direction of verdict, after hearing argument of counsel for and against said motion, I find and hold as follows: That the undisputed testimony shows that the Huey-Martin Drug Company and the Calhoun Drug Company, in the sale and purchase of the stock of drugs, etc., which is the basis of this action, in bulk, failed to comply with the requirements of the law known as the 'Bulk Sales Law,' contained in sections 2434, 2435, and 2436 of volume 1, Code of Laws of South Carolina of 1912; also appearing as sections 448, 449, and 450 in volume 2, Code of

Laws of South Carolina of 1912. The undisputed testimony also shows that the defendant Calhoun Drug Company, the purchasers of said stock, have sold and disposed of said stock of merchandise in the ordinary course of their drug business to an amount equal to the amount due on the notes sued on in this action. I am therefore of the opinion that the plaintiff is entitled to a direction of a verdict against the Huey-Martin Drug Company and the Calhoun Drug Company for the amount sued for, in the sum of six hundred and eighty-nine and  $\frac{12}{100}$  dollars (\$689.12); and it is so ordered. My conclusion as above stated is based upon the view that the statutes referred to make it a prima facie presumption of fraud for the seller and purchaser of a stock of merchandise in bulk to fail to comply with the requirements of said statutes provided with reference to such sales, and upon this prima facie presumption such failure must be held to be fraudulent as to the creditors of the seller of such stock of merchandise, and that this presumption of fraud is not rebuttable by evidence of the good faith of the parties to such sale; the good or bad faith of the parties having nothing to do with the result."

The circuit judge also ruled that the objection to the constitutionality of the said sections, on the ground that they were in violation of sections 5 and 17, art. 5, of the state Constitution, and of article 5, and of section 1 of the Fourteenth Amendment to the Constitution of the United States, could not be sustained. The first question that will be considered is whether there was error in this ruling. It is only necessary to cite the case of *Kidd, Dater & Price Co. v. Musselman Grocer Co.*, 217 U. S. 461, 30 Sup. Ct. 606, 54 L. Ed. 839, which shows that the exception raising this question cannot be sustained.

The next question that will be considered is whether there was error in the ruling that the presumption mentioned in the statute is not rebuttable by evidence of the good faith of the parties to such sale; the good or bad faith of the parties having nothing to do with the result. Section 2434 provides that "in either of such events such sale shall prima facie be presumed to be fraudulent and void as against the creditors of such seller," and the language of section 2436 is:

"Except as expressly provided in the preceding sections, nothing therein contained, nor any act thereunder, shall change or affect the present rules of evidence or the present presumption of law."

Our construction of the statute is that, where the parties to the sale of a stock of merchandise in bulk fail to comply with the statutory requirements, a presumption arises that the sale was fraudulent and void, and the burden of proof rests upon the parties to the sale to show that the transaction was in good faith; in other words, that the statute was intended to be merely a rule of evidence,

casting upon the parties to the sale the burden of proof as to the bona fides of the transaction. No other construction will give force and effect to all the provisions of the statutes. The exception raising this question is sustained.

When the case was called for trial, his honor the presiding judge made the following order:

"After hearing motion of the defendants to refer to a referee all the issues arising out of the pleadings, except the liability on the notes of the defendant Huey-Martin Drug Company, now owned by the plaintiff, and after a consideration of the pleadings, it is ordered that the following issues be submitted to the jury: First, whether or not there is any liability on the part of the defendant the Huey-Martin Drug Company upon the notes described in the complaint; and, second, whether or not there is any liability on the part of the defendant the Calhoun Drug Company upon said notes. Any equitable issues raised by the pleadings are subject to the further orders of this court, except such as arise incidentally in the determination of the above issues."

The issues under both causes of action were equitable in their nature, and were not properly triable by a jury. *Ex parte Landrum*, 69 S. C. 136, 48 S. E. 47; *Pratt v. Timmerman*, 69 S. C. 186, 48 S. E. 255; *Mobley v. McLucas*, 99 S. C. 99, 82 S. E. 986; *Rainwater v. Bank*, 108 S. C. 206, 93 S. E. 770; *Oliver v. McWhirter*, 109 S. C. 358, 96 S. E. 140.

These conclusions practically dispose of all questions presented by the exceptions.

For these reasons I dissent.

#### On Petition for Rehearing.

**PER CURIAM.** [3] The appellant Calhoun Drug Company petitions for a rehearing, contending that, in affirming the judgment of the circuit court, this court overlooked its contention that the statute denounces as unlawful, unless its terms are complied with, the sale by any merchant, etc., of his "stock of merchandise"; that those words are not sufficiently comprehensive to include "store fixtures" sold with the stock of merchandise; that in this case the price of the "stock of merchandise" was \$1,819.31, and that of the "fixtures" was \$2,018.76, making a total of \$3,838.07; that \$3,538.07 of the total purchase price had already been paid to other creditors of the seller, leaving in the hands of the purchaser only about \$300, and that, besides, plaintiff's claim, there are still others unpaid, amounting to about \$161; that, upon these figures, if only the price of the "stock of merchandise" is available to pay creditors (as contended by the petitioner), then plaintiff's pro rata would be only about 46 per cent., but, if the total purchase price is to be taken into account then it would be only about 87 per

cent.; and therefore the court erred in giving plaintiff judgment against the Calhoun Drug Company for the full amount of its claim.

We are not called upon in this case to decide whether the words "stock of merchandise" are sufficiently comprehensive, or were intended by the Legislature (in view of the general purpose of the statute and the evils which it was designed to prevent and remedy) to include the store furniture and fixtures of a merchant who sells them along with his "stock of merchandise," with the intention of closing out and ceasing to carry on his business, because both parties to the transaction have considered the total purchase price, which was to be paid by the purchaser for the "stock of merchandise" and the "fixtures" as a single fund applicable to the payment of the claims of all the creditors of the seller, and the petitioner's statement shows that all of the fund (except about \$300) has been so applied.

[4] Moreover, petitioner's contention erroneously assumes that the creditors must be satisfied with the price agreed upon by the seller and purchaser. One purpose of the statute in requiring the inventory and schedule of creditors and notice of the proposed sale to be given to each creditor was to give the creditors opportunity to ascertain whether the price and terms of payment were fair and reasonable, and, if not, to take such steps as they might be advised to protect their interests, and the record shows that the sale was made at a discount of 25 per cent. from the market price.

When the parties to the sale fail to comply with its provisions, the statute imposes upon the purchaser liability to the creditors of the sellers in the following language:

"The merchandise in the hands of the purchaser, or any part thereof, if it shall be found in his or its hands, shall be liable to such creditors, and in the event the same, or any part thereof, shall be withdrawn by said purchaser, then the purchaser himself or itself personally shall also be liable to said creditors of such seller to the extent of the value of the merchandise so received by him or it and thus withdrawn."

It will be seen from the language quoted that the creditors are not relegated to the purchase price alone, as the petitioner erroneously assumes, for that may have been paid to the seller and disposed of; but they may also follow the goods in the hands of the purchaser, and, if he had disposed of them, the statute makes him personally liable to the creditors to the extent of the value of the goods so received by him and disposed of. As the testimony showed that petitioner had received and disposed of more than enough goods in value to pay plaintiff's claim, the court properly directed a verdict

against the petitioner, as well as the original debtor, for the full amount of the claim.

For the reasons stated, the petition is dismissed.

GARY, C. J. I concur in dismissing the petition on the ground that no material question of law or of fact was either overlooked or disregarded.

(150 Ga. 73)

BANKS v. STATE. (No. 1784.)

(Supreme Court of Georgia. March 9, 1920.)

(Syllabus by the Court.)

CRIMINAL LAW  $\S$ 200(1)—SEDUCTION  $\S$ 36—DEFENDANT, ON GIVING BOND FOR SUPPORT AND OFFER OF MARRIAGE, ENTITLED TO A DISCHARGE; DISCHARGE OF PROSECUTION FOR SEDUCTION BARS PROSECUTION FOR FORNICATION.

An indictment charged that the accused seduced a named woman on January 1, 1918. On the call of the case for trial, and before arraignment and plea, the accused, in response to the charge, presented to the court a written statement to the effect that he had obtained from the ordinary of the county of the woman's residence a license to marry her, and at the time of obtaining it he had given a good and sufficient bond in the sum fixed by such official, payable to him and his successors in office, and conditioned for the maintenance and support of the woman and her child for the period of five years; and in this statement he made, in open court, a bona fide and continuing offer to marry the woman, attaching to such statement the marriage license and the bond referred to, approved by the ordinary. Whereupon the woman, in open court, refused to marry the accused. The trial judge thereupon entered a judgment reciting the facts, and ordered that the prosecution against the accused for seduction "be and the same is hereby at an end, and cannot be further prosecuted against the said defendant. It is further ordered that the said defendant be, and he is hereby, discharged in said case." Thereafter, and on the same day, the grand jury returned a special presentment against the accused, charging him with the offense of fornication, alleging the act to have been committed on February 12, 1918; the woman referred to being the same in both indictments. To this last indictment the accused pleaded in bar that the prosecution for fornication was founded upon the same transaction as that charged in the former indictment for seduction, and that both transactions were founded upon the same evidence, and that, as the lesser offense of fornication charged in the last indictment was involved in the indictment for seduction, his discharge under the indictment for seduction was a bar to the prosecution for fornication. This plea was stricken by the court as insufficient.

The Court of Appeals, after stating in substance the facts as above recited, certified to the Supreme Court the question whether the striking of the plea was error.

In our opinion the plea should not have been stricken. The offense of seduction necessarily embodies, as an element thereof, the offense of fornication. Seduction cannot be accomplished without sexual intercourse. Upon complying with the provisions of the statute (Pen. Code 1910, § 379), by obtaining a license to marry the woman whom he was charged with seducing, giving the bond as required by the ordinary, having it approved by him, and by making a bona fide and continuing offer to marry the woman, and she in open court refusing to marry him, the accused, under the statute, had the right to have the prosecution for seduction stopped, and to be discharged from further prosecution thereunder. The judgment of the court effectually ended that prosecution, and the accused could not subsequently be indicted for any essential element involved in that charge of seduction. If the accused, on the trial for fornication, should sustain his plea, he would be entitled to an acquittal. See *Disharoon v. State*, 95 Ga. 351, 22 S. E. 698; *Ingram v. State*, 124 Ga. 448, 52 S. E. 759.

#### Certified Question from Court of Appeals.

Warrior Banks was prosecuted for fornication, his plea in bar was stricken, and the Court of Appeals certified a question. Question answered.

W. W. Bennett, of Baxley, for plaintiff in error.

Alvin V. Sellers, Sol. Gen., of Baxley, for the State.

FISH, C. J. Certified question answered as per headnote. All the Justices concur, except BECK, P. J., absent on account of sickness.

(150 Ga. 72)

#### SCOGGINS v. STATE. (No. 1783.)

(Supreme Court of Georgia. March 9, 1920.)

(Syllabus by the Court.)

**CRIMINAL LAW** ¶1049—SPECIAL VERDICT FINDING DEFENDANT SANE, AND OVERRULING OF MOTION TO CONTINUE AND PRAYER FOR A STAY OF TRIAL PENDING HIS APPEAL FROM VERDICT, SHOULD HAVE BEEN EXCEPTED TO PENDENTE LITE.

Raymond Scoggins was indicted for the offense of murder, and before arraignment and pleading to the merits of the case he filed a special plea of insanity at the time of the trial. After evidence submitted by both sides, the

jury returned a verdict against the special plea of insanity, finding that the defendant was then sane. The defendant filed a motion for new trial. On the day following the trial on the special plea, the defendant was placed on trial for murder under the indictment; whereupon a motion to continue the case for the term was made, and the court was asked in writing to grant a supersedeas and a stay of the proceedings of the trial for murder "until his appeal from the verdict of the jury and the judgment of the court on his special plea of insanity could be passed upon by the Court of Appeals of Georgia." The motion recites that the defendant had been tried on the special plea of insanity under Pen. Code (1910) §§ 976, 978, and that he was entitled, under those sections, to a stay of the proceedings as a matter of right until the court of review could pass upon his exceptions, one of which was that the failure of the trial judge to grant the supersedeas asked for had the effect of denying the defendant due process of law and the equal protection of the law, under the state and federal Constitutions. The court overruled the motion to continue, or to stay the proceedings, denied the prayer for a supersedeas on all the grounds thereof, and ordered the accused to proceed to trial under the indictment. To this ruling the accused excepted. *Held*, that the rulings and judgment complained of should have been excepted to pendente lite. The accused could not, as a matter of right, have a direct bill of exceptions, which would operate as a supersedeas and prevent further proceedings in the case, until the question made in the writ of error to the Court of Appeals was disposed of. The writ of error will therefore be dismissed.

Error from Superior Court, Bibb County; E. D. Graham, Judge.

Raymond Scoggins was indicted for murder, and on his special plea of insanity the jury found that he was sane. His motion to continue the case, and his prayer for a supersedeas and a stay until determination of his appeal from the verdict, were denied, and he brings error. Writ of error dismissed.

See, also, 102 S. E. 89.

John R. Cooper and W. O. Cooper, Jr., both of Macon, for plaintiff in error.

Chas. H. Garrett, Sol. Gen., of Macon, for the State.

HILL, J. Writ of error dismissed. All the Justices concur, except BECK, P. J., absent on account of sickness.

¶ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(150 Ga. 65)

**BIBB BRICK CO. v. CENTRAL OF GEORGIA RY. CO.** (No. 1536.)

(Supreme Court of Georgia. March 9, 1920.)

*(Syllabus by the Court.)*

**ESTOPPEL** ¶92(4)—**EVIDENCE** ¶43(1)—**INJUNCTION** ¶27—**OWNER TAKING PART IN CONDEMNATION PROCEEDING ESTOPPED FROM OBJECTING THERETO; SUPREME COURT WILL TAKE JUDICIAL NOTICE OF APPEAL PENDING ON CERTIORARI; INJUNCTION NOT MAINTAINABLE, WHERE PLAINTIFF HAS REMEDY AT LAW.**

This case is practically the same as it was when here on a former occasion (149 Ga. 38, 99 S. E. 126), where it was held: "Where the owner of an easement in land takes part in proceedings to condemn his interest for public purposes, selecting an assessor, offering evidence, etc., and after an award accepts full payment, such owner will be thereby estopped from urging objections, in an equitable proceeding for injunction, etc., to the condemnation proceedings. *Atlantic & Birmingham R. Co. v. Penny*, 119 Ga. 479, 46 S. E. 665; *Georgia Granite R. Co. v. Venable*, 129 Ga. 341, 348, 58 S. E. 864; *Winslow v. B. & O. R. Co.*, 208 U. S. 59, 28 Sup. Ct. 190, 52 L. Ed. 888; 10 R. C. L. 210, § 179." The prayer of the amended petition is substantially the same as it was in the original petition, and seeks to enjoin the "appeal," of which this court will take judicial cognizance as pending in this court on certiorari from the Court of Appeals. As was held in the case cited above, such a suit cannot be maintained, as the plaintiff has an available remedy at law (Civ. Code 1910, § 5230), and is now pursuing that remedy.

Error from Superior Court, Bibb County; H. A. Matthews, Judge.

Action between the Bibb Brick Company and the Central of Georgia Railway Company. Judgment for the latter, and the former brings error. Affirmed.

See, also, 101 S. E. 588.

John R. L. Smith, Grady C. Harris, and John P. Ross, all of Macon, for plaintiff in error.

T. S. Felder and R. C. Jordan, both of Macon, for defendant in error.

HILL, J. Judgment affirmed. All the Justices concur, except BECK, P. J., absent on account of sickness.

(149 Ga. 329)

**LOUISVILLE & N. R. CO. v. HOOD.** (No. 1328.)

(Supreme Court of Georgia. Feb. 14, 1920.)

*(Syllabus by the Court.)*

**1. MASTER AND SERVANT** ¶228(1)—**CONTRIBUTORY NEGLIGENCE HELD NO BAR UNDER FEDERAL EMPLOYERS' LIABILITY ACT.**

In a suit for personal injuries, brought against a railroad company under the federal

Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), where it is shown that the railroad company was guilty of negligence having a causal relation to the injury, contributory negligence upon the part of the plaintiff will not be a bar to a recovery, although the injuries could have been avoided by the exercise of ordinary care upon the part of the plaintiff.

**2. APPEAL AND ERROR** ¶808 — **CERTIFIED QUESTIONS OF FACT OR OF MIXED FACT AND LAW WILL NOT BE ANSWERED.**

The other questions propounded by the Court of Appeals are not of such a character as to confer upon this court the right to entertain, consider, and answer them.

Certified Questions from Court of Appeals.

Action by D. F. Hood against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant brings error, and the Court of Appeals certified questions. First question answered in the negative, and other questions not answered.

Judgment conformed to in Court of Appeals, 102 S. E. 138.

The Court of Appeals certified the following questions:

"(1) Where a suit for personal injuries is brought against a railroad company under the federal Employers' Liability Act, and the injuries could have been avoided by the exercise of ordinary care by the plaintiff, will the failure to exercise such care bar a recovery, or is this to be treated simply as contributory negligence which would diminish the recovery, if the railroad company was also shown to be negligent?

"(2) Relatively to an 'extra gang foreman' of a railroad, whose duty it was to repair and surface the track and keep the roadbed and the track in proper shape and passable for trains, is it negligence on the part of the railroad company to pile up slag, dirt, and stones—a general mixture for ballasting the roadbed—in such close proximity to the track that the vibration from passing trains would cause some of it to fall upon the track, and thereby cause the derailment of a hand car, in which the plaintiff (the extra gang foreman) was riding for the purpose of repairing the track?

"(3) Under the circumstances mentioned in question No. 2, was the danger of the derailment of the hand car in which the plaintiff was riding an ordinary risk and hazard of his occupation, or was it a risk not naturally incident to the occupation, but arising out of the failure of the railroad company to exercise due diligence with respect to providing a safe place of work for its employes?

"(4) Under the circumstances stated in question No. 2, where the hand car upon which the plaintiff was riding was derailed when going around a curve before he had reached the piece of track he was intending to repair, and where upon the trial the plaintiff himself testified: 'I could see the slag before I got to it. As far as seeing it was concerned, it was all along there; we had to contend with that every minute we were running. I knew all the time

that that was the condition we worked under. I knew that it was the way we unloaded stuff several times. \* \* \* That was the common condition; looking at it, you understand. \* \* \* Going around that curve I saw this condition ahead of me. I seen the stuff piled up on the outside of the rail ahead of me. \* \* \* My car continued at the rate of about 10 miles. \* \* \* I said a pebble about as big as your thumb, or something of that sort, would derail the wheel. I don't know how large that was we ran over. The cause of the derailment was this stuff falling down on the track. \* \* \* The matter of protecting the hand car is one of the duties of the foreman. \* \* \* The section foremen are the men of all other men whose duty it is to have a safe roadbed for the trains to go back and forth over. The company has to look to them to do it. \* \* \* I had four men on the car, going about 10 miles an hour around the curve, and did not send a flagman around the curve. \* \* \* It is my duty to flag around all dangerous places. I was in charge of my lever car there and in control of it. The men on it were subject to my orders. I could tell them to slow down, and it was their duty to do it. \* \* \* I had railroaded for 35 to 40 years in all capacities almost. \* \* \* When a foreman, extra gang man, or ordinary foreman goes out on the railroad track it is his duty to be on the lookout for any and all sorts of defects. He carries the eyes of the railroad company, so far as finding defects. \* \* \* When I started out it was as much my business and as much my duty to be looking out for spikes that might be loose or any sort of defect that might exist in the track as well as it was [for looking out] for the bucked track. That was true not only on that particular trip, but it was true all the time. \* \* \* I didn't know just where the bucked track was, but it is a fact that it usually bucks on curves. \* \* \* I had not gotten to the bucked track when my lever car was derailed. \* \* \* I knew that the shaking and running of trains would cause it [the slag] to fall down. \* \* \* I knew that two trains had come over this track about a couple of hours before that. \* \* \* The passenger train had just come over this same piece of track. \* \* \* It was immediately after these trains passed that I left Hombre to go out on my lever car. \* \* \* Yes; it is also true they run extra trains up there on that road. They get up a train of coal cars and send them off down to the mines to be loaded extra; and I wouldn't know what minute they might come on me. \* \* \* This railroad is not very old. \* \* \* I forget the age of it. \* \* \* There was a great deal to do to bring it up to what railroad men call a standard or good railroad"—was the presence of the ballast upon the roadbed, placed as it was in such close proximity to the track, and the danger of the same falling upon the track by the vibration of passing trains, and derailling the hand car in which the plaintiff was riding, ordinary risks and hazards of the plaintiff's occupation, which he had assumed, and defects and risks which were known to him, or which were plainly observable? Under such circumstances, was the plaintiff entitled to recover even if the defendant were negligent in so placing and maintaining the ballast upon the roadbed?

"See, in this connection, *Schlemmer v. Buffalo R. R.*, 220 U. S. 590, 81 Sup. Ct. 561, 58 L. Ed. 596; *Seaboard Air Line Ry. v. Horton*, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475; *Roberts, Injuries to Interstate Employes*, § 103; *Richey on Federal Employers' Liability Act*, p. 154, § 65, p. 177, § 72, p. 186, § 75; *Thornton on Federal Employers' Liability Act* (3d Ed.) p. 173, § 110, p. 177, §§ 113, 114."

Tye, Peeples & Tye and W. E. Roberts, all of Atlanta, and Jno. H. Boston and D. W. Blair, both of Marietta, for plaintiff in error. Geo. F. Gober and W. I. Heyward, both of Atlanta, and J. E. Mozley and H. B. Moss, both of Marietta, for defendant in error.

BECK, P. J. [1] 1. In the act of Congress known as the federal Employers' Liability Act, approved April 22, 1908, and entitled "An act relating to the liability of common carriers by railroad to their employes in certain cases," it was enacted, after describing the carriers by railroad to which the terms of the act are applicable:

"That in all actions hereafter brought against any such common carrier by railroad under or by virtue \* \* \* of the provisions of this act to recover damages for personal injury to an employe, or where such injuries have resulted in his death, the fact that the employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe." Section 8659.

In a case involving the provisions of the act quoted this court said:

"The statute contains three propositions which stand out in bold relief: The first is, that a carrier is liable for the injury or death of an employe resulting in part from the carrier's negligence; secondly, the employe's contributory negligence does not cut off the right of action; and, thirdly, there is to be a diminution of damages in proportion to the employe's negligence. It would seem that the clear intent of Congress was to allow some damages for every injury or death caused by the carrier's negligence." *Southern Railway Co. v. Hill*, 139 Ga. 549, 77 S. E. 803.

See, also, *L. & N. R. Co. v. Paschal*, 145 Ga. 521, 89 S. E. 620. And it has been held by the Supreme Court of the United States that it is only where the act or omission on the part of the plaintiff is the sole cause—when the defendant's act is no part of the causation—that the defendant is free from liability under the act. See *Grand Trunk Ry. Co. v. Lindsay*, 233 U. S. 42, 34 Sup. Ct. 581, 58 L. Ed. 838, Ann. Cas. 1914C, 168. And it would seem a fair statement of the rule to say that, unless the act or omission of the plaintiff is the sole cause of the injury, his act or omission must be considered as contributory negligence, and contributory

negligence does not defeat a recovery. See Richey on Federal Employers' Liability, p. 39 et seq.; 18 R. C. L. 826 et seq. And where a railroad company has been guilty of negligence that has a causal relation to the plaintiff's injury, the plaintiff may recover, even though he has been guilty of contributory negligence in regard thereto, and that contributory negligence was of such a character and so related to the injury received that if the plaintiff had exercised ordinary care he might have avoided the consequences of the defendant's negligence. If the defendant was negligent, and negligent in such a way as to bring about or contribute to the injury, the fact that the plaintiff failed to exercise diligence, when under the circumstances by the exercise of diligence he might have avoided the injury, in no wise makes his negligence the sole cause of the injury. But where the injury was the joint result of the negligence of the defendant railroad and of the plaintiff, there may be a recovery by the plaintiff, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to the employé. In briefs submitted to this court counsel for both the defendant in error and the plaintiff in error have urged that this first question is not involved in this case, under the pleadings and the evidence. But the question propounded is a question of law, and such as the Court of Appeals is authorized, by the act creating that court and defining its jurisdiction and right to propound questions to this court, to ask instructions thereon; and where such a question is propounded, it is the duty of this court to answer it without looking to the record or pleadings and the facts to discover whether the question is there involved, though this court might decline to answer a question of law if it appears from the other questions propounded in connection therewith that it could not be involved in the decision of the case before the Court of Appeals.

[2] 2. This court cannot undertake to answer the other three questions. After giving them careful consideration, we are satisfied the questions are not of the character which the Court of Appeals is authorized to certify to this court. Question No. 2 is a question of fact, and question 3 is a question of mixed fact and law, depending to a considerable extent upon the proper answer to question 2. Question 4 contains various mixed questions of fact and law. In the case of *Lynch v. Southern Express Co.*, 146 Ga. 68, 90 S. E. 527, it was said:

"With a view of preserving uniformity of decision, the Constitution provides for the certifying of constitutional questions to the Supreme Court, and further provides that 'the Court of Appeals may at any time certify to the Supreme Court any other question of law concerning which it desires the instruction of the Supreme Court for proper decision; and thereupon the Supreme Court shall give its in-

struction on the question certified to it, which shall be binding on the Court of Appeals in such case. The manner of certifying questions to the Supreme Court by the Court of Appeals, and the subsequent proceedings in regard to the same in the Supreme Court, shall be as the Supreme Court shall by its rules prescribe, until otherwise provided by law.' Constitution of Georgia, art. 6, § 2, par. 9 (Civil Code of 1910, § 6506). Two features stand prominent in this constitutional provision. One is that the question certified is to be one of law, and the other is that the purpose of the certification is to settle the question of law for application by the Court of Appeals in a 'proper decision' of the case by them. There can be no doubt that the words, 'question of law,' as used in the Constitution, considered abstractly or in connection with the context, were not intended to embrace questions of fact, or mixed questions of law and fact; the manifest object being to submit to the Supreme Court a definite question of law."

And in connection with this discussion the writer of the opinion, Presiding Justice Evans, referring to decisions rendered by the Supreme Court of the United States touching similar questions, said:

"A similar question was presented to the United States Supreme Court in the construction of an act of Congress which authorized the judges of the Circuit Court of Appeals in any civil suit or proceeding before it, where they were divided in opinion, to certify to the Supreme Court the point upon which they so disagreed. The Supreme Court of the United States, speaking through Mr. Justice Gray, held that each question certified must be a distinct question or proposition of law clearly stated, so that it could be definitely answered without regard to other issues of law or of fact in the case. He said: 'The points certified must be questions of law only, and not questions of fact, or of mixed law and fact—'not such as involve or imply conclusions or judgment by the court upon the weight or effect of testimony or facts adduced in the cause.' \* \* \* The whole case, even when its decision turns upon matter of law only, cannot be sent up by certificate of division'—citing the following cases: *Jewell v. McKnight*, 123 U. S. 426, 8 Sup. Ct. 193, 31 L. Ed. 190; *Chicago, etc., Ry. v. Williams*, 205 U. S. 444, 452, 27 Sup. Ct. 559, 51 L. Ed. 875; *The Folmina*, 212 U. S. 354, 29 Sup. Ct. 363, 53 L. Ed. 546, 15 Ann. Cas. 748; *U. S. v. Mayer*, 235 U. S. 55, 35 Sup. Ct. 16, 59 L. Ed. 129.

The ruling made in the *Lynch Case*, supra, has been followed in subsequent decisions by this court. The decision in that case was rendered under the provisions of the amendment to the Constitution adopted in 1906, under which the Court of Appeals was created and established. The language of the amendment of 1906, allowing certified questions, is as follows:

"The Court of Appeals may at any time certify to the Supreme Court any other question of law concerning which it desires the instruction of the Supreme Court for proper decision; and thereupon the Supreme Court

shall give its instruction on the question certified to it, which shall be binding on the Court of Appeals in such case."

In the amendment to the Constitution, adopted in 1916 (Acts 1916, p. 19) wherein the jurisdiction of the Supreme Court and of the Court of Appeals is defined, it was declared that—

"Where a case is pending in the Court of Appeals and the Court of Appeals desires instruction from the Supreme Court, it may certify the same to the Supreme Court, and thereupon a transcript of the record shall be transmitted to the Supreme Court, which, after having afforded to the parties an opportunity to be heard thereon, shall instruct the Court of Appeals on the question so certified, and the Court of Appeals shall be bound by the instructions so given."

The language of these two provisions as to the certification of questions to the Supreme Court for instruction is somewhat different, but we do not think it was the purpose of the Legislature proposing this latter amendment to the Constitution to change the character of the questions which might be certified to the Supreme Court. For, although the amendment of 1916 which we are considering declares that, where a case is pending in the Court of Appeals, and that court desires instructions from the Supreme Court, it may certify the same to the Supreme Court, etc., that language must be considered and construed in connection with the further provision immediately following, which is that the Supreme Court, after having afforded to the parties an opportunity to be heard thereon, "shall instruct the Court of Appeals on the question so certified." The language of the amendment of 1906 is substantially the same, which declares that "the Supreme Court shall give its instruction on the question certified to it." Therefore the decision in the Lynch Case, which we have set forth at some length above, is as applicable now to the matter of questions certified by the Court of Appeals as it was when rendered. It follows from what is said above that this court cannot entertain for decision, and for the purpose of instructing the Court of Appeals thereon, the last three questions.

All the Justices concur.

(150 Ga. 53)

CHEW et al. v. JONES et al. (No. 1250.)

(Supreme Court of Georgia. Feb. 28, 1920.)

(Syllabus by the Court.)

1. WILLS §683—DEVISE TO DAUGHTERS IN TRUST CONSTRUED IN RESPECT TO PROPERTY INCLUDED, IN THE TRUST.

After the death of a testator, which occurred in 1866, the executor invested in land certain

funds left by the testator, taking a deed therefor in his own name as executor. The purchase was in pursuance of a power expressed in item 1 of the will, in which direction was also given that the property of the testator should be kept together until the happening of certain events. The only part of the will that contained a devise to children of daughters of the testator was item 5, which provided: "I desire and direct that when either of my sons shall attain the age of twenty-one, or one of my daughters shall marry, or in case from death none of my sons shall attain the age of twenty-one, then, when a daughter shall marry or attain the age of twenty-one, that there shall be a division of my estate both real and personal per stirpes among my children then in life, and the lineal representatives of any child or children previously dead to take their portions in said division in fee simple. Respective shares falling to my daughters in said division I give, bequeath, and devise unto my executors in trust for the use, benefit, and behoof of my daughters respectively during the term of their natural lives, [free] from the debts, liabilities, and contracts of any husband or husbands, or any other person or persons whatsoever; with this understanding, however, that my executors, whom I hereby appoint trustees for my daughters, shall allow my daughters and their husbands, should they marry, to have possession, use, and enjoyment of their respective shares given in trust as aforesaid, for their support during coverture, except the money and cash assets embraced in each share, the interest of which alone shall be paid to my daughters if single and twenty-one years of age, or married to their husbands." Then follows a statement of certain contingencies which did not happen, after which was a provision for another contingency which did occur, as follows: "And in case either of my daughters die leaving no husband, but a child or children surviving her, then at the death of said daughter her trust estate shall cease and vest in fee simple in such child or children." In 1867, one of the daughters of the testator having married, the executor applied to the court of ordinary for leave to divide the estate as directed by the will. Partitioners were appointed, who made distribution among the testator's four children. The land purchased by the executor as mentioned above was not included in the division, and was never divided among the testator's children. Among the children left by the testator were two daughters, both of whom subsequently married and survived their respective husbands, and themselves died, leaving children surviving them. *Held*, that the only property devised to the daughters to which a trust attached was the "respective shares falling to my daughters in said division," and the only property that was devised to the children of the daughters was "the trust estate" created in behalf of their mother.

2. JUDGMENT PROPERLY RENDERED FOR DEFENDANTS ON AGREED STATEMENT OF FACTS.

After the order for partition was granted, and prior to the return of the commissioners, the executor sold the land under an order from the court of ordinary, and on the same day became himself a grantee of the purchaser. The executor accounted for the proceeds of the sale, his accounts were duly approved, and he was



finally discharged. The daughters of the testator lived for more than the prescriptive period after the death of the executor (who himself lived 30 years after the sale), and they did not repudiate the sale by him, or complain that the division of the estate was only partial, or unfair or objectionable for any cause. From the date of the sale and until his death the executor, claiming individually under his deed from the purchaser at the executor's sale, remained in adverse possession of the land, a fact within the knowledge of the daughters, and after his death his children as heirs at law continued in adverse possession for more than 7 years. After the expiration of such time, and after the death of the testator's daughters, children of the latter instituted an action against the children of the executor, to recover the land. *Held*, that the judge to whom the case was submitted upon an agreed statement of facts did not err in rendering a judgment for the defendants.

Error from Superior Court, Burke County;  
H. C. Hammond, Judge.

Action by E. G. Chew and others against S. H. Jones and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

W. K. Miller and Pierce Bros., all of Augusta, for plaintiffs in error.

Callaway & Howard, of Augusta, and E. L. Brinson, of Waynesboro, for defendants in error.

PER CURIAM. Judgment affirmed. All the Justices concur, except GILBERT, J., absent.

(150 Ga. 51)

HODGSON et al. v. HODGSON et al.  
(No. 1448.)

(Supreme Court of Georgia. Feb. 26, 1920.)

(*Syllabus by the Court.*)

1. CHARITIES  $\S$  34—EXECUTORS AUTHORIZED TO MAKE DONATIONS FROM A FUND TO INSTITUTIONS DEEMED SUBJECTS OF CHARITY.

In the fifth item of a will the testator made provision for the creation of a fund to be held by the executors as a trust fund, and gave directions as to the use and employment of a part of it. It was then provided: "And from the rest and residue of this fund of two shares, and after said special bequests have been paid, there shall be made annually, as long as it shall last, liberal donations for charitable purposes, especially Decatur Orphans' Home and assistance to homes for fallen women in Georgia." *Held*, that under a proper construction the executors were authorized to make donations from such fund to other charitable purposes, institutions, persons, or individuals who in their judgment are deemed subjects of charity, as well as to the Decatur Orphans' Home and homes for fallen women in Georgia. In this connection see *King v. Horton*, 149 Ga. —, 100 S. E. 103.

2. ITEM OF A WILL CONSTRUED.

Under a proper construction of subdivision (b) of item 4 of the will, taken in connection

with the codicil, the trustees were authorized to make donations of the income and corpus of the bequests in behalf of two named sons of the testator, prior to their becoming 35 years of age.

3. WILLS  $\S$  702, 705—EFFECT OF JUDGMENT AND AMENDMENTS TO ANSWER IN ACTION BY EXECUTORS FOR CONSTRUCTION.

The executors of the will filed a suit in equity, asking a construction of specified items of the will and directions. Certain legatees who were named as defendants filed an answer in the nature of a cross-petition, in which they sought construction of other items of the will, and alleged facts on the basis of which, under a stated interpretation of such items of the will, it was alleged that the defendants would be entitled to recover from the executors certain moneys, the proceeds arising from a sale of land alleged to have been donated by the testator before his death. Upon such allegations it was prayed that the items of the will specified in the answer be construed, and that the executors be decreed to pay to the defendants the amounts derived from the sale of the land. The plaintiffs demurred to these portions of the answer, on the grounds: (a) That they were not responsive or germane to the allegations of the petition; (b) that defendants had an adequate remedy at law; (c) that the allegations failed to state a legal or equitable cause of action. The plaintiffs also moved to strike the same portions of the answer, on the ground that the allegations thereof were not germane or responsive to the allegations of the petition; but the motion to strike did not state that the allegations were insufficient to set forth a cause of action. Subsequently to the appearance term the judge entered a judgment which declared: "After considering the petition and answer \* \* \* and \* \* \* demurrer filed to said answer and the motion to strike the same, it is ordered \* \* \* that so much of said answer which seeks [the relief to which the demurrer and motion to strike relates] be and the same is hereby stricken." No exception was taken to this judgment, and at a subsequent term the defendants offered amendments elaborating the grounds taken in the original answer, and seeking in effect to recover the land instead of the proceeds of the sale. Demurrers to the amendment and special pleas were filed, urging that the defendants were concluded by the judgment above mentioned, and that the amendment set forth no cause of action. The judge sustained the demurrers and pleas, the amendments were disallowed, and a decree was duly entered. The defendants excepted to the judgment disallowing the amendment to the answer and also to the final judgment of the court. *Held*:

(a) The judgment striking the original answer, construed in the light of the pleadings, was an adjudication that the defendants could not call for a construction of those items of the will specified in the answer, rather than an adjudication that the defendants were not entitled to any relief upon a proper construction thereof.

(b) The amendments to the defendants' answer which were disallowed did not materially change the cause as presented by the original answer, and the court did not err in disallowing such amendments on the ground that de-

defendants were not entitled to ask for a construction of the will.

(c) In view of the grounds of demurrer to the defendants' answer and motion to strike the same, and considering the terms of the judgment striking certain portions of defendants' answer, such judgment should be construed as holding that the defendants were not entitled to set up and have adjudicated in this action the relief prayed for in their answer, and not a decision on the merits of their claims. So construing the judgment, the court rightly held that the amendment to the answer, which was merely elaborative of the allegations in the original answer, was to this extent res adjudicata.

#### 4. PROPER DECREE.

It follows that the judge did not err in directing the verdict and entering the decree.

Error from Superior Court, Clarke County; W. L. Hodges, Judge.

Suit in equity by J. M. Hodgson, executor, and others against C. N. Hodgson and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

R. B. Russell, of Winder, and T. J. Shackelford and Jno. J. & R. M. Strickland, all of Athens, for plaintiffs in error.

John B. Gamble, T. W. Rucker, Erwin, Erwin & Nix, Lamar C. Rucker, H. S. West, and Du Pree Hunnicutt, all of Athens, and Robt. Lee Avary, of Atlanta, for defendants in error.

ATKINSON, J. Judgment affirmed.

All the Justices concur, except GILBERT, J., absent on account of sickness.

(149 Ga. 325)

JONES v. LARAMORE et al. (No. 1319.)

(Supreme Court of Georgia. Feb. 14, 1920.)

*(Syllabus by the Court.)*

1. MOTION TO DISMISS ON GROUNDS THAT THERE WAS NO EXCEPTION TO FINAL JUDGMENT, AND THAT CERTAIN DEFENDANTS WERE NOT MADE PARTIES TO BILL OF EXCEPTIONS, HELD WITHOUT MERIT.

There is a motion to dismiss the writ of error upon the grounds, first, that there was no exception to a final judgment in the case, and, second, that two of the codefendants in the court below were not made parties to the bill of exceptions; it appearing that the judgment complained of was adverse to these codefendants. The motion is without merit.

2. MORTGAGES  $\S$  372(5), 616—WHERE SALE NOT MADE AS ADVERTISED, GRANTEE OF PURCHASER WOULD HOLD SUBJECT TO RIGHTS OF MORTGAGOR; SUFFICIENCY OF PETITION.

One ground of attack upon the conveyance executed by the grantee in the security deed to the defendant's predecessor was that, although the property was advertised for sale in pursuance of the power contained in the security

deed, the property was not in fact exposed for sale at the time and place specified in the advertisement, and the conveyance was executed without any such sale having been made. It was also alleged that the defendant had notice of such facts before he entered possession under his deed from the pretended purchaser under the power of sale. Under such circumstances the defendant would hold possession subject to the right of the grantor in the security deed, and her successors in title, to have an accounting for rents and profits derived from the land by the defendant, and to have so much thereof as may be necessary to discharge the secured debt credited thereon, and, when the debt should be extinguished, the property to return to the grantor or her successors in title. *Polhill v. Brown*, 84 Ga. 338, 10 S. E. 921; *Coates v. Jones*, 142 Ga. 237, 82 S. E. 649; *Powell on Actions for Land*, 514,  $\S$  386.

The petition also alleges that the rents, issues, and profits received by the defendant were more than sufficient to discharge the debt. The petition was not subject to general demurrer on the ground that plaintiffs did not offer to do equity by paying to the defendant the amount of the security deed, or on the ground that there was no equity in the petition and no cause of action was set forth. In so far as any of the grounds of the special demurrer were meritorious, they were met by amendment.

3. MORTGAGES  $\S$  619—IN MORTGAGOR'S ACTION FOR ACCOUNTING, ON AUDITOR'S FAILURE TO FIND ON ISSUE MADE, CAUSE SHOULD HAVE BEEN RECOMMENDED.

Under the pleadings and the evidence, there was an issue as to the amount of the debt remaining unpaid and secured by the deed, and as to the amount of the profits received by the defendant from the land while he was in possession. The auditor did not find specific amounts due on the secured debt, or the specific amount of profits received from the land by the defendant; but as to these matters his findings were in general terms as follows: "It is extremely difficult to arrive at a satisfactory finding with reference to the annual rental value of said land, or the annual profits that might arise from possession and cultivation of the same. I have, therefore, carefully considered the testimony of each of the above-stated witnesses, and have reached a finding on what I must consider as just and equitable a basis as possible, in view of the conflicting testimony on this point. I accordingly find that the first nine years of his possession of said land have fully reimbursed the defendant, D. C. Jones, for the amount of the purchase price he paid for said land, and therefore for the indebtedness due by the estate of Mary Laramore to the Equitable Mortgage Company on said land, for all improvements placed on the same by D. C. Jones, at the prices named by him, and for the payment of all taxes that had accrued on the same, and that the net amount of rents, issues, and profits accruing to the defendant since the time when he had been fully reimbursed for the amount paid to the Equitable Mortgage Company, or Joseph Wheatley, taxes and improvements, as aforesaid, to the date of the filing of this report, is \$2,025, \* \* \* at rate of \$225.00 rental value on net property

per year. I further find that the amount due the Equitable Mortgage Company by Mary Laramore has never been paid directly by Mary Laramore, nor any representative of her estate." It was the duty of the auditor to find and report the amounts of annual rents and profits accruing during the time the defendant was in possession; also the amount of the debt specified in the security deed remaining unpaid, and the amount of taxes paid by defendant and the value of improvements placed on the land by him. Accordingly it was erroneous to overrule the motion to recommit the case to the auditor, in so far as it related to the above finding.

**4. REFERENCE  $\S$  100(4)—EXCEPTIONS TO AUDITOR'S REPORT NOT SETTING OUT EVIDENCE WILL BE OVERRULED.**

"The neglect of a party excepting to an auditor's report on matters of fact, or on matters of law dependent for their decision upon the evidence, to set forth, in connection with each exception of law or of fact, the evidence necessary to be considered in passing thereon, or to point out the same by appropriate reference, or to attach as exhibits to his exceptions those portions of the evidence relied on to support the exceptions, is a sufficient reason, in an equity case, for refusing to approve the exceptions of fact, and for overruling the exceptions of law." *Armstrong v. American National Bank*, 149 Ga. 165, 99 S. E. 884. A number of exceptions failed to comply with the rule first stated, and consequently were insufficient to present any question for consideration. Other exceptions of fact which were sufficient in form are without merit.

**5. EVIDENCE  $\S$  114—RENTAL VALUE OF PROPERTY MAY BE SHOWN TO PROVE AMOUNT RECEIVED AS RENTS BY DEFENDANT.**

On the question of the value of rents, issues, and profits from the land received by the defendant, testimony of a witness stating his opinion as to annual rental value of the property was admissible. None of the exceptions to the report of the auditor on the question of admissibility of evidence were meritorious.

**6. MORTGAGES  $\S$  602—LIABILITY OF GRANTEE FROM PURCHASER UNDER SECURITY DEED NOT CONFINED TO NET PROFIT FROM USE OF LAND.**

Net profit which the defendant realized from the cultivation and use of the land was not the sole measure of his liability. *Page v. Blackshear*, 78 Ga. 597, 8 S. E. 423; *Polhill v. Brown*, 84 Ga. 388, 10 S. E. 921; *Wilkins v. Gibson*, 113 Ga. 31, 57, 38 S. E. 374, 84 Am. St. Rep. 204; *Harris v. Powers* 129 Ga. 74, 58 S. E. 1038, 12 Ann. Cas. 475; *Culver v. Lambert*, 132 Ga. 296, 64 S. E. 82; *Coates v. Jones*, 142 Ga. 237, 82 S. E. 649. See, also, 19 R. C. L. 336, §§ 110, 111. The above ruling does not conflict with the case of *Gunter v. Smith*, 113 Ga. 18, 38 S. E. 374 (4).

**7. DESCENT AND DISTRIBUTION  $\S$  8—MORTGAGES  $\S$  619—WHERE GRANTOR IN SECURITY DEED DIES, TITLE DOES NOT PASS TO HIS HEIRS; CAUSE RECOMMITTED TO AUDITOR FOR CLEARER FINDING.**

Where a deed conveys legal title to land as security for debt, and the grantor dies while

the title is thus outstanding, as against the grantee and his privies in estate such legal title does not descend to the heirs at law of the grantor. *Humphrey v. Smith*, 142 Ga. 291, 82 S. E. 885; *First National Bank of Commerce v. McFarlin*, 146 Ga. 717, 92 S. E. 69. Accordingly the auditor erred in holding that upon the death of the grantor in the security deed legal title to the land descended to her heirs at law. On the basis of such ruling the auditor further found: "That the title to the land in controversy vested in the three plaintiffs and their father immediately upon the death of their mother, Mary Laramore; that any right of action pertaining to the land in controversy was therefore in the plaintiffs, who were then minors; and that for this reason they are not barred by the statute of limitations, regardless of the fact that there was an administration [of] the said estate, \* \* \* and regardless of the further facts that the said plaintiffs, then minors, had a guardian." By this ruling, when considered in the light of the pleadings and the evidence, it is not clear whether the auditor, in referring to the "statute of limitations," meant the limitations as specified in Civil Code 1910, § 3267, relating to actions against mortgagees in possession of the mortgaged property, and applied, in *Gunter v. Smith*, 113 Ga. 18, 38 S. E. 374 (4), to grantees in possession under security deed, or to the law of prescription. On another hearing before the auditor, which is hereby directed, evidence on both questions should be received, and specific rulings should be made upon each question.

Error from Superior Court, Lee County; Z. A. Littlejohn, Judge.

Action by L. E. Laramore and others against D. C. Jones. Case referred to auditor, motion to recommit overruled, and judgment for plaintiffs. Defendant brings error. Reversed.

Several of the heirs at law of the grantor in a security deed to land instituted an action against a remote grantee of the grantee in that deed. The petition also named as parties defendant certain persons alleged to be heirs at law of one of the heirs of the grantor in the security deed, but none of the persons so named answered. It was alleged in the petition as amended that the defendant who answered and his predecessor had entered possession under a pretended sale conducted by the grantee in the security deed under a power contained therein; that the sale was void, and that the purchaser thereunder and his successors, having notice of the facts which rendered the sale void, acquired and held possession subject to the right of the heirs at law of the grantor to pay the secured debt and have reconveyance of the property. The amount of the debt was stated. It was further alleged that the annual rents of the land amounted to a specified sum, which had been received by the defendant, and were more than sufficient to

pay off the debt; that the grantor in the security deed died intestate; that there were no debts, except that specified in the security deed; and that there had never been any administration on the estate. The prayers were: (a) For decree to each of the plaintiffs specified undivided interests in the land, and for possession; (b) that the deed purporting to have been executed in pursuance of the power of sale be canceled; (c) that the land be sold by a commissioner and the proceeds be distributed to the plaintiffs as heirs at law of the deceased, according to their several interests; (d) that the plaintiffs have judgment against the defendant for a stated portion of the rents over and above the amount necessary to discharge the debt; and (e) for general relief and process. The case was referred to an auditor. Among his findings was one holding, in effect, that the defendants who did not answer were not entitled to any interest in the land. There was no exception to this finding. A motion to recommit the case was overruled, and all the exceptions of law and fact, save one, were disallowed. The judgment also provided that the plaintiffs each recover of the defendant a specified undivided interest in the land and a stated sum of money, with interest from the date of the auditor's report. The defendant assigned error upon the overruling of the exceptions of law and fact, and upon the judgment in its entirety.

Wallis & Fort and R. L. Maynard, all of Americus, for plaintiff in error.

Ware G. Martin, of Leesburg, and Shipp & Sheppard, of Americus, for defendants in error.

ATKINSON, J. Judgment reversed. All the Justices concur.

(149 Ga. 787)

OGLETHORPE SAVINGS & TRUST CO. v. MORGAN et al. (No. 1298.)

(Supreme Court of Georgia. Feb. 13, 1920.)

(*Syllabus by the Court.*)

1. MECHANICS' LIENS §263 — MORTGAGES §151(3)—LIEN ATTACHES FROM COMMENCEMENT OF WORK; IS PRIOR TO TITLE ACQUIRED WITH NOTICE BY OWNER'S SUBSEQUENT GRANTEE.

The lien of a contractor on real estate improved under a contract with the owner thereof, as provided by the Civil Code 1910, § 3352, if and when "created and declared" as required by section 3353, attaches from the time the work under the contract is commenced, and takes priority over the title acquired, with actual notice of the contractor's claim of lien, by a subsequent grantee in a trust deed from the owner of the real estate, although the deed was executed and recorded before the completion

of the contract and before the claim of lien was recorded and before the commencement of an action to recover the amount of the claim.

2. MECHANICS' LIENS §263 — CONVEYANCE TO PURCHASER WITH NOTICE OF LIEN DID NOT AFFECT LIEN.

A conveyance of the property to the purchaser, with actual notice of the contractor's claim of lien, after the contractor's lien attaches by a beginning of performance under the contract, does not affect the right to a lien for a whole, though a part of the execution of the contract is before and a part after the time of the conveyance.

3. MECHANICS' LIENS §263(4) — LIEN IS PROPERLY RECORDED AND FORECLOSED AGAINST ORIGINAL OWNER, NOTWITHSTANDING SALE TO PURCHASER WITH NOTICE.

In such case the subsequent purchaser of the property, with actual notice of the contractor's claim of lien, takes subject thereto. The lien is therefore properly recorded against the original owner, and the foreclosure proceeding properly brought against him. The subsequent purchaser is not a necessary party to the action.

4. MECHANICS' LIENS §263 — RECEIVER PROPERLY APPOINTED IN AID OF ENFORCEMENT OF LIEN.

The court did not err in overruling the general and special demurrers to the petition as amended, and in appointing a receiver.

Error from Superior Court, Chatham County; John Rourke, Jr., Judge.

Suit in equity by Ebenezer Morgan against the Masonic Temple Association and the Oglethorpe Savings & Trust Company, trustee, to enforce a contractor's lien and for the appointment of a receiver, etc. Demurrers of trustee to petition overruled and receiver appointed, and the trustee excepts and brings error. Affirmed.

In September, 1912, Ebenezer Morgan entered into a contract with the Masonic Temple Association, a corporation, of Chatham county, Ga., to build a five-story reinforced concrete building on land known as No. 39, Jasper Ward, in the city of Savannah, Chatham county, then owned by the association. Morgan immediately entered into possession of the tract of land and began the construction of the building. At the completion of the building according to his contract, the association owed him therefor \$29,726.82. Within 3 months after the completion of the building Morgan recorded his mechanic's or contractor's lien in the office of the clerk of the superior court of Chatham county, and within 12 months after his debt against the association became due he brought suit against the association, and recovered a judgment, which was declared to be a general lien upon all the property of the association and a special lien upon said lot No. 39. The assets of the association consisted of

that lot and of subscriptions to its capital stock by various persons, amounting to \$20,000. The officers of the association had neglected to collect the amount of these subscriptions, and had practically abandoned the association. On December 1, 1914, and while the work of improving the lot was in progress, but before the completion of the building and the recording of the contractor's lien, the association executed a trust deed to the Real Estate Bank & Trust Company, a corporation, of Chatham county, by the terms of which it conveyed lot No. 39, Jasper Ward, to secure an issue of bonds amounting to \$100,000. On June 18, 1915, the trustee named in the deed resigned, and the Oglethorpe Savings & Trust Company, also of Chatham county, was substituted as trustee. The trust deed was properly recorded before the completion of the building by Morgan, and before his lien was recorded. The bonds were not sold, but were hypothecated with the trustee as security for the payment of several items of indebtedness, amounting to \$60,026.20, due and owing to various named persons. Each of the debts so secured was incurred by the association prior to the execution of the trust deed. At the time of the execution of the trust deed the trustee named therein, the substituted trustee, and the several creditors had actual knowledge of the pendency of the plaintiff's contract and notice of his claim of lien. The trustee nevertheless claimed that its title was superior to Morgan's adjudicated lien. Morgan was unable to pay the creditors whose claims were secured by the hypothecation of the bonds of the association; whereupon he filed his petition in equity in Chatham superior court, returnable to the October term, 1918, naming the association and the trustee as parties defendant. In addition to the foregoing, he alleged that the assets of the association were rapidly deteriorating; and he prayed that a receiver be appointed to collect the unpaid subscriptions and to protect the property of the association, that the court determine between the plaintiff and the trustee the due and proper relation between their liens, that the assets of the association be marshaled and all priorities determined, and that he have such further relief as the court should deem proper in the premises. The association answered, admitting substantially all the allegations of the plaintiff's petition, and, in effect, consenting to the appointment of a receiver as prayed. The trustee filed demurrers, both general and special, to the petition. It also answered. At the December term, 1918, of Chatham superior court, these demurrers were overruled, and the court appointed a receiver for all the properties and assets of the association, as prayed in the petition. The case was submitted upon the verified petition, the answer, and the affi-

davit of J. E. Jaudon. The trustee excepted to the overruling of its demurrers and to the appointment of a receiver.

Edward S. Elliott, of Savannah, for plaintiff in error.

Osborne, Lawrence & Abrahams and Robt. L. Colding, all of Savannah, for defendants in error.

GEORGE, J. (after stating the facts as above). The judge was authorized to find that the trustee, the grantee in the trust deed, and each of the creditors whose claims against the association were secured by a pledge of the bonds, had actual notice of the plaintiff's contract and of his contractual rights, whatever they were, at the time of the execution of the deed. The plaintiff's lien was not recorded until the completion of his contract, and at a time subsequent to the making of the trust deed; but it was recorded within 3 months after the completion of his contract, and he commenced suit against the association for the recovery of the amount due him within 12 months from the time the same became due.

[1-3] While other questions are made, which will be later considered, the controlling question is whether, under the facts above stated, a contractor's lien, when recorded and prosecuted to judgment as required by the statute, relates back to the beginning of the performance of the contract, or whether it dates from the time of the recording of the claim of lien or of the judgment declaring it. This court, so far as we have been able to find, has not been called upon to determine the precise question involved. Section 3352 of the Civil Code, so far as material here, is as follows:

"All mechanics of every sort, who have taken no personal security therefor, shall, for work done and material furnished in building, repairing, or improving any real estate of their employers; all contractors, materialmen, and persons furnishing material for the improvement of real estate \* \* \* shall each have a special lien on such real estate."

Subdivision 2 of section 3352 provides for a lien for work done and material furnished upon the employment of a contractor or some other person than the owner of the real estate, and has no bearing upon the question for decision. Section 3353 provides:

"To make good the liens specified in section 3352, they must be created and declared in accordance with the following provisions, and on failure of either the lien shall cease, viz.:" (1) A substantial compliance by the contractor with his contract. (2) The recording of his claim of lien within 3 months after the completion of the work, or within 3 months after such material is furnished, in the office of the clerk of the superior court in the county where such property is situated. (3) The commencement of an action for the recovery of the amount

of his claim within 12 months from the time the same shall become due.

Subdivision 3 of section 3353 is as follows:

"As between themselves, the liens provided for in said section shall rank according to date, but all of the liens herein mentioned for repairs, building, or furnishing materials, upon the same property, shall, as to each other, be of the same date when declared and recorded within three months after the work is done, or before that time. Said liens specified in section 3352 shall be inferior to liens for taxes, to the general and special liens of laborers, to the general lien of landlords for rent when reduced to execution and levied to claims for purchase money due persons who have only given bonds for titles, and to other general liens, when actual notice of such general lien of landlords and others has been communicated before the work was done or materials furnished; but the said liens provided for in said section shall be superior to all other liens not herein excepted."

This court has decided that the subdivision just quoted does not embrace absolute conveyances. In *Ashmore v. Whatley*, 99 Ga. 150, 24 S. E. 941, it was held:

"A bona fide purchaser of the absolute title of real estate, who bought without notice of a materialman's lien upon the same, which at the time of the purchase had been neither recorded nor foreclosed, took the property divested of such lien."

It will be noted that the court did not decide that the materialman's lien upon real estate did not exist before record and before the commencement of foreclosure proceedings. On the contrary, the decision recognizes the existence of the lien, and it is declared that the title thus acquired by a bona fide purchaser takes the property "divested of such lien." This decision was followed in *Bennett Lumber Co. v. Martin*, 132 Ga. 491, 64 S. E. 484, where it was held:

"Where title to real estate is conveyed by a duly recorded deed to secure a debt, and the grantee takes the deed and advances the money loaned, without notice and before the record of a materialman's lien upon the property, the title thus acquired is superior to such lien."

Attention is called to the fact that the existence of the lien before its record is recognized, but the title of the grantee is held to be "superior to such lien." The decision in *Ashmore v. Whatley* was again followed in *Willingham-Tift Lumber Co. v. Barnes*, 147 Ga. 209, 93 S. E. 201 (2). In *Milner v. Wellhouse*, 148 Ga. 275, 96 S. E. 566, a case involving a contest between a materialman's lien which was recorded within the time prescribed by law and a security deed executed by the common debtor after the material was furnished but before the record of the materialman's lien, the principle decided in *Ashmore v. Whatley* was again

recognized, and the case of *Bennett Lumber Co. v. Martin*, supra, was cited in support of the ruling there made. It was further held, in *Milner v. Wellhouse*, that the presumption arises that the grantee in the security deed is a purchaser without notice, to quote the language of the Chief Justice, who delivered the opinion—

"where it affirmatively appears that the security deed was upon a valuable consideration, and there is nothing to show actual knowledge to the grantee, or knowledge of any fact sufficient to put him upon inquiry as to the existence of the materialman's lien."

Again, it will be noted that the court recognized the existence of the lien at the time of the execution of the deed, but held that the title conveyed by the deed was superior to the lien. In all the cases cited there is a strong implication that the lien had its inception at a date prior to the completion of the contract, or the recording of the claim of lien, or the commencement of an action to foreclose the same. Looking to section 3353, it will be observed that the language is, "to make good the liens specified in section 3352," and that in order to make good those liens the claimant must do certain things, and "on failure of either the lien shall cease." The language quoted recognizes the actual existence of the lien even prior to the completion of the contract, the recording of the claim of lien, or the commencement of an action to foreclose the same. Again, in subdivision 3 of section 3353, where the rank of the lien is declared, it will be observed that the mechanic's or contractor's lien is inferior to "other general liens, when actual notice of such general liens \* \* \* has been communicated before the work was done or materials furnished." This language clearly indicates that the lien declared in section 3352 has its inception in the commencement of the work or the beginning of the execution of the contract.

It is true that while the rank of the mechanic's or contractor's lien is declared, in so far as it comes in competition with other liens (and it is made superior to all liens not therein excepted), there is no provision that the lien of a materialman shall be superior to title acquired without notice of the existence of such lien, whether the conveyance be absolute or merely for the purpose of securing a debt. Nevertheless, the point which we are now undertaking to make clear is that under our Code the lien exists, and existence of the lien is recognized from the date of the beginning of the execution of the contract out of which it springs, although it is not made superior to the title acquired by a bona fide purchaser. In 27 Cyc. 110, it is said:

"The doing of work or furnishing of materials gives merely an inchoate lien or the right

to acquire a lien, and the statute prescribes the steps to be taken to perfect such lien."

Lien laws are, of course, to be strictly construed, and one who claims a lien must bring himself within the law. *Palin v. Cooke*, 125 Ga. 442, 54 S. E. 90. The mechanic's lien, as to realty, is in derogation of common law, and is to be construed strictly and extended no further than its words plainly import. *Fox v. Rucker*, 30 Ga. 525. The failure of a mechanic or contractor to perfect his lien as provided by statute vitiates the lien, not only as against third persons, but, under our decisions, as against the owner himself. *Cherry v. North & South Railroad*, 65 Ga. 633, 635. To "make good" the contractor's lien the statute must be strictly complied with; but in this case the statute was complied with, that is, the contract was completed, the claim of lien recorded, and the action commenced to recover judgment within the time prescribed by the statute. In such circumstances it must be decided, giving to the language of the statute its clear import, that the contractor's lien attaches from the time the work under the contract is commenced, although it lacks, certainly until its record, the quality of constructive notice. But one who purchases the property while the work is in progress, with knowledge of the contract and notice of the contractor's claim of lien, though imperfect at the time, must be held to take the property subject to the lien, provided the contract is completed and the lien is declared and enforced within the time and as prescribed by the statute. See *Loudon v. Blandford*, 56 Ga. 150 (6). In the sixth division of the opinion in that case Judge Jackson, speaking for the court, said:

"If mechanics held a lien on the property sold, duly recorded within 3 months, and brought suit thereon in 12 months by attachment, their lien attaches from the date of the work done or material furnished and not from the attachment or by virtue of the attachment, and it is not lost by dissolution of the attachment, but should be paid."

Sections 1959 and 1963 of the Code of 1863 were cited. By section 1959:

"All mechanics who have taken no personal security therefor, shall have a lien on every house [or other property], and the premises to which it shall be attached for work done or materials furnished in building or repairing such house [or other property]; which lien shall be superior in dignity and of higher claim than any other incumbrance, without regard to date. And such lien upon the improvements made by the mechanic shall attach to them without regard to the title."

Section 1963 declared:

"The following provisions must be complied with to make good the mechanic's lien, and on failure of either, the lien shall cease—viz.," enumerating the provisions now contained in

subsections 1, 2, and 3 of section 3353 of the Code of 1910.

By the act approved February 24, 1873 (Ga. Laws 1873, p. 43, § 41; Civil Code 1910, § 3353, par. 3), the mechanic's lien was declared to be inferior to certain liens therein specified; but nothing in this act indicates an intention to modify the rule announced in *Loudon v. Blandford*, supra. See, also, *Camp v. Mayer*, 47 Ga. 414, where it was held that the lien of a mechanic attached at the time the work is done and is not postponed until foreclosure. As bearing upon the general question, see *Rose v. Gray*, 40 Ga. 156; *Frazer v. Jackson*, 46 Ga. 621; *Beall v. Butler*, 54 Ga. 43 (1).

The plaintiff in error relies upon the ruling made in *Pace v. Shields-Geise Lumber Co.*, 147 Ga. 36, 92 S. E. 755 (2), where it was held:

"While the lien of a materialman is not complete until a judgment thereon is obtained, after the rendition of the judgment the lien dates from the time of its filing."

In that case it appeared that Mrs. Pace died owning certain land, leaving her husband and three daughters as her heirs at law. Before administration on her estate the husband contracted with the lumber company to build a dwelling house on the land. When the house was completed the husband failed to pay the contract price. The lumber company recorded a materialman's lien on that portion of the land on which it had constructed the dwelling. After the claim of lien was recorded, but before judgment thereon, the husband was appointed administrator upon the estate of his wife, and, a formal report having been made to the court of ordinary that all debts of the estate had been paid, the land was partitioned among the heirs; that portion of the land against which the lien was recorded being set apart to two of the daughters. Subsequently the lumber company obtained a general judgment against the husband and a special judgment against the property described in the lien. The question before the court was whether the lien of the judgment obtained in the foreclosure proceeding was superior to the deed of partition. The court was not called upon to determine the particular time when the lien attached. The decision is therefore to be construed as a holding that the materialman's lien attached prior to the date of the judgment establishing it; and while it was held that on the rendition of the judgment the lien dates from "the time of its filing," meaning, of course, the date of its record (see *Jones v. Kern*, 101 Ga. 309, 28 S. E. 850), the court did not intend to adjudicate that the lien dated only from the date of the record. As against the claimants, it was sufficient if it related back to the date on which it was recorded. We find it

unnecessary, therefore, to review the decision in the case referred to.

The case of Englehart-Hitchcock Co. v. Central Inv. Co., 136 Ga. 564, 71 S. E. 787, is also clearly distinguishable on its facts, and does not militate against the ruling here made. Many cases holding that a laborer's lien does not arise until the completion of the contract of labor are cited; among them, Walls v. Rutherford, 60 Ga. 440; Love v. Cox, 68 Ga. 268; Cumming v. Wright, 72 Ga. 767. These cases are not controlling upon the question made in this case. Liens of laborers, by the express terms of the statute, "arise upon the completion of their contract of labor." Civil Code, § 3339. In the same connection it may be noted that general liens of landlords date "from the time of the levy of a distress warrant to enforce the same" (section 3340); and special liens of landlords "from the maturity of the crops on the lands rented," unless otherwise agreed upon (section 3341). As we have seen, the Code does not expressly provide when the mechanic's or contractor's lien shall attach.

Owing to the variety of state statutes, cases construing those statutes are of little service beyond the jurisdictions where they were decided. Where mechanics' and contractors' liens attach as of the time when performance begins, the authorities are, however, unanimous in holding that a conveyance made after work is done or materials are furnished does not cut off or affect the right to a lien for the whole, though a part of the execution of the contract is before and a part after the time of the conveyance; provided the contract is "entire" and the execution of it "continuous." *Thorn v. Barringer*, 73 W. Va. 618, 81 S. E. 846, Ann. Cas. 1916B, 625, and cases there cited. See, also, *Bolsot on Mechanics' Liens*, §§ 314, 323; *Phillips on Mechanics' Liens*, §§ 227, 228. If we are correct in holding that the contractor's lien had its inception with the beginning of the work under the contract, it follows, under the findings of fact, that the trustee took subject to the contractor's lien and subject to the contractor's right to make good his lien by the completion of his contract, the recording of his claim of lien, and the commencement of an action to foreclose the same within the time required by our statute. The trustee was not a necessary party defendant to the action to foreclose the lien. It would, of course, be otherwise if the plaintiff had made his contract subsequently to the execution and delivery of the deed. In this case, however, the trustee is a stranger to the plaintiff. The plaintiff made his contract, commenced the execution of it, and put the trustee on notice of his claim of lien before the execution of the deed. Of course the trustee, not having been made a party defendant in the foreclosure proceeding, is not precluded thereby.

[4] In this view of the case, it is urged that the plaintiff had a complete and adequate remedy at law. We do not think so.

"Where there are conflicting claims to property, and the equities of the respective parties necessarily depend upon the facts which may be proven on the trial, it is right and proper that the same should be definitely settled by the decree of the court before the property is sold, so that it may bring its full value, and that the purchaser may know what he purchases at the sale." *Hall v. English*, 47 Ga. 511.

See, also, *Eagan v. Conway*, 115 Ga. 130, 134, 41 S. E. 493; Civil Code, § 4522.

Moreover, the plaintiff was a judgment creditor of the association, with a general lien upon all its assets and a special lien upon the building in question. The appointment of a receiver was necessary for the collection and preservation of the assets of the defunct association; its general assets consisting of unpaid subscriptions to its capital stock, by various persons and in varying amounts, aggregating \$20,000. It is obvious that the collection of these assets by process of garnishment would involve a multiplicity of suits. Ample reason therefore appears for the interposition of a court of equity. It follows from what we have said that the court did not err in overruling the general demurrer and in appointing a receiver. The grounds of special demurrer were cured by amendment.

Judgment affirmed.

All the Justices concur.

(150 Ga. 41)

ROBINSON v. CENTRAL OF GEORGIA RY. CO. et al. (No. 1825.)

(Supreme Court of Georgia. Feb. 25, 1920.)

(Syllabus by the Court.)

1. RAILROADS  $\S\S$  5½, New, vol. 6A Key-No. Series—INJURY SUIT MAINTAINABLE AGAINST ROAD UNDER FEDERAL CONTROL.

In virtue of the act of 1916 (Act Aug. 29, 1916, c. 418) and the proclamation of the President (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, § 1974a), which by its terms went into effect at 12 o'clock on the 28th day of December, 1917, the railroads contemplated in the act and proclamation passed into the possession and control of the Director General. *Northern Pacific Ry. Co. v. North Dakota ex rel. Langer*, 250 U. S. 135, 39 Sup. Ct. 502, 63 L. Ed. 897. Section 10 of the act of March 21, 1918 (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, § 8115½), properly construed, recognizes liability of the government to suit, among other things, for injuries received on account of negligence of the agents and servants engaged in operating the railroad "while under federal control," which, as above ruled, became operative immediately upon the President's proclamation becoming effective, and was a declara-



tion of the assent of the government to the institution of a suit of such character against it. *Westbrook v. Director General of Railroads* (D. C.) 263 Fed. 211.

**2. RAILROADS**  $\Leftrightarrow$  5½, New, vol. 6A Key-No. Series—INJURY SUIT HELD MAINTAINABLE AGAINST ROAD UNDER FEDERAL CONTROL, WITHOUT AID OF DIRECTOR GENERAL'S ORDER No. 50.

Where an injury occurred between the dates of the President's proclamation and the act approved March 21, 1918, and a suit based thereon was instituted subsequently to the date of the act, but prior to the assent of General Order No. 50 promulgated by the Director General of Railroads, which in effect gave directions that suits for injuries resulting from operation of railroads while under federal control should be brought against the Director General, under proper construction of the act of 1916 and the proclamation of the President and the act of 1918, such suit (of the character involved in this case) was maintainable against the government without the aid of General Order No. 50 by the Director General of Railroads.

**3. RAILROADS**  $\Leftrightarrow$  5½, New, vol. 6A Key-No. Series—DIRECTOR GENERAL PROPERLY SUBSTITUTED AS DEFENDANT IN INJURY SUIT IN LIEU OF RAILROAD UNDER FEDERAL CONTROL.

Where a suit of the character just indicated was instituted subsequently to the act of March 21, 1918, and the name of the defendant was alleged as the railroad company, and the petition and process were served upon the agents engaged in operating the railroad company, inasmuch as the railroad was being operated by the government, and the government would be suable for any injuries caused by its agents and servants, the suit was in effect against the government. *Westbrook v. Director General* (D. C.) 263 Fed. 211. Accordingly, the petition could be amended by substituting the Director General of Railroads in his representative capacity as defendant in lieu of the railroad company.

**Certified Questions from Court of Appeals.**

Action by J. I. Robinson against the Central of Georgia Railway Company and others. On questions certified from the Court of Appeals. Questions answered.

Hill & Adams, of Atlanta, for plaintiff in error.

Colquitt & Conyers and Little, Powell, Smith & Goldstein, all of Atlanta, for defendants in error.

**ATKINSON, J.** The Court of Appeals has propounded certain questions:

"The Court of Appeals desires instructions from the Supreme Court upon the following questions involved in this case:

"(a) Did a plaintiff have a right of action for the recovery of damages for personal injuries alleged to have been sustained on account of the negligent operation of the cars and trains of a railroad company, which, on the date of the alleged injury, had been taken over and was being operated under federal control, by virtue

of the proclamation of the President of the United States, dated December 26, 1917, pursuant to the act of Congress approved August 29, 1916, the petition showing on its face that the alleged injury was sustained on the 18th day of March, 1918, same being subsequent to the proclamation of the President referred to, but prior to the passage of the act of Congress approved March 21, 1918, entitled 'An act to provide for the operation of transportation system under federal control,' etc.?

"(b) Would the fact that the suit in this case was instituted subsequently to the act of Congress last referred to, to wit, on March 23, 1918, but prior to the issuance of General Order No. 50 by the Director General of Railroads, have any bearing upon the plaintiff's cause of action; or would such a petition seeking to recover damages from a railroad company under federal control, which shows on its face that the alleged injury had been sustained at some time between December 26, 1917, and March 21, 1918, be subject to demurrer on the ground that it fails to set out a cause of action against the defendant?

"(c) If the suit as brought against the railroad company as defendant was not maintainable, would the plaintiff have the right, under the authority of this court, to amend his cause by adding or substituting the Director General of Railroads as party defendant therein?"

[1-3] To which the following are answers: On August 29, 1916 (39 Stat. 645), Congress gave the President power—

"in time of war \* \* \* to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, \* \* \* as may be needful or desirable."

After war had been declared with Germany and Austria, the President, on December 26, 1917, referring to the existing state of war and the power with which he had been invested by Congress, proclaimed:

"Under and by virtue of the powers vested in me by the foregoing resolutions and statute, and by virtue of all other powers thereto me enabling, [I] do here \* \* \* take possession and assume control at 12 o'clock noon on the twenty-eighth of December, 1917, of each and every system of transportation and the appurtenances thereof located wholly or in part within the boundaries of the continental United States and consisting of railroads, and owned or controlled systems of coastwise and inland transportation engaged in general transportation, whether operated by steam or by electric power, including also terminals, terminal companies and terminal associations, sleeping and parlor cars, private cars and private car lines, elevators, warehouses, telegraph and telephone lines and all other equipment and appurtenances commonly used upon or operated as a part of such rail or combined rail and water systems of transportation; to the end that such systems of transportation be utilized for the transfer and transportation of troops, war material and

equipment, to the exclusion so far as may be necessary of all other traffic thereon; and that so far as such exclusive use be not necessary or desirable, such systems of transportation be operated and utilized in the performance of such other services as the national interest may require and of the usual and ordinary business and duties of common carriers."

The proclamation in conclusion declared further that—

"From and after 12 o'clock on said \* \* \* day of December, 1917, all transportation systems included in this order and proclamation shall conclusively be deemed within the possession and control of said director without further act or notice." U. S. Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 1974a.

Subsequently to the date appointed for the proclamation to go into effect, the injury which is the basis of this suit occurred on March 19, 1918. After the injury occurred, the act of Congress approved March 21, 1918, became effective. By section 10 thereof it was declared, in part:

"That carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the federal government." Fed. Stat. Ann., 1918 Supp. 762, § 10 (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, § 3115½j).

All the Justices concur, except GILBERT, J., absent on account of sickness.

(149 Ga. 796)

ANDERSON v. AMERICAN NAT. BANK OF MACON. (No. 1355.)

(Supreme Court of Georgia. Feb. 13, 1920.)

(Syllabus by the Court.)

CASE FOLLOWED.

The ruling in the opinion of the Court of Appeals, to the effect that the contract under consideration between the two defendant corporations did not effect a consolidation and merger of the two corporations, is affirmed.

2. BANKS AND BANKING ¶283—BANK TO WHOM ASSETS OF ANOTHER BANK WERE TRANSFERRED FOR LIQUIDATION LIABLE FOR SERVICES RENDERED BY ONE APPOINTED BY TRANSFEROR TO ASSIST IN REALIZING ON ASSETS.

Where one corporation transferred all of its assets to another corporation, including promissory notes and other choses in action, under a contract wherein it was stipulated that

the latter corporation was to liquidate the affairs of the other and use all reasonable diligence in realizing upon the assets, and that the expenses incurred in thus realizing upon the assets were to be deducted from the proceeds of the assets transferred, and the overplus of the proceeds, after paying the liquidating corporation the moneys advanced by it and the expenses incurred in realizing on the assets, was to be returned to the shareholders in the corporation which had transferred the assets, one who was appointed by the corporation transferring the assets, to assist the transferee in realizing upon them, and whose services were accepted by and were of value to the transferee in the work of liquidation, could maintain a suit for the value of his services against the corporation taking charge of the assets, under the allegations in his petition showing the services rendered, the value thereof, and the acceptance of the same by the transferee of the assets; the other corporation being joined as a party defendant in the suit.

Certiorari from Court of Appeals.

Suit by W. T. Anderson against the American National Bank of Macon. A judgment overruling a general demurrer to the petition was reversed by the Court of Appeals (23 Ga. App. 434, 98 S. E. 421), and plaintiff brings certiorari. Reversed.

Commercial National Bank of Macon, being embarrassed financially, on August 1, 1914, decided to liquidate and wind up its banking business. To that end it entered into a contract with American National Bank of Macon, a copy of which is set forth in the opinion of the Court of Appeals, which opinion is brought here for review by a writ of certiorari, and it is unnecessary to set out this lengthy contract again. (For the sake of brevity, the two banks will hereinafter be called the American Bank and the Commercial Bank.) Under that contract, all the assets of the Commercial Bank were transferred and assigned to the American Bank, the transferee assuming the obligations of the other bank and agreeing to reduce the assets to cash. It is stipulated in the contract that the expense of realizing on the assets transferred and liquidating the business should be paid out of the proceeds of the assets transferred; that a sum equal to the liability assumed should be deducted from the proceeds; and that the American Bank should account to the stockholders of the Commercial Bank for any overplus that might remain.

W. T. Anderson brought suit jointly against the American Bank and the Commercial Bank, for the recovery of an amount alleged to be due him for services rendered both banks as a member of the liquidating committee of the Commercial Bank in assisting the American Bank to reduce to cash assets which had been transferred and taken over by the American Bank under this contract. The petition contains two counts. In the first count, after stating the existence and execution of the

contract between the two banks and making reference to a copy thereof attached, it is alleged that on the 1st day of August, 1914, all the assets of the Commercial Bank had been transferred to the American Bank, and that on the 11th day of August, 1914, contemporaneously with the agreement between the two banks, "the stockholders of the Commercial National Bank, at the request of the American National Bank, adopted a resolution appointing plaintiff as one of the committee to assist American National Bank in reducing to cash the assets which originally belonged to the Commercial National Bank, \* \* \* but which had been transferred and taken over by the American National Bank"; that petitioner did, from the 11th day of August, 1914, until the 27th day of September, 1917, in compliance with the provisions in said resolution, proceed to assist in liquidating the assets of the Commercial Bank; that he conferred from time to time with the American Bank as to notes, securities, and other choses in action which were transferred under the agreement, giving to this work his time and attention; that the reasonable value of plaintiff's services as set forth in the petition is \$5,000 per annum; that under the agreement between the two banks all the assets of the Commercial Bank were assigned to and taken over by the American Bank; that the other bank on that date ceased to do a banking business; that the value of the assets transferred is approximately one million dollars; that by reason of the facts set forth the American Bank is liable to the plaintiff as a creditor of the said Commercial Bank for the debt due to plaintiff as aforesaid by the Commercial Bank. In count 2 it is alleged that the effect of the contract entered into was to merge and consolidate the two banks, and that by reason of this consolidation and the terms under which the merger was effected the defendants were indebted to the plaintiff in the sum alleged.

The prayers were for a judgment for the amount sued for, and for process. The American Bank demurred to both counts, on the ground that they set up no cause of action against the demurrant; and to the second count on the further ground that it contradicts, adds to, and varies the written agreement referred to. At the hearing the demurrers to the petition were overruled upon each and all the grounds thereof, the trial judge being of the opinion that the contract between the two banks effected a consolidation and merger of the two corporations, and from that construction of the contract he held that both counts were good as against a demurrer. Upon review of this judgment by the Court of Appeals, the latter court took a different view as to the proper construction of the contract, holding that there was no consolidation and merger, and reversed the ruling below; and the judgment of the Court of Appeals is by writ of certiorari brought here for review.

Hall & Grice, of Macon, for plaintiff in error.

Hardeman, Jones, Park & Johnston and Harry S. Strozler, all of Macon, for defendant in error.

FISH, C. J. (after stating the facts as above). [1] 1. After a careful consideration of all the facts in the case as alleged in the petition, we are of the opinion that the Court of Appeals properly held that the contract in question did not effect a merger of the two corporations, the defendants in the case. That view is supported by the opinion of the United States Circuit Court of Appeals, Fifth Circuit, in the case of American National Bank of Macon v. Commercial National Bank of Macon, 254 Fed. 249, 165 C. C. A. 537, in construing this identical contract. As we agree with the Court of Appeals upon the question as to whether there was a consolidation and merger of the two corporations, further discussion is unnecessary.

[2] 2. But neither the trial judge nor the Court of Appeals seems to have considered the question as to whether or not under the facts alleged in count 1 of the petition the plaintiff was entitled to recover although there was no consolidation of the two banks. Under the allegations of the petition, the plaintiff rendered valuable services in the necessary work of liquidating the assets of the Commercial Bank. In the performance of the duties undertaken by him he rendered services to the American Bank, conferring with them as to notes, securities, and other choses in action which had been transferred by the Commercial Bank. These services were accepted by the American Bank. He had been named in a resolution appointing him as one of a committee to assist the American Bank in reducing the assets to cash. Services like these can properly be regarded and treated as a part of the expense incurred in realizing on the assets, which they were authorized to deduct from the proceeds of the assets. The contract under which these assets were transferred by the Commercial Bank to the American Bank contains the express provision that the latter bank accepted the appointment as liquidating agent of the other bank, and should proceed with all due diligence in the course of liquidation to collect and reduce to cash all of the assets, and that the actual expenses incurred by the American Bank in realizing on said assets should be deducted from the proceeds produced by realizing on said assets. The allegation that these services were of value to the American Bank is to be taken as true in passing upon the demurrer. The question as to whether the plaintiff could have sued on a quantum meruit against the American Bank alone for the value of his services is not involved, as the plaintiff has seen fit to sue both of them and to rely upon the contract and upon the value of the services rendered. We are of the opinion that the suit as brought is maintain-

able. The obligation of the American Bank to the Commercial Bank rests upon the express terms of this contract, and under the provisions of that contract the services of the plaintiff in the case were rendered and were accepted by the liquidating agent. It is insisted by counsel for the American Bank that, even if there was an undertaking entered into by that bank to pay for such services as those claimed to have been rendered, it was a promise and undertaking to the Commercial Bank, and that a party for whose benefit the promise was made could not maintain a suit at law, that he would be compelled to bring a suit in equity to obtain the benefit of the promise, and that the present action is one at law. Authorities are cited to support that contention. The proper reply to that contention seems to us to be that the present suit has all the necessary elements of an equitable petition to entitle the plaintiff to the only judgment which could be rendered; that is, a judgment for the value of his services. It is true that the prayers are merely for judgment and for process. What else would have been asked in the most formal equitable petition? The petition shows clearly the relation of the defendants to one another in this transaction and shows the facts that were the basis of the plaintiff's right under the contract, treating it as one between the two banks. We think therefore that the general demurrer to the petition was properly overruled by the trial judge. And while his reason for doing so was placed upon the ground about which we differ, nevertheless the entire petition should not have been dismissed.

The second count in the petition, wherein the plaintiff seeks to state a cause of action based upon the theory that there was a consolidation of the two banking corporations, cannot avail the plaintiff, and the demurrer to that part of the petition should have been sustained. But the judgment of the trial court overruling the demurrer should not have been reversed generally. The judgment of the trial court should have been affirmed in part and reversed in part. It should have been reversed in so far as it overruled the demurrer to the second count of the petition, but affirmed in so far as it overruled the demurrer to the first count.

Judgment of the Court of Appeals reversed.  
All the Justices concur.

(139 Ga. 806)

**ATLANTA LOAN & SAVING CO. v.  
NORTON.** (No. 1491.)

(Supreme Court of Georgia. Feb. 13, 1920.)

*(Syllabus by the Court.)*

1. BUILDING AND LOAN ASSOCIATIONS §28  
—LOAN AND SAVING COMPANY HELD A "LIKE  
ASSOCIATION," WITHIN STATUTES.

Under the provisions of the charter, constitution, and by-laws of Atlanta Loan & Sav-

ing Company, set forth in connection with the questions propounded by the Court of Appeals, that company is "a like association," within the meaning of the act of 1913, which was an act to amend section 2878 of the Code of 1910.

2. BUILDING AND LOAN ASSOCIATIONS §28—  
GENERAL LAW NOT INEFFECTIVE BECAUSE  
CHARTER OF LOAN AND SAVING COMPANY AN-  
TEDATED IT.

The act of 1913 referred to above is a general law, and does not fail of effect because the company's charter antedated it and was never amended for the purpose of adopting the privileges it offers.

Certified Questions from Court of Appeals.

Action by W. L. Norton against the Atlanta Loan & Saving Company. Judgment for plaintiff, certiorari overruled, and defendant brings error, and the Court of Appeals certified questions. Questions answered.

Judgment conformed to by Court of Appeals, 102 S. E. 539.

The Court of Appeals certified the following questions to the Supreme Court:

"1. Viewed in connection with the several excerpts from the charter, constitution, and by-laws of the Atlanta Loan & Saving Company, hereinafter quoted, is that company a 'building and loan association' or 'a like association,' within the meaning of the act of 1913 'to amend section 2878 of the Code of 1910,' etc. (Ga. L. 1913, p. 54)?

"2. If the terms of the act of 1913, supra, are broad enough to embrace the Atlanta Loan & Saving Company as 'a like association,' does the act fail of this effect because the company's charter antedated it and was never amended for the purpose of adopting the privileges it offers?

"The portions of the charter, constitution, and by-laws above referred to are as follows:

"Extract from charter, second paragraph: 'The object and purpose of said corporation is to promote and encourage frugality and savings, and to establish an institution where aid may be afforded to its stockholders and others by extending them needed financial assistance upon a sound, conservative, and businesslike basis, and for pecuniary gain and profit to said stockholders, and to do any and all things herein set forth as a corporate entity or person.'

"Extract from charter, fifth paragraph: 'Petitioners pray for the right under their corporate name to lend to the stockholders of said corporation, or to others, the money accumulated by it from time to time, and to make such loans upon such security, real or personal, and upon such terms, conditions, and under such contracts, rules, and regulations as its constitution and by-laws, not inconsistent with any law, may set out; to issue and sell its stock as hereinafter defined, and to receive the money derived from the sale thereof; to secure the repayment of loans and the performance of all conditions upon which loans are made and the payment of the purchase-money for any property or stock sold, or the repayment of any advances made of any kind, by taking security of any kind or description by way of pledge of personal property or mortgage or deed

of trust or other conveyance of real estate, or by the transfer of its stock, or by such other manner as the law may permit; to fix by its constitution and by-laws interest or charges or other conditions under which it will dispose of the money in its treasury to its stockholders, and to authorize the manner in which it will award or lend its assets to any member of or stockholder according to the value of his shares, upon such reasonable charges and condition as may be fixed by said constitution and by-laws, and to further arrange by said constitution and by-laws the mode of making or repaying said disposition of its money. And petitioners further pray for the right to charge and receive interest on its loans in advance or otherwise at the legal rate, and further for the right to arrange by its said constitution and by-laws, in a manner not inconsistent with law, for the levy, assessment, and collection from its stockholders of dues or payments upon its stock in accordance with the conditions of their subscriptions and the terms of their contracts, and to retire their said stock, and to allow such interest and dividends thereon as their said constitution and by-laws shall direct. They further pray for the right to levy, assess, and collect fines for the nonpayment of dues by its stockholders, or for failure to comply with or perform any other obligation or duty owed the company by them under the terms of their contracts, and for authority to make reasonable regulations for the payment, by installments or otherwise, of the purchase money due for its stock, or the collection of its loans, the withdrawal of its stockholders, and all matters connected therewith, as may not be inconsistent with law. They further pray for the right to buy, \* \* \* to purchase, hold, sell, and reissue class A stock of the company, to purchase, hold, cancel, and reissue its class B and class C stock as may not be inconsistent with law.'

"Extract from charter, eighth paragraph: 'Petitioners pray for the right to issue and sell from time to time a third-class stock, to be known as class C stock, in an amount not to exceed at any one time one million dollars, said class C stock to be a small installment stock of the par value of fifty (\$50.00) dollars per share, and to be issued and sold subject to such regulations for its sale, purchase, and issuance, conversion, and cancellation, together with the interest and profit it bears, as the constitution and by-laws may fix and declare. Said class C stock to have no voting rights or privileges; and when this class of stock has been paid for to its par value, the company may convert the same into class B stock, or redeem or retire the same, under such reasonable rules and regulations as may be provided for in the by-laws; this stock having for its chief end and purpose the encouragement of small savings.'

"Extract from constitution, article 4: 'Any person, upon subscribing for or in any way becoming the owner of one or more shares of the capital stock of this corporation, of whichever class, shall become and be deemed a stockholder thereof, and as such shall be entitled to the privileges and subject to the liabilities as prescribed by this constitution and by-laws and by the charter, except only owners of class A stock shall be entitled to vote.'

"Extract from by-laws, section 8: 'Class C

stock is an installment stock. This stock will require payment of \$1.00 per share for fifty weeks. Any holder of class C stock, unless same is hypothecated with the corporation as security for a loan, shall be entitled to draw interest on said stock at the rate of 4 per cent. per annum, after twenty-five successive weekly payments have been made upon said stock. Upon the payments of said stock at the end of fifty weeks, or thereafter, holders of class C stock shall have the right to convert their stock into class B stock as above provided: Provided, however, the corporation consents thereto, the power being reserved to the corporation either to redeem and retire class C stock when it reaches par value, or convert the same into class B stock. Not over one million dollars of class C stock shall be issued and outstanding at any time.'

"Extract from by-laws, section 10: 'Funds of the corporation shall be loaned to its stockholders or to other persons or corporations. Any person desiring a loan from the company shall furnish such security as may be deemed by the board of directors or finance committee safe and sufficient for the protection of the money loaned. Such security shall consist in part of class C stock of the company, unless the board of directors or finance committee determine otherwise, one share for every \$50.00 or fractional part thereof borrowed. Said class C stock, when required, shall be by such borrowers hypothecated with the company as additional collateral security for the loan. Loans shall be made upon the consent of the board of directors or the finance committee for a term of fifty-two weeks, and a premium or interest charge of 8 per cent. per annum, or other rate per cent. as determined by the board of directors, not to exceed, however, 8 per cent., shall be deducted from the amount of the loan when made. The board of directors may, however, make loans for a longer period or shorter period, should they deem it advisable. Interest charged shall be deducted from the amount of the loan when made, at the rate of 8 per cent. per annum for the time the loan is made, or such other rate less than 8 per cent. as agreed by the board of directors or the finance committee. At the maturity of the loan the borrower may discharge the same either in cash or by the surrender of his class C stock pledged as security therefor: Provided all dues and fines have been paid thereon to the end of such maturity; and provided, further, that if the borrower wishes to avail himself of the privilege of surrendering his class C stock in discharge of the loan, he must indicate his wish by communication in writing filed with the cashier of the corporation two weeks before the maturity of the loan, and not later.'

"Extract from by-laws, section 11: 'Should any borrower on class C stock fail to pay his required weekly dues, or payments, a fine of five cents on each share of stock shall be charged for such failure each week he is in default. The amount of fine so assessed shall be deducted from the amount standing to the credit of such member on his stock, or from his subsequent payments, unless otherwise collected.'

Weltner & Cheatham, of Atlanta, for plaintiff in error.

M. Herzberg and D. K. Johnston, both of Atlanta, for defendant in error.

BECK, P. J. [1] 1. Section 2878 of the Civil Code of 1910 reads as follows:

"All building and loan associations, and other like associations doing business in this state, are authorized to lend money to persons not members thereof, nor shareholders therein, at eight per cent. or less, and to aggregate the principal and interest at the date of the loan for the entire period of the loan, and to divide the sum of the principal and the interest for the entire period of the loan into monthly or other installments, and to take security by mortgage with waiver of exemption, or title, or both, upon and to real estate situated in the county in which said building and loan association may be located."

If we were called upon, in answer to the question propounded by the Court of Appeals, to decide whether or not Atlanta Loan & Saving Company was, under the provision of section 2878 as it stands in the Code of 1910, a "building and loan association" or "a like association," we should reply that under the decisions in the cases of *Cook v. Equitable B. & L. Ass'n*, 104 Ga. 814, 30 S. E. 911, and *McIntosh v. Thomasville Real Estate, etc., Co.*, 138 Ga. 128, 74 S. E. 1088, Ann. Cas. 1914C, 1302, it is not a building and loan association or a like association. In the *Cook* Case it was held:

"A building and loan association, as such organizations usually exist to-day, is a private corporation designed for the purpose of accumulating into its treasury, by means of the gradual payment by its members of their stock subscriptions in periodical installments, a fund to be invested from time to time in advances made to such shareholders on their stock as may apply for this privilege on approved security, the borrowing members paying interest and a premium for this preference in securing an advancement over other members, and continuing to pay the regular installments on their stock in addition, all of which funds, together with payments made by the nonborrowing members, including fines, forfeitures, and other like revenues, go into the common fund until it, with the profits thereon, aggregates the face value of all the shares in the association, the legal effect of which is to extinguish the liability incurred for the loans and advancements, and to distribute to each nonborrowing member the par value of his stock."

In the *McIntosh* Case it was held:

"In order for an incorporated company to come within the classification of like character to a building and loan association, so that it may conduct business on the plan of a building and loan association and escape the penalty of taking an excess of legal interest, its charter must indicate that its method of business with relation to mutual participation in profits and losses \* \* \* made by it has some distinctive feature of the plan of a building and loan association."

And in the course of the opinion delivered in that case it was said:

"It is the mutual participation in profits and losses by borrowers and nonborrowers which is the basic principle on which contracts between this class of associations and its members have been saved from the consequences attached to other usurious loans. *Rooney v. Southern Building & Loan Association*, 119 Ga. 941, 47 S. E. 345. The original conception of building and loan associations confined the loans to its members, but in the course of evolution such associations have been allowed to make loans to nonmembers. At the same time, however, the departure from the original scheme of a community of interest among its members has never been so radical that a corporation which gathers its capital from its members by installment payments on stock subscriptions of fixed amounts may loan the money accumulated in its treasury indiscriminately to any person at greater than the maximum legal rate of interest and escape the consequences of usury. The scheme of a true building and loan association holds fast to the basic plan that members are to be given a preference in obtaining loans, and that the excess of interest is to be adjusted to the stock in the way of premiums and fines, and not to the loan, and there must be some nexus between at least some of the loans and the stockholder's interest in the association."

We do not find in the excerpts quoted in the questions propounded by the Court of Appeals the essential features, as pointed out in the two decisions from which the above quotations are taken, of a building and loan association or a like association; but that feature of a building and loan association, called by the writer of the opinion in the *McIntosh* Case the "basic principle" of such an association, is wanting from the charter and by-laws of the Atlanta Loan & Saving Company, unless it appears in other portions of the charter and by-laws not quoted in connection with the questions propounded. For we find nothing in the charter and by-laws, as exhibited here, making provision for the mutual participation in profits and losses by borrowers and nonborrowers, which constitutes the basic principle on which contracts between this class of associations and its members have been saved from the consequences attached to other usurious loans. After these decisions were rendered, the Legislature passed an act approved August 16, 1913 (Acts 1913, p. 54), entitled "An act to amend section 2878 of the Code of 1910, to define the term 'other like associations' therein referred to," etc. It had previously passed the amending act of 1910, relating to the location of such associations. See Acts 1910, p. 55. As thus amended, section 2878 reads as follows:

"All building and loan associations, and other like associations doing business in this state, [and the term other like associations shall include a corporation organized to do a general savings and loan business, and among other

things lending its funds to members of the industrial and working classes, or others, and secured in whole or in part by personal indorsements and its own fully paid or installment stock, or its own fully paid or installment certificates of indebtedness, or other personal property,] are authorized to lend money to persons not members thereof, nor shareholders therein, at eight per cent. or less, and to aggregate the principal and interest at the date of the loan for the entire period of the loan, and to divide the sum of the principal and the interest for the entire period of the loan into monthly or other installments, and to take security by mortgage with waiver of exemption, or title, or both, upon and to real estate situated in the county in which said building and loan association may be located; [and such building and loan association shall be construed to be located in any county wherein it has an office, agent or resident correspondent:] [Provided, however, and nevertheless, the associations referred to and as defined herein shall not be compelled to lend their funds exclusively in the manner hereinbefore specified, but in addition thereto also have authority to make loans to members of the industrial and working classes and to all other persons, due at fixed intervals not exceeding twelve months, and secured in whole or in part by personal indorsements and by its own fully paid stock, or stock payable on the installment plan, certificates of indebtedness, fully paid or payable on the installment plan, or both indorsements and such securities, or other personal security and choses in action, and on such loans so made and secured as aforesaid it shall be lawful to deduct interest in advance, but not to exceed eight per cent. discount, and the installment payments, if any, made on such hypothecated stock or certificates of indebtedness during the time the loan is of force may or may not bear interest, at the option of the association, and the taking of said installment payments on said hypothecated stock, certificates of indebtedness, choses in action, or other evidences of indebtedness shall not be deemed usurious]."

The parts in brackets are the additions and interpolations made by the acts of 1910 and 1913.

The plain language of the amendment of 1913 makes a radical departure from what was formerly an essential feature of a building and loan association and from what has been termed the "basic principle" of such an association. That is apparent without discussion and without an analytical construction of the language employed in the act of 1913. For under the plain, unambiguous declaration of this amending statute, a corporation organized for the purposes set forth in the charter and constitution of the Atlanta Loan & Saving Company falls within the terms there used to define a like association. Whether this departure from the underlying principles of building and loan associations by which companies may charge a rate of interest which was formerly usurious, and which would have been usurious until the amendment contained in the act of 1913 was

made, was a wise departure, is a legislative question; and we are not called upon to discuss the wisdom of such legislation. But we may point out the fact that it will enable many corporations to charge usurious rates of interest which could not have charged it under the law defining building and loan associations and prescribing and limiting their powers, as it existed before the act of 1913.

[2] 2. This is a general law to the advantage of and conferring additional privileges and rights upon corporations like the plaintiff in error, and, moreover, makes provision for doing business as the Atlanta Loan & Saving Company prayed it might be permitted to do. And we are of the opinion that this amendment became a part of the charter, in view of these facts, without formal adoption, and we deem it unnecessary to enter upon an extended discussion as to when amendments become a part of the charters of existing corporations without formal adoption. See 2 Fletcher's Cyclopaedia of Corporations, § 784, and cases there cited.

All the Justices concur.

(24 Ga. App. 771)

ATLANTA LOAN & SAVING CO. v.  
NORTON. (No. 10206.)

(Court of Appeals of Georgia, Division No. 1.  
Feb. 24, 1920.)

(Syllabus by the Court.)

1. PROVISIONS OF STATUTE; RESPONSE OF SUPREME COURT TO CERTIFIED QUESTIONS.

"All building and loan associations, and other like associations doing business in this state, and the term other like associations shall include a corporation organized to do a general savings and loan business, and among other things lending its funds to members of the industrial and working classes, or others, and secured in whole or in part by personal indorsements and its own fully paid or installment stock, or its own fully paid or installment certificates of indebtedness, or other personal property, are authorized to lend money to persons not members thereof, nor shareholders therein, at eight per cent. or less, and to aggregate the principal and interest at the date of the loan for the entire period of the loan, and to divide the sum of the principal and the interest for the entire period of the loan into monthly or other installments, and to take security by mortgage with waiver of exemption, or title, or both, upon and to real estate situated in the county in which said building and loan association may be located; and such building and loan association shall be construed to be located in any county wherein it has an office, agent or resident correspondent: Provided, however, and nevertheless, the associations referred to and as defined herein shall not be compelled to lend their funds exclusively in the manner hereinbefore specified, but in addition thereto also

have authority to make loans to members of the industrial and working classes and to all other persons, due at fixed intervals not exceeding twelve months, and secured in whole or in part by personal indorsements and by its own fully paid stock, or stock payable on the installment plan, certificates of indebtedness, fully paid or payable on the installment plan, or both indorsements and such securities, or other personal security and choses in action, and on such loans so made and secured as aforesaid, it shall be lawful to deduct interest in advance, but not to exceed eight per cent. discount, and the installment payments, if any, made on such hypothecated stock or certificates of indebtedness during the time the loan is of force may or may not bear interest, at the option of the association and the taking of said installment payments on said hypothecated stock, certificates of indebtedness, choses in action, or other evidences of indebtedness shall not be deemed usurious." Civ. Code 1910, § 2878, as amended by the act of 1910 (Acts 1910, p. 55) and the act of 1913 (Acts 1913, p. 54). See Park's Ann. Code, § 2878.

(a) "Under the provisions of the charter, constitution, and by-laws of the Atlanta Loan & Saving Company, set forth in connection with the questions propounded by the Court of Appeals, that company is 'a like association' within the meaning of the act of 1913, which was an act to amend section 2878 of the Code of 1910."

## 2. RESPONSE OF SUPREME COURT TO CERTIFIED QUESTIONS.

"The act of 1913 referred to above is a general law, and does not fail of effect because the company's charter antedated it and was never amended for the purpose of adopting the privileges it offers."

## 3. FINDING FOR PLAINTIFF AGAINST LOAN AND SAVINGS COMPANY FOR AMOUNT PAID IT ON GROUND OF USURY HELD ERRONEOUS.

Under the foregoing rulings and the facts of the instant case, the trial judge erred in finding for the plaintiff in his suit to recover from the defendant company an amount paid by him to it and alleged to be a usurious interest charge, and the judge of the superior court erred in overruling the certiorari.

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by W. L. Norton against the Atlanta Loan & Saving Company. Judgment for plaintiff, certiorari overruled, and defendant brings error, and the Court of Appeals certified questions. Reversed, in conformity to answers of Supreme Court (102 S. E. 536).

Phillip Weltner, of Atlanta, for plaintiff in error.

M. Herzberg, of Atlanta, for defendant in error.

LUKE, J. This was a suit by W. L. Norton against the Atlanta Loan & Saving Company for an "amount due overpayment on money borrowed," and was submitted to and tried before a judge of the municipal court

of Atlanta upon an agreed statement of facts, which were, briefly, as follows:

That shortly prior to November 17, 1916, the plaintiff made a written application to the defendant company for a loan of \$100, for a term of 52 weeks, and on December 14, 1916, obtained the loan from the defendant company, giving to it his personal note for \$100, with two indorsers, and for additional security two \$50 shares of the class C (installment) stock in that company. This stock had been issued to the plaintiff, as a part of the loan transaction, simultaneously with the approval of his application for the loan. Under the terms of the loan agreement, as evidenced by the note, the stock certificate, and the constitution and by-laws of the defendant company, this stock was to be paid for in 50 weekly payments of \$2 each (\$1 per week on each share) payable promptly on Monday of each successive week; one of the provisions of the agreement being that—

"In the event the weekly installments due on the shares represented by this certificate are not paid promptly on each Monday a fine of five cents for each share shall be charged for each week said payments are in default."

The defendant company, when making the loan, deducted the interest of 8 per cent. *in advance*, and paid to the plaintiff the sum of \$92 net. Simultaneously with the execution of the plaintiff's note for the money borrowed and the issuance to him of the certificate for two shares of stock in the loan company, he assigned and transferred to the defendant company that stock certificate. The plaintiff thereafter on a number of occasions failed to meet his weekly payments when due, and when these were later paid he was penalized to the extent of \$5.20. On November 26, 1917, \$96 had been paid in installments on the stock in question; the fines at that time aggregating \$5.20. On December 14, 1917, or 52 weeks after the date of the note, the obligation fell due. On January 3, 1918, the finance committee of the defendant company, charged off a small fine (40 cents) from the \$96 credited to the plaintiff on his stock certificate (because of his failure to meet the installments due on November 19 and 26, 1917), and, under the terms of the loan agreement, retired the two shares of stock at \$95.50 net, leaving a balance due thereon of \$4.40, which was paid by the plaintiff on January 3, 1918, and upon receipt of that amount the plaintiff's note was surrendered to him.

From this it will be seen that for a loan of \$100 (from which 8 per cent. interest was deducted in advance) the plaintiff repaid in installments weekly, in 52 weeks, the sum of \$105.20; that \$5.20 of this sum represented legitimate fines for failures to pay the in-



installments when due as agreed; and the only question remaining was whether the retention in advance by the loan company of 8 per cent. interest on the loan and the repayment in weekly installments of the principal sum constituted the collection of usurious interest, as contended by the plaintiff. Upon this question the trial court found for the plaintiff, and the judge of the superior court, in overruling the certiorari, concurred in that judgment.

In response to certain questions propounded by this court the Supreme Court held substantially as set forth in the first and second headnotes hereto, and further ruled that—

"A corporation organized for the purpose set forth in the charter and constitution of the Atlanta Loan & Saving Company falls within the terms there used [Civil Code, § 2878, as amended by the act of 1913] to define a like association."

It may be said, in this connection, that the case of *McIntosh v. Thomasville Real Estate & Imp. Co.*, 138 Ga. 128, 74 S. E. 1088, Ann. Cas. 1914C, 1302, cited and relied on by the defendant in error, was decided before the passage of the act of 1913 (Laws Ga. 1913, p. 54) amending section 2878 of the Civil Code, and that the doctrine of that case (the second division thereof) and of the authorities therein cited, has been modified by the legislative definition of the term "a like association." For an elaboration of this decision, see the full opinion of the Supreme Court in this case, rendered February 18, 1920 (102 S. E. 536).

Judgment reversed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(25 Ga. App. 93)

JONES et al. v. FUNSTON. (No. 11053.)

(Court of Appeals of Georgia, Division No. 2.  
March 18, 1920.)

(Syllabus by the Court.)

# 1. RULINGS ON FORMER APPEAL.

When this case was last before the Court of Appeals it was held: "Where facts are charged to be within the knowledge of a party, or where from all the circumstances such knowledge is necessarily presumed, and he fails to answer altogether, or makes an evasive answer, the charge is to be taken as true. Civil Code (1910) § 5637. (2) 'The surety on a bond given by a defendant in an action of trover for the eventual condemnation money is bound by the judgment against the defendant, and cannot, after judgment, raise any question which could have been raised by the principal before judgment. *Waldrop v. Wolf*, 114 Ga. 610, 40 S. E. 830; *Jackson v. Guilmartin*, 61 Ga. 544; *Thomas v. Price*, 88 Ga. 533, 15 S. E. 11; *Holmes v. Langston*, 110 Ga. 861, 36 S. E. 251; *Hogan v. Scott*, 146 Ga. 126, 90 S. E. 863.' *Johnston v.*

*Sheppard*, 22 Ga. App. 207, 95 S. E. 743. (3) 'An oral motion to strike a plea can be made at any time before the verdict, if the motion is in the nature of a general demurrer. *Kelly v. Strouse*, 116 Ga. 872, 43 S. E. 280; *Cooney v. Sweat*, 133 Ga. 511, 66 S. E. 257, 25 L. R. A. (N. S.) 75.' *Blount v. Radford*, 18 Ga. App. 95(2), 84 S. E. 591; Civil Code (1910) § 5629. (4) Applying the principles stated above, the court did not err in sustaining the oral motion to strike the plea as amended. (5) When this case was first before this court (22 Ga. App. 410, 95 S. E. 1003), it was held: 'Where personal property is recovered in a bail trover action, and no alternative judgment is rendered, and thereafter the defendant sues out a writ of certiorari, giving the usual condemnation bond, and at the hearing the certiorari is dismissed for want of legal notice, and judgment is rendered against the plaintiff and his surety on the certiorari bond for the cost of the proceeding only, suit on that bond may thereafter be instituted against the principal and his surety for the value of the property recovered in the original trover action, to be ascertained by proof, where the property itself cannot be found to answer the judgment therefor, or has been destroyed or has ceased to exist. See, in this connection, Civil Code (1910) § 5205.' This ruling is therefore the law of the case, and in a suit on the certiorari bond, the property itself not having been produced to answer the judgment, it was a condition precedent to a recovery that the value of the property recovered in the original suit be ascertained by proof. This is true, even though the pleas were stricken. See Civil Code (1910) § 5657; *Palmer v. Ingram*, 2 Ga. App. 200(2), 58 S. E. 362; *Lamb v. McElwaney*, 143 Ga. 490(3), 85 S. E. 705, and cases cited. No proof of the value of the property having been submitted, the judgment must be reversed." *Jones v. Funston*, 23 Ga. App. 706, 99 S. E. 287 (1-5). For a full statement of the facts in this case, see the statement of facts there made.

2. REPLEVIN ~~§~~133—IN ACTION ON BOND AMENDMENT TO SHOW ACT OF GOD PREVENTING DELIVERY OF PROPERTY RECOVERED WAS PROPERLY REJECTED.

Under the foregoing rulings the only question left for determination on the new trial was the value of the cow, the property recovered in the trover suit, and the court did not err (as contended in the fourth ground of the motion for a new trial) in rejecting the amendment by which it was attempted to set up the defense that the cow "died after the rendition of the judgment in the trover suit, by the act of God, without fault on the part of the defendants, or either of them, and could not be delivered as directed in the judgment on the trover suit."

3. REPLEVIN ~~§~~134—IN SUIT ON BAIL TROVER BOND, CERTIORARI BOND CONTAINING THE SAME SURETY WAS ADMISSIBLE.

The court did not err (as contended in the fifth ground of the motion for a new trial) in allowing the plaintiff to introduce in evidence the certiorari bond. The fact that the same person was surety on the bail trover bond and also on the certiorari bond would not make this evidence inadmissible, and the defendants could not take advantage of the fact that the same person was surety on both bonds.

4. REPLEVIN  $\Rightarrow$  134—TRIAL  $\Rightarrow$  62(2)—WITNESSES  $\Rightarrow$  268(13)—DEFENDANT'S REBUTTAL EVIDENCE AS TO VALUE OF PROPERTY ADMISSIBLE; FAILURE TO MAKE DEMAND BEFORE SUIT NOT ADMISSIBLE.

It was error for the court to exclude the evidence offered by the defendants, tending to rebut the evidence of the plaintiff, as to the value of the cow. The defendants had the right to cross-examine witnesses for the plaintiff, and also to introduce evidence as to the value of the property. *Pittman v. Colbert*, 120 Ga. 341, 47 S. E. 948 (1), and cases there cited. The court did not, however, err in excluding the evidence offered by the defendants tending to show that no demand had been made for the cow prior to the bringing of this suit.

5. APPEAL AND ERROR  $\Rightarrow$  843(3)—DENIAL OF NONSUIT NOT CONSIDERED AFTER VERDICT AND DEFENDANTS' EXCEPTION TO DENIAL OF NEW TRIAL ON GENERAL GROUNDS.

An assignment of error on the overruling of a motion for a nonsuit will not be considered, if the case proceeds to verdict, and if the defendant excepts to the overruling of a motion for a new trial, based upon the general grounds.

6. TRIAL  $\Rightarrow$  25(8)—DEFENDANT NOT ENTITLED TO OPEN AND CLOSE IN ABSENCE OF PLEA.

The court did not err in denying to defendants' counsel the right to open and conclude the argument before the jury, as there was no plea in the case, and under the law the defendants had no right to open and conclude the argument.

Error from City Court of Hinesville; W. C. Hodges, Judge.

Action by Florence Funston against Maury Jones and others. Judgment for plaintiff, and defendants bring error. Reversed.

N. J. Norman, of Savannah, for plaintiffs in error.

Ben A. Way and S. B. Brewton, both of Hinesville, for defendant in error.

SMITH, J. Judgment reversed.

JENKINS, P. J., concurs.

STEPHENS, J., concurs specially.

STEPHENS, J. (concurring specially). I concur in all except the conclusions reached in paragraph 3. I concur in the ruling there announced in so far as it holds that the certiorari bond was properly admitted in evidence. The suit being based upon this bond, the bond was necessarily relevant to the issue and was properly admitted in evidence. I am not prepared to hold that the certiorari bond is a binding obligation upon the surety therein irrespective of the fact that the surety had already entered into the same obligation in another bond given in another branch of the same case. Besides, I do not think it necessary to decide this question in passing upon the 5th ground of the amended motion for a new trial.

(25 Ga. App. 43)

ATLANTA COCA-COLA BOTTLING CO. v. DANNEMAN. (No. 10720.)

(Court of Appeals of Georgia, Division No. 2. March 11, 1920.)

(Syllabus by the Court.)

1. NEGLIGENCE  $\Rightarrow$  121(2)—DOCTRINE OF RES IPSA LOQUITUR DEFINED.

An accident may arise from a mere casualty for which no one is to blame, or it may be brought about by the acts or conduct of persons, other than the defendant, charged with the duty of providing or maintaining the instrumentality causing the injury, or it may be occasioned by reason of the conduct of the plaintiff himself, or by the joint action of the plaintiff and defendant. Whenever the allegations of the petition, or the facts shown in support thereof, are such as might reasonably support the inference that the accident might have been thus occasioned, no presumption can arise that the accident was occasioned by negligence, or by the particular acts or omissions charged against the defendant. *Chenall v. Palmer Brick Co.*, 117 Ga. 106, 43 S. E. 443. But where the event is unusual and extraordinary in its nature, and there is nothing to indicate an external cause, but the peculiar character of the accident is sufficient within itself to indicate that it must have been brought about by negligence on the part of some one, and where the most reasonable and probable inference which can be rationally drawn from the happening of such an event is that it would not and could not have taken place, had not the person charged with furnishing or maintaining the instrumentality causing the accident been guilty of the particular acts or omissions set forth by the plaintiff as constituting the actual cause, then the jury is authorized to apply the rule of evidence known as the doctrine of *res ipsa loquitur* in determining whether or not the accident must have been thus occasioned (*Central Railway Co. v. Blackman*, 7 Ga. App. 766, 68 S. E. 339[5]); and if the jury should decide that it had been thus brought about, and should further determine that such causal acts or omissions on the part of the defendant constituted negligence, then the plaintiff would be entitled to recover (*Augusta Railway & Electric Co. v. Weekly*, 124 Ga. 384, 52 S. E. 444[2]). The contention of plaintiff in error in this case that the doctrine of *res ipsa loquitur* cannot have application, unless, in the opinion of the jury, the circumstances are such as to exclude every other reasonable hypothesis as to the cause of the accident save the alleged negligence of the defendant, is met under the foregoing rule. Just as in civil cases facts are proved by a mere preponderance of evidence, so in the application of this doctrine, if in the opinion of the jury the most reasonable and most probable inference which can be drawn from the nature and character of such an extraordinary event is that it would not and could not have happened, had not the defendant been guilty of the particular conduct charged, then there has been an exclusion in their minds of every other reasonable hypothesis, not by evidence, but by virtue of the peculiar nature and character of the event speaking for itself.

**2. NEGLIGENCE ¶121(3) — EVIDENCE AS TO PARTICULAR DEFECTS OR OCCURRENCES.**

Where an action is brought to recover damages for an injury resulting in the loss of an eye, caused by the explosion of a bottle, the contents of which had been bottled and sold by the defendant as a harmless beverage, and where it is alleged and shown that the bottle had been properly handled in the usual and customary way after it left the defendant's hands, and that it was not subjected to any unusual atmospheric condition, the jury would be authorized to apply the rule of evidence known as the doctrine of *res ipsa loquitur* in establishing the allegations of negligence charged against the defendant as constituting the cause of the accident, to the effect that the bottle was too highly and dangerously charged with gas, and that the bottle used and furnished by the defendant was of inferior material, and for that reason unable to withstand the pressure of the gas. *Payne v. Rome Coca-Cola Co.*, 10 Ga. App. 762, 73 S. E. 1087; *Commerce Bottling Co. v. Farabee*, 17 Ga. App. 487, 87 S. E. 720.

**3. NEGLIGENCE ¶121(3) — EVIDENCE HELD NOT TO OVERCOME PRESUMPTION UNDER DOCTRINE OF RES IPSA LOQUITUR.**

Where the defendant undertakes to exonerate itself from the blame which the jury is thus authorized to infer, by showing to their satisfaction that the defendant had exercised on its part all the diligence which the law requires of it (*Palmer Brick Co. v. Chenall*, 119 Ga. 837, 842, 47 S. E. 329), in that the bottle had been skillfully and properly charged in accordance with the most approved and scientific process, and that the bottle furnished to the plaintiff did not disclose any inherent defect or weakness, and had been purchased as a sound and suitable article from a reputable dealer, but where the evidence of the defendant entirely fails to thus account for the particular bottle causing the accident, but, on the contrary, it appears that the bottle had not been thus purchased by the defendant from a reputable dealer, and was in fact a refilled bottle originally purchased by some other bottling concern from persons unknown to the defendant, then, under the particular facts as thus disclosed, it cannot be said that the defense sought to be interposed has been established.

**4. NEGLIGENCE ¶134(1) — PLAINTIFF NEED NOT RELY ON RES IPSA LOQUITUR, WHERE THERE IS DIRECT PROOF.**

Under the state of facts testified to, the plaintiff in this case was not dependent upon the application of the doctrine *res ipsa loquitur* in order to establish his case, since there was direct proof going to show the defective character of the bottle.

**5. CHARGE OF COURT.**

There was no substantial error in the charge of the court, which fairly and correctly submitted the issues in accordance with the rules of law above indicated.

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by Ben Danneman against the Atlanta Coca-Cola Bottling Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Candler, Thomson & Hirsch, of Atlanta, for plaintiff in error.

Westmoreland, Anderson & Smith and Dorsey, Shelton & Dorsey, all of Atlanta, for defendant in error.

JENKINS, P. J. Judgment affirmed.

STEPHENS and SMITH, JJ., concur.

(25 Ga. App. 47)

**QUINAN v. STANDARD FUEL SUPPLY CO.**  
(No. 10760.)

(Court of Appeals of Georgia, Division No. 2  
March 11, 1920.)

(Syllabus by the Court.)

**1. MASTER AND SERVANT ¶316(1), 318(1, 2) — "INDEPENDENT CONTRACTOR" DEFINED.**

Where a corporation contracts with an individual exercising an independent employment, for him to do a work not in itself unlawful or attended with danger to others, such work to be done according to the contractor's own methods, and not subject to the employer's control or orders, except as to results to be obtained, the employer is not liable for the wrongful or negligent acts of such independent contractor or of his servants (*Civ. Code* 1910, § 4414; *Atlanta Railroad Co. v. Kimberly*, 87 Ga. 161, 13 S. E. 277, 27 Am. St. Rep. 231; *Fulton Railroad Co. v. McConnell*, 87 Ga. 756, 13 S. E. 828; *Ridgeway v. Downing Co.*, 109 Ga. 501, 34 S. E. 1028; and the mere fact that the employer may have had an agent who supervised the work, for the purpose merely of seeing that it was done in conformity to the contract, without interfering as to the particular method in which it was to be done or the means by which the given result was to be accomplished, would not in law be such control and direction of the work by the employer as would render him responsible for the manner in which the work was done (*Harrison v. Kiser*, 79 Ga. 588, 4 S. E. 320; *Louisville & Nashville R. Co. v. Hughes*, 134 Ga. 75, 67 S. E. 542). But the employer is liable for the negligence of the contractor if he retains the right to direct or control the time and manner of executing the work, or interferes and assumes control, so as to create the relation of master and servant. *Civ. Code* 1910, § 4415; *Savannah Railroad Co. v. Phillips*, 90 Ga. 829, 17 S. E. 82; *Johnson v. Western & Atlantic R. Co.*, 4 Ga. App. 131, 60 S. E. 1023; *International Agricultural Corporation v. Suber*, 24 Ga. App. 445, 101 S. E. 300.

**2. MASTER AND SERVANT ¶332(3) — EXISTENCE OF RELATION OF INDEPENDENT CONTRACTOR QUESTION FOR JURY.**

Applying the foregoing rulings to the proof submitted in this case, together with all rea-

sonable deductions and inferences to be drawn therefrom, it was a question for the jury to determine whether or not the alleged foreman and alter ego of the defendant was in fact such, or whether he was, as contended by the defendant, an independent contractor, and, if the latter, whether the defendant retained, or interfered and assumed, the right to direct and control the time and manner of executing the work. The court, therefore, erred in directing a verdict for the defendant upon the theory that the alleged injury was inflicted by an independent contractor.

Error from City Court of Savannah; Davis Freeman, Judge.

Action by W. J. Quinan against the Standard Fuel Supply Company. Judgment for defendant on a directed verdict, and plaintiff brings error. Reversed.

W. J. Quinan brought an action for damages against the Standard Fuel Supply Company, a corporation, for personal injuries alleged to have been sustained by him through the negligence of one Powers, who it is alleged was the vice principal and alter ego of the defendant, and others working under his orders and directions. It appears from the petition and the evidence that the plaintiff was an employé of the American International Shipbuilding Corporation, and at the time of the alleged injury was engaged in checking certain piling which that company had contracted with the defendant to unload from cars, and the alleged improper and negligent unloading of which the plaintiff contends caused the injury. The defendant set up as a defense that Powers, its alleged vice principal, was not in fact such, but was an independent contractor on the work, was in the exercise of an independent business, and was not subject to the immediate direction or control of the defendant, and that the defendant was therefore not liable for any acts of negligence on the part of Powers or his servants. Upon this issue the following evidence was introduced:

The plaintiff testified:

"Mr. Powers was looking after the work there as foreman for the Standard Fuel Supply Company. \* \* \* The contract was taken away from Ramsey, and given to the Standard Fuel Supply Company, and Mr. Powers came there as foreman of the job. The men were working under his direction. \* \* \* The Standard Fuel Supply Company were doing this work. I knew Mr. Powers was in charge as their foreman. I knew Powers was foreman, because Mr. Ross, chief in charge of the American International Shipbuilding Corporation, that I reported to, he told me the Standard Fuel Supply Company had taken over the contract. The darkies were all under his direction. He was the man who gave them directions. Mr. Salas [president of the defendant company] visited the dock two or three times a day and conferred with Mr. Powers. Mr. Salas was not giving the darkies any directions. I never saw Mr. Salas give anybody instructions.

Mr. Powers was the only man giving instructions to men on that particular work. \* \* \* I knew Mr. Powers as a wharf builder and contractor all my life. I knew he had taken other jobs for Mr. Salas, and that he had taken jobs for himself. I know the relations between them by the pay roll of the Standard Fuel Supply Company, showing Mr. Powers as their foreman. I did not know so definitely at the time. I knew Mr. Powers was in control of the work, but I was not told that the contract was turned over to Mr. Powers, but to the Standard Fuel Supply Company."

W. H. Patterson, Jr., sworn in behalf of the plaintiff, testified:

"I was with the government. \* \* \* That is my signature to a contract between the government and Mr. Salas for unloading this piling and loading the vessel. Mr. Powers was down there as Mr. Salas' foreman, and when I had any instructions for Mr. Powers, I was compelled to communicate them through Mr. Salas. When I went to him he would say: 'Tell Mr. Salas, and he will tell me.' I knew Mr. Powers in the contract as Mr. Salas' foreman. I made this contract on behalf of the United States Shipping Board with the Standard Fuel Supply Company. \* \* \* I knew Mr. Powers was in charge of the work. I saw him there every day. I knew nothing about the arrangement between him and Mr. Salas, except as stated in the bill. My information is that he was not an independent contractor. I don't know the arrangement between them for doing this work. I knew nothing about their private arrangement. Mr. Powers actually directed the work. I had no contract with Mr. Powers. I know absolutely nothing about the contract or relation between Mr. Salas and Mr. Powers. I have known Mr. Powers probably 25 years. I have known him as a contractor. When I would approach Mr. Powers, he would tell me to see Mr. Salas. Mr. Salas told me nothing about the arrangement. \* \* \* I had supposed Mr. Powers was foreman at all times. If the contention is that Mr. Powers was doing the work as a subcontractor, I see no reason why they should put him down as foreman. \* \* \* This bill was rendered by the Standard Fuel Supply Company. I O. K'd that bill as correct according to his say-so. \* \* \* This contract provides for compensation to the Standard Fuel Supply Company, at \$1.37½ a piling by the piece. \* \* \* This bill for \$2,000 or \$1,800 represents Sunday work. The Standard billed us for \$1.37½ plus one-half of that, and I objected to it. I told him I wanted the bill based on the actual cost of the labor. I paid the Standard for it. It was charged for at the rate of \$12 a day, but that was after the work was over. \* \* \* I don't think he [Powers] would be put down as foreman if he was a subcontractor. If he was put down as subcontractor, I don't suppose his time would have been paid for; but they might have used some other method. I have no interest in it at all. I am speaking of the bill in black and white. I understood Mr. Powers as foreman, first, last, and all the time. If I thought the work was not going fast enough, or wanted a little extra work done, and if Mr. Salas happened to be in New York, I

had to wait to see him. Mr. Salas did not give any orders within my hearing as to the mechanical details, as to how the work should be done. When he came there, I was not with him. When I complained about the work not being fast enough, Mr. Powers would tell me to see Mr. Salas."

The plaintiff also introduced in evidence the contract entered into between the defendant and the United States Shipping Board, and a bill rendered by the defendant to the American International Shipbuilding Corporation for work performed on Sunday, containing an item as follows:

"D. Powers, foreman, two Sundays at \$12.00, \$24.00."

David Powers, sworn in behalf of the defendant, testified:

"I am pile driver, wharf builder, and sometime stevedore. I have been in business for myself some 21 or 22 years. I recall this particular contract under which I was working at this dock with Mr. Salas. The contract was that Mr. Salas would furnish the money and two big lighters, I to furnish everything else, on a fifty-fifty basis; I to get half the profits and bear half the losses, if any. I employed the men. I discharged them. The Standard Fuel Supply Company didn't have a thing to do with that. All correspondence was done with Mr. Salas, Standard Fuel Supply Company. I paid the men off on Saturday, either at the dock or at Tom Curry's. They did not state who I was to hire or discharge; I had full right of way on that. On this bill, on which I am put down as foreman, I did not get that money. I have not settled up on this case yet. I am to get one-half. We worked on a fifty-fifty basis. \* \* \* I am not Mr. Salas' foreman. I never was his foreman in any of this work—that's according to my contention. At no time was I foreman, from the time I took this subcontract with the Standard Fuel Supply Company, up to the time this man was hurt, except it was stated on that bill—I ought to have something for my services. He billed the government per piling first, and they objected to that, and said to send in actual labor. He put me in as foreman. \* \* \* He told me that he was going to furnish the money and turn the balance over to me. He had nothing to do with anything else. We did things for Mr. Patterson, until I found him undermining me with another stevedore, and after that I says, 'Mr. Patterson, you go to Mr. Salas; he is the boss of this proposition.' He was fixing up that I was not competent, and wanted to get somebody else. I did that after I found him out."

102 S.E.—35

R. S. Salas, sworn in behalf of the defendant testified:

"I am president of the Standard Fuel Supply Company. I made this contract with the United States Shipping Board. \* \* \* I talked with Powers, and he said he would take the job on a fifty-fifty basis. He has been in the contracting business for 20 years to my knowledge. Not in years has he been foreman for me. He has done joint contract work of this kind. Under the contract, I furnished two lighters and the money. I had nothing to do with the employment or discharging of the men. I had nothing to do with the actual work. I went there once or twice a day to keep Patterson straight. He was very contentious. It was the only way to keep the bill correct for the government, to put him in as foreman on Sunday. They would not work on Sundays for the wages they got every day in the week. There was no way, except to charge for every man actually engaged on the work. Mr. Powers was one of the men. Our contract calls for fifty-fifty, and that goes into the general fund of the earnings and losses of the transaction—it was absolutely fifty-fifty. Powers was to get half the profits and bear half the losses. He was a partner of mine. I financed and let him have the two lighters. \* \* \* I had to put him on there as foreman. I could not get pay for his work on Sunday otherwise. How could I do otherwise? How am I going to let men work there and not charge for it? It was a verbal agreement for Sunday work—this was extra work. That contract is for week day work—there is nothing in there about it. The Shipping Board called for Sunday work. They said: 'We will pay you for all men working there Sundays.' I made the contract with Patterson—United States Shipping Board. \* \* \* The contract was based on the piling, and this was based on the work. That contract did not cover Sunday work. Patterson said: 'The only way I will settle is per hour for each man.'"

At the conclusion of the evidence, counsel for the defendant moved the court to direct a verdict in favor of the defendant, upon the ground that the evidence showed that the plaintiff's injury was inflicted by an independent contractor, for which the defendant was not liable. This motion the court sustained, and to the direction of a verdict in favor of the defendant the plaintiff excepted.

Shelby Myrick, of Savannah, for plaintiff in error.

Lawton & Cunningham, of Savannah, for defendant in error.

JENKINS, P. J. Judgment reversed.

STEPHENS and SMITH, JJ., concur.

(25 Ga. App. 54)

**HIGDON v. BELL** (No. 10650.)(Court of Appeals of Georgia, Division No. 2.  
March 11, 1920.)*(Syllabus by the Court.)***1. PRINCIPAL AND SURETY §112 — SURETY NOT DISCHARGED BY ACCEPTANCE OF PAYMENT, AVOIDED BY MAKER'S TRUSTEE IN BANKRUPTCY.**

While any act of the creditor, either before or after judgment against the principal, which injures the surety or increases his risk, or exposes him to greater liability, will discharge the surety (Civil Code of 1910, § 3544), the mere fact that the holder of a note in good faith accepts payment thereof from the maker at a time when the maker is insolvent, so that such payment is voidable in the event of the maker's bankruptcy, and is thereafter actually avoided by his trustee or voluntarily surrendered to the trustee by the holder, will not discharge the note or release a surety thereon. That the creditor, at the time such payment was made and accepted, may have known of the maker's insolvency, will not alter the rule; for there might never be any bankruptcy proceeding instituted against the maker, and in that event the payment would be a valid one, and a refusal upon the part of the creditor to accept it might in fact release the indorsers. *Harner v. Batdorf*, 35 Ohio St. 113; *Second National Bank v. Prewett*, 117 Tenn. 1, 96 S. W. 334, 9 L. R. A. (N. S.) 581, and note, 119 Am. St. Rep. 987. The excerpt from the charge of the court complained of in the fifth special ground of the motion for a new trial, being in substantial accord with the ruling here announced, is not erroneous.

**2. PRINCIPAL AND SURETY §125 — SURETY NOT DISCHARGED BY HOLDER'S FAILURE TO PROVE DEBT IN BANKRUPTCY AFTER HAVING SURRENDERED PREFERENTIAL PAYMENT.**

Nor would the failure on the part of the holder of the note to prove his debt in bankruptcy against the principal debtor, after having surrendered such a payment as that referred to above, operate to discharge the surety. This is true, for the reason that mere nonaction on the part of the creditor, or negligence to prosecute with vigor his legal remedies, will not release the surety, unless such nonaction or negligence to prosecute with vigor his legal remedies is based upon a consideration paid by the principal debtor to the creditor, or he is notified under the statute to collect the debt. Civil Code 1910, § 3544; *Jordan v. Farmers' & Merchants' Bank*, 5 Ga. App. 244, 62 S. E. 1024 (5); *Yerxa v. Ruthruff*, 19 N. D. 13, 120 N. W. 758, 25 L. R. A. (N. S.) 139, 141, and note, Ann. Cas. 1912D, 809; *Lumsden v. Leonard*, 55 Ga. 874; *Williams v. Kennedy*, 134 Ga. 339, 344, 67 S. E. 821; *McMillan v. Heard National Bank*, 19 Ga. App. 148, 153, 91 S. E. 235.

**3. PRINCIPAL AND SURETY §200(2)—SURETY, SUING FOR CONTRIBUTION, MUST FIRST ACCOUNT FOR MONEYS RECEIVED FROM PRINCIPAL.**

While, under the provisions of Civ. Code 1910, § 3566, "a surety suing for contribution

must first account for all money or other thing received from the principal to indemnify him against loss," under the evidence adduced upon the trial of this case the jury was authorized to find that the plaintiff had in fact accounted for everything of value that he had received; and under the rulings announced in this and the two preceding paragraphs, the first, second, third, fourth, and seventh grounds of the amendment to the motion for a new trial, which are merely amplifications of the general grounds, are without merit.

**4. PRINCIPAL AND SURETY §196—MEASURE OF CONTRIBUTION AMONG COSURETIES STATED.**

At common law contribution could be enforced only for the aliquot share of each, reckoned as if all were solvent (13 C. J. 825, § 10; *Hall v. Harris*, 6 Ga. App. 822, 828, 65 S. E. 1086); and the doctrine of the common law, not expressly repealed by statute, is still of force in this state. *Park's Ann. Code*, § 1(3), and note; *Westmoreland v. Powell*, 59 Ga. 258(3). The only amendment or modification of this common-law rule, governing the amount which each of the cosureties must contribute to the one who has paid more than his equal share of the indebtedness, is found in Civ. Code 1910, § 3564, which provides that, "if one of the cosureties be insolvent, the deficiency in his share must be borne equally by the solvent sureties." While there appears in the opinion in the case of *Hall v. Harris*, supra, the following quotation from 9 Cyc. 800: "Each co-obligor is liable to contribute in proportion to his share of the common debt or obligation, but, in determining the proportion which a debtor should contribute, regard will be had to only the solvent debtors, and to those within the jurisdiction of the court called upon to enforce contribution" (italics ours); and while this appears to be the rule in some jurisdictions, such, under the doctrine of the common law as of force here, is not the rule in this state; and the statement there contained, that regard will be had only "to those within the jurisdiction of the court called upon to enforce contribution," was merely obiter, since no such question was involved in that case.

(a) In this case there was no evidence whatever tending to show that the nonresident surety was insolvent, and the court therefore erred in charging the jury as complained of in the sixth special ground of the motion for a new trial. The verdict in favor of the plaintiff against the defendant, who was one of the three sureties, being for \$973.35 principal and \$545.06 interest, one-half of the amount paid by the plaintiff in discharge of the principal's indebtedness, together with interest thereon, is therefore contrary to law; but if the plaintiff will, at the time the remittitur is made the judgment of the court below, write off from the judgment rendered the sum of \$506.14, thus reducing the judgment to \$1,012.27, principal and interest, or to one-third of the amount paid by the plaintiff, together with interest thereon, there being sufficient evidence to authorize a verdict for the plaintiff for that amount, the judgment will stand affirmed; otherwise, it is reversed. It is further ordered that the costs of the writ of error be taxed against the defendant in error.

Error from Superior Court, Grady County; W. M. Harrell, Judge.

Action by W. E. Bell against Joe Higdon. Judgment for plaintiff, and defendant brings error. Affirmed on condition.

The Higdon Trading Company, a corporation of the state of Florida, executed to the Dutton Bank of Gainesville, Fla., a note for the principal sum of \$2,000, which note was indorsed by the plaintiff, W. E. Bell, and one T. J. Terry, both residents of the state of Florida, and by the defendant, Joe Higdon, a resident of Grady county, Ga. When the note became due, it was protested for non-payment, and upon demand being made upon him the plaintiff paid to the bank the principal sum of \$2,000, together with \$21.60 interest, took up the note, and this suit was instituted by him in the superior court of Grady county to recover of the defendant one-half of the amount thus paid together with interest thereon, less a credit of \$75, which sum he had realized from certain collateral. Upon the trial of the case the evidence disclosed that, shortly after paying off the note, the plaintiff went to the maker thereof and received from it personal property, consisting of live stock, goods, wares, and merchandise, of the value of about \$1,500, and notes and mortgages, aggregating about \$2,600, constituting assets of the corporation, which were to be applied by the plaintiff to his reimbursement as realized upon. After this transaction, the Higdon Trading Company was cast into bankruptcy, and after proceedings had been begun by the bankruptcy court to recover of the plaintiff the assets which had been turned over to him by the bankrupt, the plaintiff paid over to the trustee in bankruptcy the sum of \$900 in settlement of this proceeding, which sum he testified represented all he ever realized from the sale of the personal property, consisting of live stock, goods, wares, and merchandise turned over to him by the bankrupt, and that the only sum ever realized from the notes and mortgages was the \$75 which appears as a credit upon the note, and that the remainder thereof were worthless, being either barred by the statute of limitations at the time he received them, or against insolvent persons, and therefore uncollectable. The jury returned a verdict in favor of the plaintiff for the full amount sued for.

The defendant made a motion for a new trial, contending in the first, second, third, fourth, and seventh special grounds thereof that the verdict rendered is contrary to the law and the evidence, for the reason that the act of the plaintiff, which was without

the defendant's knowledge or consent, in demanding and receiving from the maker of the note \$4,000 worth of its assets rendered the maker insolvent, and caused it to commit an act of bankruptcy, thereby increasing the defendant surety's risk and exposing him to greater liability and that he was therefore discharged from any liability; that the \$4,000 worth of assets were delivered by the maker of the note to the plaintiff in payment of the note, and that by reason thereof the defendant was discharged from any liability to make contribution; that the plaintiff failed to account to the defendant for any of the property received by the plaintiff, and that he therefore could not maintain the present suit for contribution; that the failure of the plaintiff, after having surrendered to the bankruptcy court the value of the goods, wares, and merchandise received by him, to prove his claim against the bankrupt's estate, likewise increased the defendant's risk as cosurety, and thereby discharged him. In the fifth special ground of the motion, the defendant excepts to the charge of the court to the effect that if the maker of the note, while insolvent, paid to the plaintiff any amount, either in goods or money, as a payment on the note, and the plaintiff was thereafter compelled to pay over to the bankrupt court any such amount thus received from the maker, that the amount so paid on the note should not be credited as a payment on the same, and would not release or discharge the indorsers from their liability to contribute to the plaintiff. The defendant also complains in the sixth special ground of the motion of the following excerpt from the charge of the court:

"I charge you further that, if you should find that T. J. Terry resided without the limits of the state of Georgia, the fact that he may have been an indorser on said note would not be considered by you in determining what would be the liability, if any, of Joe Higdon to contribute to plaintiff, W. E. Bell."

The trial court overruled the motion for a new trial, and to this judgment the defendant excepted.

Titus, Dekle & Hopkins, of Thomasville, and Ledford & Christopher, of Cairo, for plaintiff in error.

Chris. Matheson, of Gainesville, Fla., and Bell & Weathers, of Cairo, for defendant in error.

JENKINS, P. J. Judgment affirmed, on condition.

STEPHENS and SMITH, JJ., concur.

(25 Ga. App. 85)

**KIRKLAND et al. v. ADDISON, Constable.**  
(No. 10864.)(Court of Appeals of Georgia, Division No. 2.  
March 13, 1920.)*(Syllabus by the Court.)*

1. EXCEPTIONS, BILL OF ~~6~~—BILL MUST SPECIFICALLY MAKE AMENDMENT TO MOTION FOR NEW TRIAL, A PART OF THE RECORD.

Although the bill of exceptions recites that there was an amendment to the motion for a new trial, it does not specify such amendment as being a part of the record and material to a clear understanding of the errors complained of, and there does not appear in the record sent to this court any amendment to the motion for a new trial. This court, therefore, can consider only the original motion for a new trial, which contains only the general grounds.

2. EXECUTION ~~155~~—VERDICT FOR DAMAGES FOR BREACH OF FORTHCOMING BOND HELD NOT CONTRARY TO LAW.

This being a suit against the principal and the surety on a forthcoming bond given by the defendant in *fi. fa.*, in which the plaintiff seeks to recover damages for a breach of the bond, and the evidence showing a failure of the defendant to produce the property at the time and place of sale after due advertisement, and a resulting damage therefrom to the plaintiff, the verdict for the plaintiff was not contrary to law for any reason insisted upon under the general grounds.

Error from Superior Court, Haralson County; F. A. Irwin, Judge.

Action by G. W. Addison, Constable, for use, etc., against C. H. Kirkland and others. Verdict and judgment for plaintiff, and defendants bring error. Affirmed.

J. S. Edwards, of Buchanan, for plaintiffs in error.

Griffith & Matthews, of Buchanan, for defendant in error.

STEPHENS, J. Judgment affirmed.

JENKINS, P. J., and SMITH, J., concur.

(25 Ga. App. 42)

**C. H. BATEMAN CO. v. MACON NAT. BANK**  
et al. (No. 10709.)(Court of Appeals of Georgia, Division No. 2.  
March 11, 1920.)*(Syllabus by the Court.)*

COURTS ~~189~~(11½, 15)—MUNICIPAL COURT OF MACON MAY ON ITS OWN MOTION VACATE JUDGMENTS AGAINST NONRESIDENT IN ATTACHMENT AND GARNISHEE AT TERM IN WHICH THEY WERE RENDERED.

The terms of the act creating the municipal court of Macon, by which it is provided (Georgia Laws 1913, p. 258, § 20) that "suits shall be filed in the clerk's office of said court

at least fifteen days before the first day of the term to which it is returnable," and that all cases which on the call are marked in default shall be "ripe for trial and judgment," have reference only to civil cases brought by ordinary petition, and do not pertain to attachment cases. *Davis v. Williams*, 149 Ga. —, 98 S. E. 338. In such a case the provisions of section 15 of said act are applicable, by which it is provided that such a proceeding is to be returned and disposed of under the same rules pertaining to the superior or justice's courts as the case may be. Thus, where a judgment by default in the sum of \$300 is rendered at the first term against a nonresident defendant in attachment and against the garnishee in attachment, the judge of the municipal court did not err in proceeding on his own motion during the term at which such judgments were rendered to vacate and set them aside. The quoted provisions of section 20 of the act not being applicable, final judgment could not legally be rendered in such a case until the second term (*Lambert Hoisting Engine Co. v. Bray & Co.*, 117 Ga. 4, 43 S. E. 371), and then could be rendered only on proof being made (*Fincher v. Stanley Electric Mfg. Co.*, 127 Ga. 362, 56 S. E. 440).

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

Action between the C. H. Bateman Company and the Macon National Bank and others. Judgment for the latter, and the former brings error. Affirmed.

J. M. Hancock and Feagin & Hancock, all of Macon, for plaintiff in error.

Miller & Jones, of Macon, for defendants in error.

JENKINS, P. J. Judgment affirmed.

STEPHENS and SMITH, JJ., concur.

(25 Ga. App. 59)

**SMITH v. SAVANNAH ELECTRIC CO.**  
(No. 10862.)(Court of Appeals of Georgia, Division No. 2.  
March 11, 1920.)*(Syllabus by the Court.)*

1. TRIAL ~~25~~(12)—PLEA IN JUSTIFICATION OF EVICTION OF PASSENGER HELD TO ENTITLE DEFENDANT TO OPEN AND CLOSE.

Where, in an action for damages against a street railway company, brought by a passenger claiming an unlawful eviction from a street car, the defendant filed an answer admitting that the plaintiff was a passenger on its car and that she was evicted therefrom, but claiming that the eviction was fully justified because she refused to move to the proper place in the car, and acted in such a disorderly manner that the defendant was compelled, in the interest of decency and good order, to remove her from the car, this was a good plea of justification, which admitted a *prima facie* case in favor of



the plaintiff, entitling the defendant to the opening and conclusion of the argument. Civ. Code 1910, §§ 4488, 5746.

## 2. ADMISSIBILITY OF EVIDENCE.

The court did not err in overruling the objection to the evidence of Robert H. Davis, a witness for the defendant, as set out in the fifth ground of the motion for a new trial. The evidence of this witness tended to show that the plaintiff was present at the time of the conversation about which the witness testified, and that she heard it or could have heard it.

## 3. EVIDENCE ¶471(17)—QUESTIONS CALLING FOR CONCLUSIONS ARE PROPERLY EXCLUDED.

The court did not err in sustaining the objection to the question propounded to the witness Hodges, "Did you see this darkey [referring to plaintiff] doing anything annoying?" This question called for a conclusion of the witness, and it does not appear from the exception taken what the answer of the witness would have been.

## 4. EVIDENCE ¶164 — WRITTEN REPORT IS BEST EVIDENCE OF ITS CONTENTS.

The court did not err in refusing to allow the witness Fountain, on cross-examination, to testify as to the contents of a written report. The writing was the best evidence of its contents.

## 5. APPEAL AND ERROR ¶302(3), 690(4)—ASSIGNMENT OF ERROR IN ADMISSION OF EVIDENCE, NOT SETTING FORTH EVIDENCE, WILL NOT BE CONSIDERED.

The assignment of error upon the admission of the evidence of the witnesses Fountain and Davis will not be considered, as the evidence alleged to have been illegally admitted was not set forth literally, or its substance clearly stated, either in the motion for a new trial or in the bill of exceptions. See Civ. Code 1910, § 6083. *Pearson v. Brown*, 105 Ga. 802(1), 31 S. E. 746; *Hicks v. Mather*, 107 Ga. 77(1), 32 S. E. 901; *Georgia Nor. Ry. Co. v. Hutchins*, 119 Ga. 504(5), 46 S. E. 659; *Hicks v. Webb*, 127 Ga. 170(5), 56 S. E. 807.

## 6. CARRIERS ¶384(1) — PLEADING ¶134—TRIAL ¶259(1)—PLEA OF JUSTIFICATION DOES NOT ADMIT ALL FACTS IN PETITION; REQUEST TO CHARGE MUST BE IN WRITING; "PRIMA FACIE CASE."

The court did not err in not charging the jury as follows: "The defendant has admitted a 'prima facie case,' which means in law that defendant has admitted all the facts in plaintiff's petition, except its liability, which admission entitles plaintiff to a verdict, unless defendant by a preponderance of the evidence shows that it was justified under the law in doing the acts complained of." There was no written request so to charge, and, besides, to

have charged in this language would have been error. The plea of justification does not admit all the facts in the plaintiff's petition, but admits only a prima facie case, and claims justification on the part of the defendant. To have admitted all the facts set out in the petition would have excluded the defendant from any defense. This the law does not require.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Prima Facie Case.]

## 7. REQUESTS TO CHARGE.

The principles of law embodied in the requests to charge set out in the tenth and eleventh grounds of the motion for a new trial, in so far as they were applicable to the facts in this case, were covered by the charge of the court.

## 8. SUFFICIENCY OF CHARGE.

The excerpts from the charge of the court complained of in grounds 12, 13, 15, and 16 (designated as 17 in the motion for a new trial), taken in connection with the remainder of the charge, contain no reversible error.

## 9. APPEAL AND ERROR ¶1051(8)—ADMISSION OF CITY ORDINANCE, IF ERROR, WAS HARMLESS, WHERE RULE PRESCRIBED BY IT WAS ADMITTED BY PLAINTIFF.

It is immaterial whether the alleged ordinance of the city of Savannah, referred to by the judge in his charge, was legally in evidence or not, inasmuch as it is admitted by the plaintiff, in her own evidence, that the rule made by the alleged ordinance was known to and recognized by her. The fourteenth ground of the motion for a new trial is therefore without merit.

## 10. SUFFICIENCY OF EVIDENCE.

There was evidence to sustain the verdict the charge of the court fully submitted to the jury all the material issues in the case, and the court properly overruled the motion for a new trial.

Error from City Court of Savannah; John Rourke, Jr., Judge.

Action by Georgia Smith against the Savannah Electric Company. Judgment for defendant, and plaintiff brings error. Affirmed.

W. B. Stubbs and F. A. Tuten, both of Savannah, for plaintiff in error.

Osborne, Lawrence & Abrahams, of Savannah, for defendant in error.

SMITH, J. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(25 Ga. App. 61)

COCHRAN v. MEEKS et al. (No. 10871.)

(Court of Appeals of Georgia, Division No. 2.  
March 11, 1920.)*(Syllabus by the Court.)*1. SALES  $\S$ 390, 392 — REMEDIES OF PURCHASER FOR FRAUDULENT REPRESENTATIONS STATED.

This was a suit to recover back the purchase price paid for a number of bales of cotton; the plaintiff contending that in his purchase he was defrauded by reason of the seller's false and fraudulent substitution of samples, on the basis of which the purchase was made. The plaintiff alleged that, promptly upon discovering the fraud, he offered to restore the property to the defendant, and that he held it as the property of the defendant, for the use and benefit, and subject to the order of the defendant. *Held:*

While a mere "breach of warranty does not annul an executed sale, but gives the purchaser a right to damages where the contract price has been fully paid, or he may plead in abatement of the purchase money when sued therefor" (Pound v. Williams, 119 Ga. 904, 47 S. E. 218; Civ. Code 1910,  $\S$  4136), still, if the sale has been induced by fraudulent representations on the part of the seller as to existing conditions, a contract may be rescinded at the instance of the purchaser, upon his promptly restoring or offering to restore the property received by virtue of the contract; and, upon this being done, the purchaser is, without any independent proceeding in equity taken to rescind the contract, entitled to recover back the amount of the purchase price actually paid by him. Civ. Code 1910,  $\S$  4305, 4306; Fudge v. Kelly, 4 Ga. App. 630, 62 S. E. 96; 39 Cyc. 1997 (b). The demurrer to the petition was properly overruled.

2. NEW TRIAL  $\S$ 41(2)—NOT GRANTED ON ACCOUNT OF HEARSAY EVIDENCE, WHEN SAME FACTS PROVEN BY COMPETENT EVIDENCE.

The evidence objected to in the first special ground of the motion for a new trial was admissible, in connection with other testimony in the case, as tending to throw light on the main contention of the plaintiff. The evidence of the plaintiff objected to in the second and fourth special grounds of the motion was inadmissible as being hearsay; but since the same fact was testified to by the person thus quoted, and the letter quoted from was afterwards itself introduced, a new trial will not be granted on these grounds. Daughtry v. Savannah Railway Co., 1 Ga. App. 393, 58 S. E. 230 (3). The evidence objected to in the third special ground was admissible as a part of the history of the transaction; but, even if it were irrelevant, it could not have been harmful to the defendant.

## 3. INSTRUCTIONS.

The excerpts from the charge of the court complained of in the sixth and seventh special grounds of the motion for a new trial, in which were given in charge certain principles of law relative to fraud as embodied in the Code, were not erroneous, but were applicable to the case.

## 4. INSTRUCTIONS.

The portion of the charge complained of in the eighth and ninth special grounds of the motion do not afford ground for new trial, since the plaintiff, if entitled to recover at all, was entitled to recover the full amount sued for.

Error from City Court of Waycross; H. M. Wilson, Judge pro hoc.

Action by R. Meeks and others against A. E. Cochran. Judgment for plaintiffs, and defendant brings error. Affirmed.

A. E. Cochran and W. A. Milton, both of Waycross, for plaintiff in error.

Parker & Parker and A. B. Spence, all of Waycross, for defendants in error.

JENKINS, P. J. Judgment affirmed.

STEPHENS and SMITH, JJ., concur.

(25 Ga. App. 89)

JONES v. FULLER. (No. 10894.)

(Court of Appeals of Georgia, Division No. 2.  
March 18, 1920.)*(Syllabus by the Court.)*1. CONTRACTS  $\S$ 212(2)—FRAUDS, STATUTE OF  $\S$ 109, 110(1), 158(3)—PLACE OF CONTRACT FOR SALE OF LEASE ADMISSIBLE IN DETERMINING PROPERTY INVOLVED; WHERE SUCH CONTRACT AFFORDS MEANS OF IDENTIFYING PROPERTY, PAROL EVIDENCE IS ADMISSIBLE FOR THAT PURPOSE; CONTRACT NOT WITHIN STATUTE; REASONABLE TIME ALLOWABLE FOR PERFORMANCE.

On May 17, 1919, Jones sued Fuller for the alleged breach by the defendant of his contract for the transfer and sale of a certain lease, basing his claim on the following instrument of writing:

"Calhoun, Ga., 12/16/1918.

"Received of Hugh B. Jones ten (\$10.00), being payment on purchase price of five-year lease on F. L. Hicks building on Court street. The consideration being two hundred fifty (\$250.00) dollars; ninety (\$90.00) dollars more cash to be paid on delivery of rental contract with F. L. Hicks at a rental of \$30.00 per month, and a note for one hundred fifty dollars due in six months from date.

"[Signed] W. E. Fuller."

The plaintiff in his petition alleged that it was understood and agreed that he was to have possession of the building on January 1, 1919, and that on or about December 19, 1918, he tendered to the defendant the sum of \$90 in cash and his promissory note for the balance of the purchase price, due six months after date, in accordance with the terms of the agreement; that the defendant has breached his contract of sale, in that he has failed and refused to deliver to the plaintiff the rental contract specified; that the plaintiff has been damaged in a named sum, representing the difference in the reasonable rental value of said premises and the amount stipulated to be paid under said bargained lease. The defendant demurred to the petition, on

various grounds, and the demurrer was sustained by the trial judge, and the petition dismissed. The plaintiff excepts to this ruling. *Held*, the quoted agreement must be taken to relate to a sale or transfer by the defendant to the plaintiff, for a stated consideration, of a certain existing lease, and it is in substance stated in the contract of sale that the lease, which thus constitutes the subject-matter of the sale, is one executed by F. L. Hicks to the defendant for a period of five years, of what is known as the F. L. Hicks building, located on Court street in Calhoun, Ga., and that the lease thus bargained calls for a payment to Hicks of a monthly rental of \$30. As thus construed, the lease, constituting the subject-matter of the sale, was sufficiently set forth, in the written instrument sued on, to take the transaction without the operation of the statute of frauds, so as to withstand a demurrer to the suit as brought.

(a) The place where the contract is dated may properly be considered, in connection with the other descriptive marks embodied in the contract, in determining what particular property was involved in the bargained contract of lease. *Singleton v. Close*, 130 Ga. 723, 61 S. E. 722; *Horton v. Murden*, 117 Ga. 72, 43 S. E. 786.

(b) In a case where a sale or transfer of property is, under the statute, required to be in writing, while it is necessary that the contract relied on shall designate the particular property embraced in the transfer (in this case the lease), together with the contract price and the terms of sale, still, where particular property is thus designated, and the writing furnishes within itself the means whereby the designated property can be thus actually identified, then the doctrine which holds that to be certain which can be made certain is applicable, and it is permissible to employ parol evidence for such purpose, as well as to explain ambiguities in the terms of the instrument, if by so doing the actual terms of the contract are not impaired. *Douglass v. Bunn*, 110 Ga. 163, 35 S. E. 339; *Horton v. Murden*, 117 Ga. 72, 43 S. E. 786(3); *Singleton v. Close*, 130 Ga. 722, 61 S. E. 722 (2); *King v. Brice*, 145 Ga. 65, 88 S. E. 980 (1); *King v. Brice*, 18 Ga. App. 178, 89 S. E. 175.

(c) While the date when the identified and bargained five-year lease was to commence was not itself stated in the contract, this was such an ambiguity relating to an existing fact as might be shown by parol. *Simpson v. Sanders*, 130 Ga. 265, 271, 60 S. E. 541.

(d) The time when the balance of the purchase price for the lease was to be paid by the plaintiff, and the delivery of the lease was to be made by the defendant, not being specified in the contract of sale, a reasonable time, not extending beyond the date set for the beginning of the lease, would be allowed for performance.

## 2. CONTRACTS ¶10(4)—CONTRACT FOR SALE OF LEASE HELD NOT WANTING IN MUTUALITY.

The contract sued on, taken in connection with the allegations of the petition, was not wanting in mutuality. See *Perry v. Paschal*, 103 Ga. 134, 29 S. E. 703 (7); *Ellis v. Bryant*, 120 Ga. 890, 48 S. E. 352; *Sivell v. Hogan*, 119 Ga. 168, 46 S. E. 67. The measure of

damages for the alleged breach was correctly laid. *Kenny v. Collier*, 79 Ga. 743, 8 S. E. 58 (2); *Williams Wagon Works v. Gunn*, 14 Ga. App. 158, 80 S. E. 668. The petition having set forth a cause of action the court erred in dismissing the suit on demurrer.

Error from City Court of Floyd County; W. J. Nunnally, Judge.

Action by H. B. Jones against W. E. Fuller. Suit dismissed on demurrer to petition, and plaintiff brings error. Reversed.

Maddox & Doyal, of Rome, for plaintiff in error.

Nathan Harris, of Rome, for defendant in error.

JENKINS, P. J. Judgment reversed.

STEPHENS and SMITH, JJ., concur.

(25 Ga. App. 163)

## SAVANNAH ELECTRIC CO. v. FALCONE. (No. 11181.)

(Court of Appeals of Georgia, Division No. 2  
March 18, 1920.)

(Syllabus by the Court.)

### 1. APPEAL AND ERROR ¶1005(2)—APPROVED VERDICT, SUPPORTED BY SOME EVIDENCE, WILL NOT BE DISTURBED.

The motion for a new trial in this case contains the general grounds only. There is some evidence to support the verdict, which has the approval of the trial judge, and this court will not interfere.

### 2. COSTS ¶262 — AWARD OF DAMAGES FOR APPEAL FOR DELAY DENIED IN CASE OF DOUBT.

Not being fully convinced that this case was brought to this court for delay only, the request of the defendant in error that damages be awarded against the plaintiff in error, as provided in section 6213 of the Civil Code of 1910, is denied.

Error from City Court of Savannah; Davis Freeman, Judge.

Action between the Savannah Electric Company and Dominick Falcone. Judgment for the latter, and the former brings error. Affirmed.

See, also, 99 S. E. 889.

Osborne, Lawrence & Abrahams, of Savannah, for plaintiff in error.

M. H. Bernstein and F. P. McIntire, both of Savannah, for defendant in error.

SMITH, J. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(25 Ga. App. 95)

COPELAND v. PYLES. (No. 11180.)

(Court of Appeals of Georgia, Division No. 2.  
March 18, 1920.)*(Syllabus by the Court.)*

ESCENT AND DISTRIBUTION  $\S$ 91(1)—TROVER AND CONVERSION  $\S$ 2—ACTION WILL LIE TO RECOVER BOND FOR TITLE; HEIR HAS NO TITLE TO "PERSONALTY" ON WHICH HE CAN MAINTAIN TROVER.

Mrs. Rosa Lee Pyles brought an action of trover against T. S. Copeland, seeking to recover certain furniture and also a bond for title, all of which she alleged was in the possession of the defendant. The petition alleged that the furniture and the bond for title had been the property of her deceased husband, and that she, as the sole heir at law of her said deceased husband, was now the true owner of the property. The jury found in favor of the plaintiff, \$762, and upon the hearing of a motion for a new trial, based on the general grounds only, the court below passed an order granting a new trial unless the plaintiff would write off \$262, the admitted value of the furniture. The plaintiff wrote off this amount, and the motion for a new trial was then overruled. *Held*, that while a bond for title is personalty, and trover will lie for the recovery thereof (see, in this connection, *Coursey v. Curtis*, 18 Ga. 237, 238; *Long v. McIntosh*, 129 Ga. 661, 59 S. E. 779, 16 L. R. A. [N. S.] 1043, 12 Ann. Cas. 263; *Birmingham Fertilizer Co. v. Cox*, 10 Ga. App. 699, 73 S. E. 1090; Civil Code 1910, § 8646; 88 Cyc. 2098), the evidence submitted on the trial of this case failed to show any title whatever in the plaintiff, except a claim of title as the sole heir of her deceased husband, and since the title to personal property vests in the administrator of a deceased person, for the purpose of paying debts and distribution, and not in the heir at law, the verdict was for these reasons contrary to law, and the judgment of the court below, overruling the motion for a new trial, must be reversed.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Personal Property.]

Error from City Court of Cairo; L. W. Rigby, Judge.

Action of trover by Mrs. Rosa Lee Pyles against T. S. Copeland. Verdict for plaintiff, motion for new trial denied, on the writing off of a part of the verdict, and defendant brings error. Reversed.

Ledford & Christopher, of Cairo, for plaintiff in error.

J. Q. Smith, of Cairo, for defendant in error.

SMITH, J. Reversed.

JENKINS, P. J., and STEPHENS, J., concur.

(25 Ga. App. 64)

CITY OF SANDERSVILLE v. MOYE.  
(No. 10917.)(Court of Appeals of Georgia, Division No. 2.  
March 11, 1920.)*(Syllabus by the Court.)*

1. ELECTRICITY  $\S$ 19(2)—PETITION HELD TO STATE CAUSE OF ACTION FOR DEATH FROM CONTACT WITH CHARGED ELECTRIC LIGHT POST.

The petition as amended set out a cause of action, and the trial judge did not err in overruling the general and special demurrers.

2. TRIAL  $\S$ 256(1)—FURTHER OR ADDITIONAL INSTRUCTIONS IF DESIRED SHOULD BE REQUESTED.

The excerpts from the charge of the court which are complained of contain correct statements of law applicable to the case; and if any further or additional instructions were desired, the trial judge should have been presented with appropriate written requests so to charge.

3. APPEAL AND ERROR  $\S$ 260(1)—NEW TRIAL  $\S$ 40(4)—OMISSION TO CHARGE NOT GROUND FOR NEW TRIAL WHERE NO REQUEST; REFUSAL OF INSTRUCTIONS PROPER WHERE COVERED BY OTHERS GIVEN.

The failure of the court to give certain instructions to the jury, as complained of in the motion for a new trial, is not cause for a new trial, as there was no appropriate written request for such instructions, and in the charge of the court all the substantial issues in the case were fully and fairly submitted to the jury, with the law applicable thereto.

4. ADMISSION OF TESTIMONY OF DEFENDANT'S COUNSEL ON EXAMINATION AS TO QUALIFICATION OF JURORS.

The court did not err in admitting the testimony of W. M. Goodman, counsel for the defendant, and in permitting counsel for the plaintiff to examine into the qualifications of jurors about to try the case. The note of the judge in approving the motion for a new trial clearly and fully explains the matter and shows that upon an examination as to the qualifications of the jurors, some of them were found to be disqualified.

5. ELECTRICITY  $\S$ 19(5)—SUFFICIENCY OF EVIDENCE TO SUSTAIN VERDICT FOR DAMAGES FOR DEATH FROM CHARGED ELECTRIC LIGHT POST.

The evidence, while conflicting, was sufficient to authorize the verdict, and the court did not err in overruling the motion for a new trial.

*(Additional Syllabus by Editorial Staff.)*

6. ELECTRICITY  $\S$ 16(5)—AFTER KNOWLEDGE OF DEFECT IN ELECTRIC LIGHT POST CITY SHOULD STOP CURRENT THROUGH WIRES.

Where a city had actual notice of the defective condition of an electric light post located on the premises of a public school where children were continually at play, the law required it to cease sending current through the wires attached to the post until it was repaired.

**7. ELECTRICITY — 14(3)—CARE REQUIRED IN USE DEFINED.**

Persons or companies operating telephones and electric light systems for the transmission of electricity upon and over public highways owe to the public the duty of properly constructing and maintaining their wires and poles, and they are bound to provide such safeguards against danger as are best known and most extensively used, and all necessary precaution to avoid casualties which may be reasonably expected.

**8. ELECTRICITY — 14(2)—HIGH DEGREE OF CARE REQUIRED IN CONSTRUCTION AND REPAIR OF POST SUPPORTING HEAVILY CHARGED ELECTRIC WIRES.**

A city using a public highway for electric wires carrying a powerful and dangerous current must use a "very high degree" of care in the construction, use, and repair of an electric light post to which they were attached.

Error from City Court of Sandersville;  
E. W. Jordan, Judge.

Action by S. M. Moye against the City of Sandersville. Judgment for plaintiff, motion for new trial denied, and defendant brings error. Affirmed.

W. M. Goodwin, J. E. Hyman, and Rawlings & Wood, all of Sandersville, for plaintiff in error.

A. R. Wright and J. J. Harris, both of Sandersville, for defendant in error.

SMITH, J. S. M. Moye brought suit against the city of Sandersville to recover damages for the homicide of his minor son, alleging that the deceased, while riding a bicycle upon one of the sidewalks of said municipality, came to his death by reason of coming in contact with an electric light post, commonly known as a "white way" post, which post was located at the entrance of the public school grounds, immediately adjacent to the sidewalk, and that it was an improper instrumentality to support electric wires charged with approximately 2,300 volts; that the wires were insufficiently insulated, the insulation thereon being old and worn, and inadequate to prevent the passage of the dangerous current therefrom in the event any person or thing came in contact therewith; that the defendant was negligent in stringing along the public highway, and over grounds where the public was invited to be, at a height of between 10 and 11 feet only, wires charged with such a highly dangerous current of electricity; that the defendant continued to use this post for the purposes above enumerated notwithstanding it had knowledge of the improper construction and maintenance thereof, and that the post was likely to become charged with the high voltage referred to; that the defendant permitted a "ground" to continue in its system an unreasonable length of time without detecting or curing the same;

and that it was also negligent in failing and refusing to cut off its current for an unreasonable length of time after notice that the deceased was in contact therewith. We will briefly state the evidence supporting each of these several alleged acts of negligence and the law applicable thereto.

The following evidence will suffice to indicate whether or not the defendant had knowledge of the defective condition of the post:

"Mr. Porter [superintendent of the city's electric plant] reported to the council that this was a defective post. \* \* \* He made this report in the council room at the time the city council were present. \* \* \* He advised the removal of those posts, and that he did not consider them safe. \* \* \* That was some months previous to the death of young Mr. Moye."

Another witness testified to the same effect and import in the following language:

"My understanding is that he [Mr. Porter] reported we had a post there charged with electricity at the time, and that it was dangerous."

[6] Still another witness testified that he erected the post, and at the time it was being put up he protested to Mr. Porter against the manner in which it was erected and told him that it was dangerous. Having, therefore, actual knowledge of the defective condition of this post, which was located on the premises of a public school, a place where children were continually at play, the law required the defendant to cease sending its current through the wires strung thereto until the same was repaired. Atlanta Con. St. Ry. Co. v. Owings, 97 Ga. 663, 25 S. E. 377 (1), 33 L. R. A. 793.

The allegation that the wires attached to the defective post conveyed an unnecessarily high and dangerous electric current, and that an innocuous current could have been used, was supported by the evidence of the witnesses Harrison and Eager.

The former testified that—

"By using a transformer that current there could have been reduced to 110, \* \* \* and not have been dangerous at all. I directed Mr. Porter's attention to that fact at the time. He directed me to carry it on with the regular voltage."

The latter testified:

"There is no danger in 110 voltage unless some other contact is made."

This statement was corroborated by another witness, an electrical engineer, who testified that a current of 110 volts was harmless. The defendant company having elected to use an extremely powerful and dangerous and unnecessary current, it should have used a "transformer," or other known and approved appliance, to reduce the current to a safe voltage.

[7] In *Heidt v. Southern Bell Telephone Co.*, 122 Ga. 474-478, 50 S. E. 361, 363, it was said by Evans, J.:

"Persons or companies operating telephone and electric light systems for the transmission of electricity upon and over public highways owe to the public the duty of properly constructing and maintaining their respective wires and poles; they are bound to provide such safeguards against danger as are best known and most extensively used, and all necessary protection must be afforded to avoid casualties which may be reasonably expected."

See, also, in this connection, *Higgins v. Cherokee Railroad*, 73 Ga. 149; *Davis v. Augusta Factory*, 92 Ga. 712, 18 S. E. 974; *Columbus Railroad Co. v. Kitchens*, 142 Ga. 677, 679, 83 S. E. 529, L. R. A. 1915C, 570.

The evidence as to the alleged negligence of the defendant in insufficiently and improperly grounding the post was as follows:

"The effect of a permanent ground is to keep the current going into the ground. Then the post would not be dangerous; it would carry it into the ground. By that means you can render it harmless. \* \* \* The effect of a permanent ground is to carry the current in the ground. No effort was made to put a ground of this character there. \* \* \* It could have been done by running the wires down seven or eight feet, depending upon the depth of the moisture. That would have rendered the post not dangerous, if they had done that."

[8] There was positive evidence that this post was insufficiently grounded, since a witness testified that he had, prior to the death of plaintiff's son, received a shock from the post without coming in contact therewith. The law imposed upon the defendant, who was using the public highway for electric wires carrying a powerful and dangerous current, a "very high degree" of care in the construction, use, and repair of the post in question. *Southern Bell Telephone Co. v. Davis*, 12 Ga. App. 34, 76 S. E. 786; *Elning v. Georgia Ry. Co.*, 133 Ga. 458, 461, 66 S. E. 237 (1 and 2).

The testimony with reference to the negligence charged against the defendant in not sufficiently and properly insulating its wires so as to prevent the escape of the current therefrom should any person or thing come into contact therewith was in part as follows:

"It would have been best to have constructed this post there with insulation that would prohibit the escape of current from those wires. That kind of wire was not used there. These were old wires they had there."

In the case of *Trammell v. Columbus Railroad Co.*, 9 Ga. App. 98, 70 S. E. 892 (3), this court, in referring to the duty of insulating wires said:

"An electric light company, engaged in conveying electricity by overhead wires over the

streets of a city, is under the duty of keeping its wires so insulated as at all times to prevent, or at least to guard against, the effect of objects coming in contact with them, regardless of the cause which brings about the contact."

To sustain his ground of negligence that the defendant willfully refused to shut off its current after notice that the deceased was in contact with the post, thereby permitting the current to pass through him for a period of 8 to 10 minutes, the plaintiff introduced the following evidence:

"I knew Phil Moya. He is dead now. I don't remember the date he died. I remember the occasion. I was going home. It was after dark and drizzling rain. Just as I crossed down there, right at the depot, I met a negro. I suppose that was 125 yards from the place where he was killed. I met this negro coming from that direction running; he came running from the direction where I found Phil Moya. After meeting that negro I went on up to the place where Phil Moya was killed. I ran on up there, and I saw Phil lying on the sidewalk on his back. \* \* \* I ran into Preacher Curr's house and telephoned the power house and told them what had occurred and to turn off the current. \* \* \* I waited until I thought they had time to turn the current off, and it didn't go off, and I went back and called Mr. Porter's house. \* \* \* Mr. Porter came to the phone, and I told him what had occurred, and he got there almost by the time the lights were cut off. \* \* \* I suppose it was six, seven, or eight minutes. I called up the power house and told them to cut it off; \* \* \* that current was going through his body all of this time."

"The duty of shutting off the current when necessary involves the duty of having a person at the power plant competent to turn off the current. If search discloses that there is no one at the plant with authority to do so, the company will be charged with injuries resulting from the continuance of the electric current."

Curtis on the Law of Electricity, pp. 713, 714.

Clearly, therefore, when we view the above facts in connection with the duty placed upon the defendant by rules of law, we are precluded from holding that the verdict was without evidence to support it and contrary to law.

It is true that there was evidence introduced in behalf of the defendant to the effect that about 10 days before the homicide the deceased threw a metal hoop over the top of this white way post, which hoop rested both upon the wires on either side of the post and the post itself; and it is upon this proof that the defendant sought to avoid the consequences of its negligence, contending, of course, that the intervening agency of the hoop brought into play by the deceased was the proximate cause of the tragedy. The proximate cause of the death in this case was as we view the facts developed upon the trial, peculiarly a question for solution by the jury. They, no doubt, rejected the defend-

ant's contention that the intervening agency of the hoop thrown over the post by the deceased was the proximate cause of his death, on the idea that this act would have been without dangerous effect but for the antecedent negligence of the defendant in improperly grounding the post, and in conveying an unnecessarily high and dangerous current through the insufficiently insulated wires strung thereto, for they had before them the testimony of an expert who said that—

If this "same hoop had been thrown over a single one of these lights out here on the public highway, and a man had come in contact with it in that manner, there would not have been the slightest danger. The difference between that post and these posts is in the voltage. There is also a difference in the method of construction. Even if the hoop had been up there like Judge Rawlings said, if that post had been constructed like the white way posts, and this boy [the deceased] had lifted it up and got hold of it, he would not have been hurt."

The defendant also sought to avoid liability on the ground that the deceased was a trespasser, contending that on the night of the homicide he tried to climb the post to remove the hoop, and in this manner met his death. The jury were amply warranted in not agreeing with the defendant in this particular, for the only eyewitness to the tragedy testified that he saw the deceased, who was riding a bicycle, enter upon the sidewalk, and that when the deceased came opposite the post he fell from his machine. This witness further testified that he attempted to pick the boy up, but was himself knocked down by the current. Another witness testified in this connection that when he reached the scene of the homicide the boy was lying across his bicycle on the sidewalk, with his head towards the center of the street and his right foot across the cement curb, with the heel of his shoe against the post, and that there was an arc between the post and the heel.

[1-5] What is hereinbefore said deals only with the general grounds of the motion for a new trial, since the other questions presented for review are sufficiently ruled upon in the headnotes.

Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(25 Ga. App. 99)

HAPP BROS. CO. v. MONTGOMERY.  
(No. 11139.)

(Court of Appeals of Georgia, Division No. 2.  
March 18, 1920.)

(Syllabus by the Court.)

APPEAL AND ERROR §1005(2) — APPROVED VERDICT SUPPORTED BY SUFFICIENT EVIDENCE WILL NOT BE DISTURBED.

The motion for a new trial being based upon the general grounds only, and the evidence,

though conflicting, being sufficient to support the verdict, this case falls within the well-settled rule that under such circumstances the verdict, which has the approval of the trial judge, will not be controlled.

Error from Superior Court, Webster County; Z. A. Littlejohn, Judge.

Action between the Happ Bros. Company and J. W. Montgomery. Judgment for the latter, motion for new trial denied, and the former brings error. Affirmed.

M. A. Walker, of Preston, for plaintiff in error.

J. F. Souther, of Preston, for defendant in error.

SMITH, J. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(25 Ga. App. 100)

MILLER v. C. M. KEYS COMMISSION CO.  
(No. 11144.)

(Court of Appeals of Georgia, Division No. 2.  
March 18, 1920.)

(Syllabus by the Court.)

1. PLEADING §854(2) — DEFENSE DENYING INDEBTEDNESS HELD PROPERLY STRICKEN AS BEING TOO VAGUE AND INDEFINITE.

C. M. Keys Commission Company brought suit against Dan Miller upon a promissory note. To this suit the defendant filed an answer denying that he was indebted to the plaintiff upon the note, but admitting that the note was past due and unpaid. The defendant further insisted that he was not indebted to the plaintiff in any amount, but that, on the contrary, the plaintiff was indebted to him because that on or about September, 1917, the defendant being in the business of buying and selling cattle, he having at that time several cars of cattle bargained for, the plaintiff through its representative persuaded him to let the plaintiff pay for, take them and resell them, agreeing to guarantee the defendant a profit over and above the purchase price, the amount of the guaranty being indefinite, but that the defendant would realize a nice profit on the cattle; that he relied upon said guaranty and allowed the plaintiff to take over and pay for six cars of cattle; that the plaintiff paid for the cattle and shipped them away. The defendant further alleged that the said cars of cattle were worth a reasonable profit over and above the purchase price, amounting to at least \$450, that he had never been paid anything in the way of profit on said cattle, and asked for a judgment against the plaintiff for his set-off. Held, that this defense was too vague and indefinite, and that the court did not err in striking the same. See Jones v. Americus Automobile Co., 15 Ga. App. 453, 83 S. E. 642, and cases there cited.

2. BILLS AND NOTES §104 — DEFENSE OF DURESS AND WANT OF CONSIDERATION PROPERLY STRICKEN.

The defendant further pleaded that shortly after this transaction he moved to Jacksonville,

Fla., and became connected in business with certain persons there, and became interested in certain property, that shortly after he settled at Jacksonville the plaintiff sent a claim against him to an attorney, said claim being for the amount of the note sued for, and that said attorney threatened to institute court proceedings, and was about to institute court proceedings and hold up defendant's property and put him out of business, and that all this was done for the purpose of extorting money or a note from the defendant, which he did not owe and which the plaintiff knew he did not owe, and that this was done for the purpose of offsetting what the defendant was due the plaintiff from the sale of the cattle, that under these circumstances he gave the note and that he alleges that there was no consideration for the note, that he owed plaintiff nothing, that the note was obtained by duress, and he prayed for a judgment against the plaintiff for \$450, besides interest. *Held*, that the court did not err in striking this defense, which sought to set up duress and total want of consideration. See *Williams v. Buchanan*, 17 Ga. App. 466, 87 S. E. 605(1), and cases there cited.

Error from City Court of Camilla; Ben T. Bursoa, Judge.

Action by the C. M. Keys Commission Company against Dan Miller, with claim to set-off by defendant. Defenses stricken, and defendant brings error. Affirmed.

Peacock & Gardner, of Camilla, for plaintiff in error.

J. J. Hill, of Pelham, for defendant in error.

SMITH, J. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(25 Ga. App. 104)

EMPIRE COTTON OIL CO. v. PENNY.  
(No. 11201.)

(Court of Appeals of Georgia, Division No. 2,  
March 18, 1920.)

(Syllabus by the Court.)

1. WITNESSES  $\S$  255(10), 259—WITNESS, REFRESHING MEMORY FROM MEMORANDUM MADE BY HIM, MUST TESTIFY FROM RECOLLECTION AS REFRESHED.

In the trial of a case a witness may refresh his memory by referring to a memorandum previously made by him at the time of the transaction; but, after thus refreshing his memory, he must testify from his recollection as thus refreshed. This is true where a court reporter, who had taken down the evidence of a witness in a former trial of the case, testified that independently of his notes of such testimony he could not testify as to what the witness had sworn, and it was not error in the court below to refuse to permit him to read to the jury his notes. *Albany Phosphate Co. v. Hugger*, 4 Ga. App. 771, 781, 782, 62 S. E. 533.

2. EVIDENCE  $\S$  211—HUSBAND AND WIFE  $\S$  235(2)—WITNESSES  $\S$  893(2)—TRANSCRIPT OF FORMER TRIAL ADMISSIBLE TO IMPEACH PARTY AS WITNESS, AND TO PROVE HIS ADMISSIONS; HUSBAND'S AGENCY FOR WIFE QUESTION FOR JURY.

A transcript of the evidence of a former trial of the same case between the same parties, when properly authenticated, is admissible in evidence on another trial, not only for the purpose of impeaching one of the parties to the case, who is a witness, but also for the purpose of proving admissions made by such witness. The court having admitted such transcript in evidence, it was error to confine the evidence to impeachment alone, and it was a question of fact for the jury to determine whether or not the husband was the agent of his wife in the purchase of the goods sued for, and the action of the judge in granting a nonsuit was error.

Error from Superior Court, Crisp County; O. T. Gower, Judge.

Action by the Empire Cotton Oil Company against Ada Penny. Judgment of nonsuit, and plaintiff brings error. Reversed.

J. T. Hill and Jas. L. Wimberly, both of Macon, for plaintiff in error.

Pearson Ellis, of Cordele, for defendant in error.

SMITH, J. Judgment reversed.

JENKINS, P. J., and STEPHENS, J., concur.

(25 Ga. App. 86)

EVANS v. LOTT. (No. 10890.)

(Court of Appeals of Georgia, Division No. 2,  
March 18, 1920.)

(Syllabus by the Court.)

SALES  $\S$  92—PURCHASE-MONEY NOTE IS AVOIDED BY TRANSACTION AMOUNTING TO RESCISSION OF ORIGINAL SALE.

Where a person sells to another personal property under an express warranty, taking in payment a purchase-money note, which recites the consideration for which the note is given, if the purchaser should subsequently, without reference to the contract of warranty, merely make an independent swap or exchange with the seller, whereby he received other property for that originally purchased, the transaction would not in law amount to a rescission of the original contract of sale, so as to avoid the note given to the seller by the purchaser. In such a transaction the consideration given by the purchaser for the new property arises by virtue of the exchange, whereby the seller receives back the original property sold by him, and the reason why the purchaser owned that property to trade with comes from his having given to the seller his note therefor. But where, as in this case, a person sells to another personal property under an express warranty, taking from the seller a purchase-money note which recites that it is given as purchase money for the



property bought, and where subsequently the purchaser, acting under the contract of warranty, returns to the seller and reports defects in the property bought by him and offers to return it, and where the seller, recognizing his contract of warranty, assents to and actually accepts a return of the property, the latter transaction amounts to a complete rescission of the former contract of purchase and sale, with the result that the note previously given for the purchase money of the original property becomes null and void. The fact that subsequent to such return and acceptance of the property the parties to the contract may have agreed to the substitution of other property in lieu of that originally purchased would not operate to revive the validity of the note which had become invalid upon the rescission of the original contract under which it was given.

Error from City Court of Douglas; W. R. Frier, Judge.

Action by J. S. Lott against E. D. Evans. Judgment for plaintiff, and defendant brings error. Reversed.

Lott sued Evans on a promissory note for \$175. The defendant admitted the execution of the note, and pleaded that the note was without consideration, for the reason that subsequent to its execution the contract under which it was given was rescinded. It appears that there have been three transactions between the parties to this litigation. In the first Evans gave Lott his note for \$100 as boot in a horse-swap; in the second horse-swap, in which Lott received back the horse first received by Evans, Lott received an additional \$75 boot, and surrendered to Evans his first note, taking a new note for \$175. In this note it was stated that it was given as purchase money for a described horse, it being the second horse referred to. In the second transaction Lott expressly warranted the soundness of the horse thus turned over to Evans. In connection with the third transaction the plaintiff, Lott, testified in part as follows:

"I am the plaintiff in the above case, and I remember the transaction for which the note sued upon was given. The note has not been paid, and is just, true, and unpaid. This note did not figure in the last horse-swap between Mr. Evans and myself. It was given in a former horse-swap between myself and Mr. Evans as boot. I did not take back the mule described in the note sued upon. I swapped Mr. Evans another mule for the one described in the note sued upon."

#### Cross-examination:

"The note sued upon shows to be for the purchase price of a black mare mule about six years old, weighing about 1,000 pounds, named Minnie. In about two or three weeks after this trade, and after the note was given, the defendant brought the mule back and stated that there was something wrong with her. I don't remember just what complaint he made. It seems to me like he stated that she was a

little thick-winded. I do not remember whether there was any complaint made as to her eyes or not. I don't think there was. However, I would not swear positively what the complaint was. He stated that I had guaranteed the mule and that he was not satisfied with her. I told him all right, turn her in my lot, and this was done. I do not remember what time of the day this was. Cannot say what time in the morning the mule was brought back and turned in the lot, or what time of the day it was when we finally swapped mules. But he got another mule from me during the same day for the one brought back. It was a different mule from the one described in the note."

The defendant, in his evidence, makes the following statement:

"I told Mr. Lott, when I carried the mule back, that he had stated to me, unless the mule was sound and all right, that she was not my mule, and I would not have to keep her. When I told him that she was going blind, and I did not want her, his reply was, 'Well, turn her in the lot.'"

The jury returned a verdict in favor of the plaintiff. The defendant made a motion for a new trial, which was overruled, and to this judgment the plaintiff excepted.

T. A. Wallace, of Douglas, for plaintiff in error.

E. L. Grantham, of Douglas, for defendant in error.

JENKINS, P. J. (after stating the facts as above). There is really very little actual conflict in the evidence as given by the plaintiff and the defendant in this case. The evidence for the plaintiff, as given on direct examination, would, we think, have been sufficient to have sustained his case as laid; but upon going into details as to the transaction, in his evidence given on cross-examination, the plaintiff makes it to plainly appear that the horse described in the note was brought back to him, the seller, under and in accordance with his contract of warranty; that the defendant, on bringing it back to him, stated that it had been guaranteed, and that he was not satisfied with the animal; that he then told the defendant, "All right," to turn her in the lot; and that this was done. It thus appears from the plaintiff's own evidence that the last transaction was not an independent horse-swap, but that, in accordance with the terms of the warranty included in the contract of sale of the second mule, the defendant, acting under his rights under that contract, returned the mule, and the plaintiff, in recognition of his duty under that contract, accepted him, all of which necessarily amounted to a complete rescission of the contract of sale as previously made, and, this being true, the note given in furtherance and in consideration of that sale no longer remained valid. Under the evidence of both the plaintiff and the defendant, the defendant

owes for the third horse; but the seller failed in the third instance to take a note therefor, as he did in the second instance. See *Fisher v. Whitehurst*, 14 Ga. App. 218, 219, 80 S. E. 536 (2). Under this view of the law there could have been no valid recovery in the suit on the note, and it is unnecessary to consider any of the other assignments of error.

Judgment reversed.

STEPHENS and SMITH, JJ., concur.

(25 Ga. App. 102)

**CITY OF ATLANTA v. GULF PAVING CO.**  
(No. 11164.)

(Court of Appeals of Georgia, Division No. 2.  
March 18, 1920.)

*(Syllabus by the Court.)*

1. MUNICIPAL CORPORATIONS ⇨864(1, 3)—  
MAY INCUR LIABILITY WITHOUT CREATING  
A DEBT IF MONEY IN TREASURY OR CURRENT  
TAXES WILL DISCHARGE.

A municipality may incur liability for a legitimate expense without creating a debt within the meaning of article 7, § 7, par. 1, of the Constitution of this state (Civ. Code 1910, § 6563), provided there be, at the time of incurring the liability, a sufficient sum in the treasury which may be lawfully used to pay the liability incurred, or if a sufficient amount to discharge the liability can be raised by taxation during the current year. *Tate v. Elberton*, 136 Ga. 301, 71 S. E. 420; *City of Dawson v. Waterworks Co.*, 106 Ga. 696, 32 S. E. 907; *City of Waycross v. Tomberlin*, 146 Ga. 504, 91 S. E. 560(5); *Gulf Paving Co. v. City of Atlanta*, 149 Ga. 114(8), 99 S. E. 874.

(a) The mere "appropriation" by the county of Fulton of money for the purpose of paving a street within the corporate limits of the city of Atlanta would not be such a provision by the city for paying the cost of the improvement as would authorize it to incur a liability therefor. See *Tate v. Elberton*, supra.

2. MUNICIPAL CORPORATIONS ⇨337—BIDDER  
MAY RECOVER DEPOSIT AFTER HIS REFUSAL TO  
CONTRACT BECAUSE OF LACK OF APPROPRIA-  
TION.

The evidence on the trial of this case showed that the city of Atlanta, desiring to repave a portion of a street within the city limits on the basis of assessments against abutting property owners for part of the cost of the improvement, and against the property of the street car company which occupied the street, for a part of the

cost of the improvement, and without any provision for payment of the balance of the cost of the improvement, except that the board of commissioners of roads and revenues of the county of Fulton had promised to appropriate a specified amount for that purpose, advertised for bids to make the improvement, and in the advertisement provided that each bidder should deposit \$1,000, conditioned to enter into a contract to make the improvement in the event the bid should be accepted, and that upon failure to enter into the contract the deposit should be forfeited to the city as liquidated damages. The plaintiff filed a bid and deposited with the city a check for \$1,000, conditioned as above mentioned. The bid was accepted, and after notice of acceptance a demand was made upon the bidder to execute the contract to do the paving. The bidder declined upon the ground that the city had not provided means with which to pay for the work, and the defendant thereupon claimed and cashed the check deposited as a forfeiture. The documentary evidence introduced showed that at the time the contract in question was entered into the city, by solemn ordinance, which has never been repealed or amended, had appropriated every dollar it could raise from any and all lawful sources of revenue to other purposes than the paving of the designated street, including the whole amount which it was authorized under its charter to raise by taxation. The promise by the county of Fulton to appropriate an amount to help pay the cost of paving the street was never carried out. Held that, applying to these facts the principles announced above, the evidence demanded a finding in favor of the plaintiff, who was seeking to recover the amount deposited with the city and which the city had claimed and converted to its own use, and the court did not err in so directing.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by the Gulf Paving Company against the City of Atlanta. Judgment for plaintiff, and defendant brings error. Affirmed.

See, also, 99 S. E. 538.

J. L. Mayson and J. M. Wood, both of Atlanta, for plaintiff in error.

Anderson, Rountree & Crenshaw, of Atlanta, for defendant in error.

SMITH, J. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(127 Va. 132)

(102 S.E.)

**SOUTHERN RY. CO. v. FINLEY & SEYMOUR.**

(Supreme Court of Appeals of Virginia. March 18, 1920.)

**1. CARRIERS  $\S$ 219(5)—CONNECTING OR DELIVERING CARRIER OF INTERSTATE SHIPMENT LIABLE FOR ITS OWN DEFAULTS.**

Under the Carmack Amendment (U. S. Comp. St. §§ 9604a, 9604aa), authorizing the shipper of an interstate shipment to sue the initial carrier for the defaults of connecting carriers, but providing that nothing therein shall deprive any holder of a bill of lading of existing remedies or rights of action, a connecting or delivering carrier is liable for its own defaults resulting in damage to live stock.

**2. APPEAL AND ERROR  $\S$ 236(2)—OBJECTION ON ACCOUNT OF VARIANCE SHOULD BE MADE BY MOTION TO EXCLUDE EVIDENCE.**

In an action for damages to a shipment of live stock, an objection based on an alleged variance between an allegation that the shipment was delivered to defendant at L, and a bill of lading showing that it was delivered to connecting carrier at that point, should have been raised by motion to exclude the evidence, in view of Code 1919, §§ 6104, 6250, as to amendments.

**3. CARRIERS  $\S$ 228(1)—BURDEN OF SHOWING CAUSE OF DAMAGE TO SHIPMENT UNACCOMPANIED BY SHIPPER IS ON CONNECTING CARRIER SUED.**

When an interstate carrier receives for transportation live stock in good condition unaccompanied by the owner or his agent, and delivers it in damaged or bad condition, the burden of proof as to the cause of the damage is on the carrier.

**4. TRIAL  $\S$ 156(3)—ON DEMURRER TO EVIDENCE, COURT BOUND TO CONCLUDE THAT DAMAGE WAS DUE TO DEFENDANT'S NEGLIGENCE.**

Where, in an action for damages to an interstate shipment of live stock, the jury might fairly have inferred from the evidence that the damage was caused by defendant's negligent failure to feed and water the stock during their journey, the court was bound to so conclude on demurrer to the evidence.

**Error to Corporation Court of Danville.**

Action by Finley & Seymour against the Southern Railway Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

Withers, Brown & Leigh, of Danville, for plaintiff in error.

P. J. Hundley and W. H. Rogers, both of Danville, for defendants in error.

**PRENTIS, J.** The Southern Railway Company complains of a judgment in favor of Finley & Seymour for damages to mules shipped from Lexington, Ky., to Danville, Va., caused by the alleged negligent failure of the company to supply them with sufficient food

and water during the transportation. The company filed its demurrer to the plaintiffs' evidence, which the court overruled, and gave judgment for the plaintiffs.

There are three assignments of error.

[1] The first is stated thus:

"The evidence shows that the said Cincinnati, New Orleans & Texas Pacific Railway Company was the initial carrier issuing the bill of lading covering the carload of mules in question in this case, and that therefore the said defendant is not a proper party, plaintiffs' right of action being against said initial carrier and it alone."

The company cites and relies on the case of *Chesapeake & Ohio Ry. Co. of Indiana v. National Bank of Commerce*, 122 Va. 471, 95 S. E. 454, and makes several quotations from the opinion, among them this language:

" \* \* \* And in such case the first contract remains in force by virtue of said federal statute law, and the shipper and all assignees of his claiming through him (all of whom could have enforced such original contract) have no right of action for damages against such subsequent carrier, but only against the initial carrier."

When the language of any opinion is to be construed, the first consideration should be directed to the precise question which was before the court when the language was used. This being ascertained, then the language should be construed as relating to that question. The issue in the case of *C. & O. Ry. Co. v. Bank*, supra, was whether the Union Pacific Railroad Company or the Chesapeake & Ohio Railway Company of Indiana was the initial carrier. The shipment in that case originated at Medicine Bow, Wyo., and an order notify bill of lading was issued by the Union Pacific Railroad Company for the transportation of horses from that point to Windsor, N. C., by way of Chicago. It appeared, however, that there was a tariff regulation in existence, which had been filed with the Interstate Commerce Commission and was effective, which prohibited the movement of live stock east of Chicago on such a bill of lading. So that it was necessary, because of that lawful regulation, to stop the shipment at Chicago. Thereupon the owner entered into a new contract with the Chesapeake & Ohio Railway Company of Indiana for the shipment of the horses from Chicago to Windsor, N. C.; the original bill of lading being surrendered and a new one issued therefor by the Chesapeake & Ohio. The chief controversy in that case, then, was whether the Union Pacific or the Chesapeake & Ohio was liable as the initial carrier, and all that is said in the opinion must be construed in view of the fact that the court determined that the Chesapeake & Ohio was such initial carrier, and therefore subject to the responsibilities imposed upon initial carriers by the Carmack Amendment.

Every expression used in that opinion, which can be fairly construed as indicating that the connecting and delivering carriers of an interstate shipment cannot be sued for their own negligence, was inadvertent and is disapproved. That question was not involved nor remotely considered in that case. It is perfectly well settled that a connecting or delivering carrier may be sued for its own defaults, and so far as we are advised there is no conflict of authority on this point.

In the case of *Georgia, F. & A. Ry. Co. v. Blish Milling Co.*, 241 U. S. 190, 36 Sup. Ct. 541, 60 L. Ed. 948, where it appeared that the shipment originated at Seymour, Ind., and that the Baltimore & Ohio Southwestern Railroad Company was the initial carrier, that the shipment was transported over the Central of Georgia Railroad Company, a connecting carrier, and reached its destination over the line of the Georgia, Florida & Alabama Railway Company, the delivering carrier, the first question raised is identical with that here involved, and is thus stated by the court:

"That the plaintiff's exclusive remedy was against the initial carrier, the Baltimore & Ohio Southwestern Railroad Company, under the Carmack Amendment of section 20 of the Hepburn Bill."

And the court disposes of that claim in this language:

"The first contention is met by repeated decisions of this court. The connecting carrier is not relieved from liability by the Carmack Amendment, but the bill of lading required to be issued by the initial carrier upon an interstate shipment governs the entire transportation, and thus fixes the obligations of all participating carriers to the extent that the terms of the bill of lading are applicable and valid. 'The liability of any carrier, in the route over which the articles were routed, for loss or damage, is that imposed by the act as measured by the original contract of shipment, so far as it is valid under the act.' *Kansas Southern Ry. Co. v. Carl*, 227 U. S. 639, 648 [33 Sup. Ct. 891, 57 L. Ed. 638]. See *Adams Express Co. v. Croninger*, 226 U. S. 491, 507, 508 [33 Sup. Ct. 148, 57 L. Ed. 814, 44 L. R. A. (N. S.) 257]; *C., C. & St. L. Ry. v. Dettlebach*, 239 U. S. 588, 591 [36 Sup. Ct. 177, 60 L. Ed. 453]; *Southern Railway v. Prescott*, 240 U. S. 632, 637 [36 Sup. Ct. 469, 60 L. Ed. 836]; *Northern Pacific Ry. v. Wall*, ante [241 U. S. 87, 36 Sup. Ct. 493, 60 L. Ed. 905]."

Among the instructive cases decided by the Supreme Court of the United States in which the connecting or terminal carrier has been sued and held responsible under the bill of lading issued by the initial carrier are *C., C. & St. L. Ry. Co. v. Dettlebach*, 239 U. S. 581, 36 Sup. Ct. 177, 60 L. Ed. 453, and *Missouri, K. & T. Ry. Co. v. Ward*, 244 U. S. 383, 37 Sup. Ct. 617, 61 L. Ed. 1213. In the latter case this is said:

"The purpose of the Carmack Amendment has been frequently considered by this court. It

was to create in the initial carrier unity of responsibility for the transportation to destination. *Atlantic Coast Line Railroad Co. v. Riverside Mills*, 219 U. S. 188 [31 Sup. Ct. 164, 55 L. Ed. 167, 81 L. R. A. (N. S.) 7]; *Northern Pacific Ry. Co. v. Wall*, 241 U. S. 87, 92 [36 Sup. Ct. 493, 60 L. Ed. 905]. And provisions in the bill of lading inconsistent with that liability are void. *Norfolk & Western Ry. Co. v. Dixie Tobacco Co.*, 228 U. S. 593 [33 Sup. Ct. 606, 57 L. Ed. 980]. While the receiving carrier is thus responsible for the whole carriage, each connecting road may still be sued for damages occurring on its line; and the liability of such participating carrier is fixed by the applicable valid terms of the original bill of lading."

The same rule is followed in the recent cases of *John Lysaght, Limited, v. Lehigh Valley R. Co.* (D. C.) 254 Fed. 353; *Elliott v. Chicago, M. & St. P. Ry. Co.*, 35 S. D. 57, 150 N. W. 777; 10 C. J. 542.

The reasons for this conclusion have been so frequently stated as to need no repetition. The Carmack Amendment itself, which provides that the shipper may sue the initial carrier, either for its own default or for the default of any connecting carrier, contains this conclusive proviso:

"That nothing in this section shall deprive any holder of such \* \* \* bill of lading of any remedy or right of action which he has under the existing law." U. S. Comp. St. § 8604a.

So that there can be no doubt that the initial carrier may be sued, either for its own negligence or for that of any connecting carrier, while each of the connecting carriers may be sued for its own default or negligence.

[2] The second assignment is based upon what is called a fatal variance between the allegations and the proof; it being alleged in the declaration that the mules were delivered to the defendant company at Lexington, Ky., whereas the bill of lading shows that they were delivered to the Cincinnati, New Orleans & Texas Pacific Railway Company at Lexington, Ky. The established rule in Virginia is that objection for a supposed variance between the allegations and the proof should be made in the trial court, and that the appropriate method of making such objection is to move to exclude the evidence. *Bertha Zinc Co. v. Martin*, 93 Va. 801, 22 S. E. 869, 70 L. R. A. 999; *Newport News & Old Point Ry. & E. Co. v. McCormick*, 106 Va. 517, 56 S. E. 281; *Va. & Southwestern Ry. Co. v. Bailey*, 103 Va. 228, 49 S. E. 33; *Conrad v. Ellison-Harvey Co.*, 120 Va. 458, 91 S. E. 763, Ann. Cas. 1918B, 1171; *Standard Paint Co. v. Vietor*, 120 Va. 595, 91 S. E. 752.

The question is controlled in this state by Code 1919, § 6250, so frequently construed, which provides that, if a variance between the evidence and the allegations appear, the court, if it considers that the substantial justice will be promoted and that the opposite party

cannot be prejudiced thereby, may allow the pleadings to be amended, or, instead of having the pleadings amended, may direct the jury to find the facts, and, if it consider the variance such as could not have prejudiced the opposite party, may give judgment according to the right of the case, and also by Code 1919, § 6104, which provides that the court may at any time, in the furtherance of justice and upon such terms as it may deem just, permit pleadings to be amended, and that at every stage of the proceedings the court shall disregard any error or defect which does not affect the substantial rights of the parties.

In this case there was no surprise whatever, because the company itself introduced the bill of lading which it now claims produces the variance. The case was fairly tried and submitted to the jury; the attention of counsel, court, and jury being directed only to ascertaining the responsibility of the company as the delivering or terminal carrier. Whenever it is desired to raise a question of this character, which may be cured by amendment of the pleadings, it should be raised by motion to exclude the evidence.

[3, 4] It is also claimed that the evidence is insufficient to support the judgment, and there is much discussion in the briefs as to whether the burden of proof as to the cause of the damage was upon the plaintiffs or the company. In our view, the weight of authority is that such burden is upon the company when it receives for transportation live stock in good condition, unaccompanied by the owner or his agent, and delivers it in damaged or bad condition. *Galveston, H. & S. F. Ry. Co. v. Wallace*, 223 U. S. 481, 32 Sup. Ct. 205, 56 L. Ed. 523 (a pertinent case, though not involving a shipment of live stock); *Church v. Chicago, B. & Q. R. Co.*, 81 Neb. 615, 116 N. W. 520; *Teeter v. Southern Express Co.*, 172 N. C. 616, 90 S. E. 761; *Illinois Cent. R. Co. v. Word*, 149 Ky. 229, 147 S. W. 949; note 130 Am. St. Rep. 442. In the case in judgment this question is immaterial, because the jury might fairly have inferred from the evidence that the damage to the mules was caused by the negligent failure of the defendant company to feed and water them properly during their long journey, and therefore the trial court was bound so to conclude under the demurrer to the evidence rule.

The judgment is plainly right.

Affirmed.

(127 Va. 772)

#### CITY OF RICHMOND v. ROSE.

(Supreme Court of Appeals of Virginia. March 18, 1920.)

#### 1. MUNICIPAL CORPORATIONS §763(1)—REQUIRED ONLY TO EXERCISE CARE TO KEEP SIDEWALK IN REASONABLY SAFE CONDITION.

A municipality is not an insurer against accidents on its sidewalks, but is liable only

for its failure to use ordinary care under the circumstances to keep the sidewalk in a reasonably safe condition for ordinary travel by persons using due care, and a defect in the walk is not actionable, unless it is such as might reasonably be presumed to be dangerous.

#### 2. MUNICIPAL CORPORATIONS §806(2)—PEDESTRIAN NEED NOT LOOK FOR DEFECTS IN WALK.

Ordinary care does not require that pedestrian, using a city sidewalk, shall inspect it for defects, or be on the lookout for defects or obstructions; but he may act on the assumption that the walk is in a reasonably safe condition, unless the danger is so obvious that it would be apparent to an ordinarily prudent person.

#### 3. MUNICIPAL CORPORATIONS §791(1)—MUST INSPECT SIDEWALK FOR DANGEROUS IRREGULARITIES.

A municipality is charged with the duty of reasonable inspection of its sidewalks, and is held to have knowledge of defects which such an inspection would disclose.

#### 4. MUNICIPAL CORPORATIONS §821(6)—WHETHER DEFECT IN SIDEWALK IS ACTIONABLE IS ORDINARILY A JURY QUESTION.

Whether a defect or obstruction in a sidewalk was such as to give a right of action to a person injured thereby is ordinarily a jury question, since it is a complicated question of fact, involving the height of the obstruction, its appearance to pedestrians, and the peril which might have been anticipated by the city by the exercise of reasonable forethought.

#### 5. TRIAL §156(3)—ON DEMURRER TO EVIDENCE, FACTS WHICH JURY MIGHT FIND AGAINST DEMURRANT ARE CONSIDERED AS FOUND.

In ruling on a demurrer to the evidence, facts as to which reasonable minds might differ under the evidence might be found by the jury against demurrant, and therefore must be considered by the court as having been so found.

#### 6. MUNICIPAL CORPORATIONS §821(6)—DEFECT IN SIDEWALK HELD NOT IN LAW TOO SLIGHT TO BE ACTIONABLE.

An irregularity in a sidewalk, causing the elevation of a section thereof to a height of two inches at one edge and half an inch at the other edge above the rest of the walk, and which to a casual glance appeared like an ordinary expansion joint in the walk, held not so slight a defect that it was not actionable as a matter of law and the city was not entitled to judgment on demurrer to the evidence.

#### 7. MUNICIPAL CORPORATIONS §768(1)—WHETHER SIDEWALK DEFECTIVE DEPENDS ON CIRCUMSTANCES.

Whether a defect in a city sidewalk is such as to give one injured thereby a right of action for damages depends on the particular circumstances of each case.

#### 8. MUNICIPAL CORPORATIONS §821(5)—DEFECT NOT REASONABLY DANGEROUS DOES NOT WARRANT VERDICT AGAINST CITY.

Where the defect in a sidewalk is so slight that the minds of reasonable men would not

differ in the conclusion that it was not dangerous to travel in the ordinary modes by persons using due care, a verdict against the municipality cannot be sustained.

**9. MUNICIPAL CORPORATIONS ⇨806(1)—MUST ANTICIPATE USE OF SIDEWALK IN ORDINARY CIRCUMSTANCES.**

A city is bound to anticipate that its sidewalks will be used by pedestrians under circumstances which ordinarily may occur, so that their attention may be directed away from the obstruction as they approach it.

**10. MUNICIPAL CORPORATIONS ⇨768(1)—CITY CANNOT AVOID LIABILITY BECAUSE DEFECT WAS OBVIOUS.**

A city cannot avoid liability for injuries caused by defective sidewalk, on the theory that the defect was not actionable, because it was so obvious, since that would allow the municipality to defend by setting up own wrong.

**11. MUNICIPAL CORPORATIONS ⇨806(2)—PEDESTRIAN AT CROSSING MUST EXERCISE GREATER CARE THAN ON SIDEWALK.**

A pedestrian, passing over a street crossing, may more reasonably expect obstructions there, and should exercise greater care than upon the sidewalk, strictly so called.

**12. MUNICIPAL CORPORATIONS ⇨821(25)—MERE SIZE OF DEFECT DOES NOT ESTABLISH CONTRIBUTORY NEGLIGENCE.**

The court cannot hold as a matter of law, from the mere size of a defect in sidewalk, that a pedestrian was contributorily negligent, since that issue involves also all the circumstances surrounding plaintiff at the time, and her conduct in the light thereof.

**13. MUNICIPAL CORPORATIONS ⇨821(25)—PEDESTRIAN HELD NOT CONTRIBUTORILY NEGLIGENT AS A MATTER OF LAW.**

Where a pedestrian fell over a slight raise in a sidewalk, otherwise smooth, after her attention had been diverted by an acquaintance passing in the street, and when the light and shadow on the walk was such that it might have rendered the defect inconspicuous, the court cannot say as a matter of law that plaintiff was contributorily negligent.

**14. MUNICIPAL CORPORATIONS ⇨821(20)—CONTRIBUTORY NEGLIGENCE DEPENDS ON CIRCUMSTANCES AND IS ORDINARILY FOR JURY.**

Whether a pedestrian, injured by a defect in the sidewalk, exercised ordinary care, depends on the surrounding circumstances and the danger reasonably to be apprehended, and even if the facts are uncontroverted the question is one for the jury, if different minds may draw therefrom different conclusions.

**15. MUNICIPAL CORPORATIONS ⇨817(3)—BURDEN OF PROVING CONTRIBUTORY NEGLIGENCE IS ON DEFENDANT.**

In an action for damages for injuries to a pedestrian, occasioned by a defective sidewalk, the burden of showing contributory negligence of plaintiff is on defendant, unless it affirmatively appears from plaintiff's evidence.

Prentis, J., dissenting.

**Error to Law and Equity Court of City of Richmond.**

Action by Marian S. Rose against the City of Richmond. Judgment for plaintiff, and defendant brings error. Affirmed.

This is an action by the defendant in error, Marian S. Rose, against the city of Richmond, to recover damages for injury sustained by a fall alleged to have been caused by the defective condition of a sidewalk of the city.

The defendant in error will be hereinafter referred to as plaintiff.

There was a trial by jury. After the testimony both for the plaintiff and defendant was in, and there had been a view by the jury, the city demurred to the evidence. The jury returned a verdict in favor of the plaintiff, subject to the demurrer to evidence. Whereupon the court overruled such demurrer and entered judgment for the plaintiff in accordance with the verdict. Thereupon the city moved the court to set aside the judgment and verdict, on the ground that the verdict was contrary to the law and the evidence.

The material facts of the case shown by the evidence, as it must be regarded upon demurrer thereto, are as follows:

The accident occurred on one of the sidewalks of Poe street.

The sidewalks on both sides of the street are of concrete, 3 feet in width. Between the sidewalks and the curbing of the street are grass plots, approximately of the same width as the sidewalks, in which plots shade trees of considerable size were standing at the time of the accident, at intervals along on both sides of the street, the whole length of the block. The street runs approximately due east and west. The accident occurred on the sidewalk on the north side of the street, at a point, as one goes westward, about 16 feet from the corner of the block where such street is crossed by Barton avenue. The defect in the sidewalk consisted in this:

A section of the sidewalk, approximately 10 feet in length, between its expansion joints, had been lifted by the roots of a shade tree growing in its location about opposite the center of such section of sidewalk, so that such section was lifted above the level of the sidewalk elsewhere on that side of the street. A difference in level existed all the way across the sidewalk, at both ends of the lifted section, along the lines of the expansion joints, at right angles to the sidewalk; but it was not the same difference at the inner edge of the sidewalk, next to the building line, as it was at the outer edge, next to the street curbing and the tree. At the inner edge the lifted section stood one-half inch, and at the outer edge two inches, above the level of the other sidewalk, at both ends of

it. There was no break in the section aforesaid, other than its being lifted in the manner described at the expansion joints, which caused the surface of the ends of such section to stand perpendicularly above the level of the sidewalk which joined it at such ends; the elevation being a half inch at the inner edge, gradually increasing to two inches at the outer edge as aforesaid.

The evidence shows affirmatively that the defect aforesaid was the only inequality in the level of the sidewalk on the north side of the street for the entire block on which the accident occurred; and the evidence does not disclose that there were any inequalities in the level of the sidewalk elsewhere on that side of the street, or on the south side of it.

The only material conflict that there is in the case, between the evidence for the plaintiff and that for the city, is on the subject of the obviousness of the obstruction on the sidewalk occasioned by the defect aforesaid. On this subject, in behalf of the plaintiff (among other circumstances in their nature difficult to recount, but at once apparent to a jury on a view after hearing the testimony in the case), the following facts appear in the record:

The elevation of the section of sidewalk aforesaid was in fact high enough to catch the foot of the plaintiff as she was walking slowly, and did in fact cause her fall and the resulting injury. Further:

The plaintiff did not in fact observe the difference in the elevation aforesaid until she struck her foot against it and fell.

The accident occurred about 2 p. m. on a March day (the 15th of March), when the sun was shining brightly. The plaintiff was walking westward on the outer side of the sidewalk, because of the fact that a servant was walking along the inner side of it; the plaintiff being as nearly beside the servant as the width of the walkway would permit, but a little to the rear of the servant. The plaintiff wore her glasses at the time. She was not in a hurry, and was walking very slowly, as her nine months old baby, in its carriage, was being rolled along by the servant, and as the plaintiff did not allow the carriage to be rolled fast, on account of jarring the baby. The plaintiff did not live in that locality. She was on her way to her mother's, who lived on North avenue. When before that time on Poe street, the plaintiff as a rule walked on the south side of it. She had no knowledge of the defect aforesaid on the north side of the street. On this occasion, as she, the baby, and nurse came to Poe street, instead of turning westward along it on its south side, as the plaintiff's custom was, the servant crossed over to the north side, and the plaintiff "made no objection," as she testifies, "because it was a chilly day, and [she] thought it was very well for the baby to be on the sunny side of the street."

As they moved along on that side of the street as aforesaid and approached the obstruction aforesaid, the plaintiff saw an acquaintance in an automobile approaching, going eastward along Poe street. How long she looked in his direction does not appear from the evidence, but she did look towards him, and, at that hour the sun would have shone almost directly in her face as she looked in that direction, moving, as she was, practically due westward. She bowed her head in greeting to this acquaintance as he passed. As the latter passed, the plaintiff was "about two steps" from the obstruction aforesaid caused by the end of the lifted section of sidewalk nearest her, according to the testimony of a witness for plaintiff. She did not stop at all, but after looking towards the acquaintance (for how long does not appear as aforesaid), and having bowed to him, she turned her gaze back in front of her, "looking straight ahead" as she walked, as she testifies, but as aforesaid, she did not see the obstruction until she struck her foot against it and fell forward upon the sidewalk, causing her serious injury.

At that time of the year, of course, there could have been no great amount of foliage, if any, on the tree aforesaid, which had lifted the section of walkway as aforesaid (and the evidence is silent on this point); but it seems quite sure that its branches, and perhaps its trunk, stood at that hour directly between the sun and the obstruction over which the plaintiff stumbled. And as to what shadow they cast on such obstruction the evidence is also silent, but they must have cast some shadow upon it. There were normal grooves at right angles across the concrete sidewalk, at intervals of approximately every 5 feet, and where the obstruction aforesaid existed a groove was normally to be expected to be seen by a traveler along the sidewalk. Such grooves, where normal, caused no inequality in the level of the sidewalk.

In addition to such circumstantial evidence on behalf of the plaintiff, on the subject of the obviousness of the obstruction, there was the express testimony of a witness for the plaintiff, which was not objected to by the city, in which, referring to the appearance of the inequality in level of the sidewalk caused by said obstruction, such witness said:

"Yes, sir; it is an abrupt rise, and you really can't detect it unless you are paying particular attention, just walking in a casual way."

On behalf of the city, certain photographs were introduced in evidence, which were taken on February 10th, nearly a year after the accident. These photographs do show the obstruction very plainly apparent at a distance of 100 feet, and also from nearer by, and it is proved for the city that the height of the obstruction aforesaid was the same when the photographs were taken as it was

at the time of the accident. But the photographer who took the pictures was not examined as a witness, and it does not appear in evidence at what time of day, or under what conditions of light or shade, or other circumstances, they were taken.

There is no evidence in the record tending to show that no accident had previously resulted from the defect in the sidewalk aforesaid.

H. R. Pollard, of Richmond, for plaintiff in error.

Fulton & Wicker, of Richmond, for defendant in error.

SIMS, J. (after stating the facts as above). The controversy in the case in judgment is not one of law, but of fact.

The law applicable to cases of this character is well settled.

There are two issues involved: (1) Whether the municipality was primarily liable; and, if so, (2) whether there was contributory negligence on the part of the plaintiff, which barred her right of recovery.

[1] The primary liability of the municipality, if it existed, must have arisen from its breach of duty in its failure to exercise reasonable or ordinary care under the circumstances to keep its sidewalk in a reasonably safe condition for travel in the ordinary modes by persons exercising reasonable or ordinary care on their part under the circumstances to avoid accident.

The duty of the municipality in the premises was not that of an insurer against accident upon the sidewalk. Not every defect, though it may cause the injury sued for, is actionable. The municipality will not be liable for every mere inequality or irregularity in the surface of the way not likely to cause injury. It is only against danger which it can or ought to anticipate, in the exercise of reasonable forethought, in view of the actual condition of the way (if it has actual or constructive notice thereof), that the municipality is bound to guard.

[2, 3] In the latter particular, however, the duty of the municipality is different from that of the person using the way. With respect to such person the condition will be held to be only what it appears or would appear to be to him in the exercise of ordinary care on his part to avoid accident. If he has no previous knowledge of a defect in the way, he owes no duty of inspection to discover it, and he is not required to be on the lookout for defects or obstructions. In the absence of knowledge to the contrary, he may, if the exercise of reasonable or ordinary care under the circumstances would not give him that knowledge, act on the assumption that the way is in a reasonably or ordinarily safe condition. But he may not negligently disregard dangers which are so open and obvious that they would be apparent

to an ordinarily prudent person in a like situation; whereas, with respect to the municipality, it is charged with the duty of reasonable inspection, and the condition will be held to be what it in truth is, if such inspection would disclose it.

That the above is the substantive law on the subjects mentioned all the authorities agree. Among them are the following, which are cited in argument before us: 4 Dillon on Mun. Corp. (5th Ed.) §§ 1697, 1711; 28 Cyc. 1358-1361, 1368-1367, 1396; Bedford City v. Sitwell, 110 Va. 296, 65 S. E. 471; Osborne v. Pulaski, etc., Co., 95 Va. 17, 27 S. E. 812; Moore v. Richmond, 85 Va. 545, 8 S. E. 387; Portsmouth v. Lee, 112 Va. 430, 71 S. E. 630; Cook's Adm'r v. Danville, 116 Va. 385, 82 S. E. 90, L. R. A. 1915A, 1199; Newport News, etc., R. Co. v. Clark's Adm'r, 105 Va. 205, 52 S. E. 1010, 6 L. R. A. (N. S.) 905, 115 Am. St. Rep. 868; Richmond v. Schonberger, 111 Va. 168, 68 S. E. 284; Richmond v. Courtney, 32 Grat. (73 Va.) 792.

It is a concession in the case in judgment that the defective condition of the sidewalk had existed for an amply sufficient time before the accident to have given the city actual or constructive notice of such condition, and it took no steps to remedy that condition; and the city took the position on the trial, as one of its defenses, that the actual condition of the sidewalk did not present a case of an actionable defect.

1. The first question for our decision, therefore, is whether, but for the demurrer to evidence, there was sufficient evidence before the jury to have warranted them in finding that the unevenness in the sidewalk, which is described in the statement preceding this opinion, was an actionable defect, in that it was a condition which the city, in the exercise of reasonable forethought, ought to have anticipated would render the sidewalk unreasonably unsafe for travel in the ordinary modes by persons exercising reasonable or ordinary care on their part under the circumstances to avoid accident.

[4-6] In the very nature of the case the problem involved in this question is ordinarily essentially a jury question. It is a complicated question of fact. It is not simply a matter of the height of the obstruction, but also of how unexpected its existence was to a person, such as the plaintiff, who had encountered no such obstructions elsewhere in that locality, and who did not previously know of its existence; of what its appearance would reasonably be expected to be to one approaching it under the circumstances which attended the plaintiff, some of which circumstances are mentioned in the statement preceding this opinion, none of which were extraordinary, and hence all of which might have reasonably been anticipated by the city by the exercise of reasonable forethought; and whether such a per-



son, in the exercise of ordinary care, would be expected to detect the true condition of the defect, if approaching it under the circumstances which attended the plaintiff. These are all matters in their nature unsuited for decision other than by a jury, being in the case before us of such character that they admit of different conclusions by reasonable men. And we think, as did the learned trial judge, that on the demurrer to evidence by the city such question of fact is concluded against the city.

[7] Decided cases are of but little assistance to the court in the consideration of such a question as that here before us. The authorities emphasize the truth that, in this character of cases, especially:

*"In each case the way is to be pronounced sufficient or insufficient, as it is or is not reasonably safe for ordinary purposes of travel under the particular circumstances which exist in connection with that particular case. \* \* \**" 28 Cyc. 1366, 1367. (Italics supplied.)

[8] It is of course true that, where the obstruction in the way is so slight that the minds of reasonable men would not differ in the conclusion that it would not be likely to endanger travel in the ordinary modes by persons exercising reasonable or ordinary care, the court would not sustain a verdict undertaking to establish the primary liability of the municipality aforesaid; but such is not the character of case before us.

[9] As above noted, the city, on this question, is charged with the duty of exercising reasonable forethought on the subject of what is likely to be the result from the actual condition of the sidewalk upon the safety with which a pedestrian, such as was the plaintiff, would traverse it, walking slowly, who before near approach to it might well look upon it as but one of the grooves across the walk, to be seen at the regular intervals of about 5 feet, because of possibly having looked only at the inner edge of the walkway, where the unevenness was scarcely perceptible, even upon close inspection, or because of the condition of light or shade at the time, and whose attention might then be attracted elsewhere by some ordinary cause until immediately upon the defect, when the person might be likely to look over and beyond it, and not observe its true character, induced, it might be, so to do, by a previous subconscious observation and appraisal of it as but a normal groove across the walk.

[10] It should be borne in mind that, as travel was not attempted to be stopped, but was permitted on the walkway in question, the defense of the city, that the defect was not actionable, must rest on the position that the defect was too slight to be actionable. The municipality will not be allowed, in such a case, to urge, in justification of its

leaving it there, that a defect in its streets is so large that it is obviously an obstruction and a menace to pedestrians, as, for example, where the defect consists in an obstruction 7.2 inches high, as in *Richmond v. Gentry*, 111 Va. 160, 68 S. E. 274. That would be to allow the municipality to defend by setting up its own wrong, consisting of its own gross neglect of duty in the premises. Hence the court will not hold as a matter of law that such a defect is so large—i. e., that the municipality's negligence has been so gross—that the defect is not actionable. If it were otherwise, municipalities would need only to be grossly negligent in the premises in order to be relieved of the duty of keeping their streets in proper condition for public travel. The defense of the municipality in such case, if defense it has, must rest upon the position that the plaintiff has been guilty of contributory negligence, which will bar recovery notwithstanding that the defect is actionable.

In the case last cited (*Richmond v. Gentry*, 111 Va. 160, 68 S. E. 274), the uncontroverted facts were that the defect consisted of a stone, in size 3 feet 6 inches long by 1 foot in width and six-tenths of a foot in thickness at the end against which the plaintiff stumbled, resting on the surface of the sidewalk 10 inches from the front of a building for an entrance step to which the stone was used, and there, too, the uncontroverted fact was also that the plaintiff "had often passed the point and knew of the stone on the sidewalk." But this court, in the opinion delivered by Judge Keith, approved the action of the trial court in refusing to give an instruction to the effect that as a matter of law such an obstruction did not constitute an actionable defect.

And, indeed, in the last-named decision the court did not consider that it was even a case in which it could say, as a matter of law, that the plaintiff had been guilty of such contributory negligence as barred recovery.

There is no case in Virginia which has been cited in argument, in which this court has held that the obstruction was so slight that it will be held, as a matter of law, not to constitute an actionable defect, where the obstruction was as great as in the case in judgment. The nearest Virginia case to the one before us on this point is that of *Richmond v. Courtney*, supra, 73 Va. (32 Gratt.) 792. There the obstruction, if there was any difference in its essential character, was less likely to cause the fall of a person walking slowly over it under ordinary circumstances than the obstruction in the case in judgment. As said in the opinion of Judge Christian in that case of the obstruction there involved:

"The plaintiff herself described it as a broken place in the sidewalk, and says that she struck her foot against a loose brick in the sidewalk

and fell. She says, further, that the pavement was broken up, and that she fell in among the loose bricks. Another witness \* \* \* describes the defects as follows: 'It consisted of a place in the pavement 3x5 feet, or thereabouts, from which bricks had been removed, and a few bricks were lying about loose in the opening; \* \* \* There was no excavation, and that he had never heard of any one else stumbling there; that he himself had walked over the place many a time and never thought it dangerous.'

Judge Christian, in his opinion, does take the position that, as a matter of law, the city was not guilty of negligence with respect to the defect in the pavement—I. e., that the defect was not actionable—and in that connection says:

"Slight obstructions, produced by loose bricks in the pavement, or by the roots of trees which may displace the pavement, from the nature of things cannot be prevented."

But that was not the majority holding. Only one other judge (Judge Moncure) concurred in Judge Christian's opinion. Judge Staples said:

"He was not prepared to concur in so much of the opinion of Judge Christian as declares that the city of Richmond is not guilty of negligence with respect to the defect in the pavement."

Judge E. O. Burks concurred in the view of Judge Staples. The case was decided in favor of the city, however, on the ground of the contributory negligence of the plaintiff, of which we shall have more to say below; and Judge Anderson concurred in the judgment to that effect.

Similarly, in *Redford v. City of Woburn*, 176 Mass. 520, 57 N. E. 1008, it is held, as stated in the opinion, that:

"\* \* \* We do not think it could be ruled as a matter of law that the jury were not warranted in finding that a shut-off box in the middle of a sidewalk much used for foot travel, projecting on one side an inch and a quarter above the surrounding gravel, did not constitute a defect. Whether such an object was liable to cause travelers, while in the exercise of due care, to stumble and fall, or to turn or sprain the ankle, as we infer the plaintiff did, and whether the defendant exercised reasonable care in suffering the box and sidewalk to remain in the condition in which they were, were, it seems to us, questions for the jury"—citing a number of Massachusetts cases.

And in *Parriah v. City of Huntington*, 57 W. Va. 286, 50 S. E. 416, it is held, as stated in the opinion of the court, that—

"While it is true, as stated, that a municipal corporation is not an insurer against accidents on its streets and highways, yet it is charged with the exercise of due and reasonable care in keeping and maintaining its streets, so as to prevent injury to persons traveling over them. In this case two water plugs, one projecting

2½ inches, and the other 1½ inches, above the sidewalk, and near the center thereof, seem to be a very dangerous contrivance to be permitted to exist at a point where persons have the lawful right to go, and where pedestrians are daily traveling. In using the sidewalks of a city, a pedestrian has the right to presume that they are kept in a reasonably safe condition for travel.

"In this case, suppose such a person as could be charged with contributory negligence should be passing over the sidewalk of the defendant at the point where the accident occurred, and not knowing of the existing defect, and should stumble over it and be injured by reason thereof, the city would be liable, unless contributory negligence could be charged to him. \* \* \*"

Among the cases cited for the city, in which the defect in the way was held as a matter of law not to be actionable, are the following, which approach nearest in their facts to the case in judgment: *Weisse v. Detroit*, 105 Mich. 482, 63 N. W. 423; *Hamilton v. Buffalo*, 173 N. Y. 72, 65 N. E. 944; *Beltz v. Yonkers*, 148 N. Y. 67, 42 N. E. 401.

[11] In *Weisse v. Detroit*, the alleged defect was one of original construction of a crosswalk, in that it was about 1½ inches above the sidewalk where the two joined. But, as said in *Richmond v. Schonberger*, 111 Va. 168, at page 171, 68 S. E. 284, at page 285:

"\* \* \* It is only reasonable to say that one passing over a street crossing may more reasonably expect obstructions, and should therefore exercise a greater degree of care than upon the sidewalk, strictly so called."

Hence the *Weisse v. Detroit* Case is distinguishable from the case in judgment.

In *Hamilton v. Buffalo*, the defect was different from that in the case in judgment, being a depression. Moreover, the plaintiff walked over it four or five times a day, was familiar with it, had often noticed it before the accident, and the plaintiff himself testified that he had not considered it at all dangerous. And the court said in its opinion:

"Evidently it did not occur to him that it was dangerous, or that accidents were reasonably to be anticipated by its existence."

Hence it was held that no such duty of anticipation rested upon the city.

In *Beltz v. Yonkers*, also, the defect was a depression, 2½ inches deep, and 7½x26 inches in surface area, caused by the removal of broken parts of the flagstone paving of a sidewalk from about the center of the way. The sidewalk was 8 feet wide, leaving ample space on each side of the depression for passage free of any defect. And as affirmatively appeared in evidence, the walkway had been used by the public in that condition "for years," and that "no accident had resulted from such use before."

On principle, therefore, and upon author-

ity, we are of opinion that there was sufficient evidence in the case in judgment to have supported a verdict of the jury, had not the demurrer been interposed, holding, in effect, in accord with the opinions of Judges Staples and E. C. Burks in *Richmond v. Courtney*, that the defect in the sidewalk in the case in judgment was actionable.

We come now to the only question remaining for our decision in this case, and that is this:

2. Was the evidence before the jury such that, but for the demurrer to evidence, they would have been warranted in finding that the plaintiff was not guilty of contributory negligence which proximately contributed to her injury?

[12] The conclusion we have reached above, that the jury might have found, and hence, there having been the demurrer to the evidence by the city, we must find, that the defect in the case in judgment was actionable, demonstrates that the plaintiff was entitled to recover if she was exercising due care at the time she fell, since her fall was unquestionably occasioned by the defect. Therefore the court cannot say, as a matter of law, from the mere size of the obstruction caused by this particular defect, that the plaintiff was guilty of contributory negligence. The latter question necessarily involves, not alone the size of the obstruction, but also all the circumstances which surrounded the plaintiff at the time, and her conduct in the light of these circumstances. This is a complicated question of fact, and much more so than that of whether the defect aforesaid was actionable.

[13] As set forth in the statement preceding this opinion, the plaintiff had no knowledge of the defective condition of the sidewalk previously to the accident. Other material facts and circumstances surrounding the plaintiff at the time are also set forth in such statement. Among them is the character of the walk itself. Concrete sidewalks are intended and are reasonably presumed to be of a smooth and uniform surface. Further, the plaintiff was in a locality at the time shortly preceding the accident in which the whole of her acquaintance with it, previously and on that occasion acquired, as the jury were warranted in inferring, also reasonably led to the impression upon her that there were no inequalities in the level of the sidewalk on which she was proceeding at the time of the accident. It was not like the situation where a person is walking on a brick pavement, which is obviously uneven, and broken up here and there at divers places by the upheaval of it by the roots of trees, where such very conditions admonish the passer-by to be unusually watchful in his lookout and careful in his step. And there was the situation mentioned in the statement preceding this opinion, of the absence of testimony showing how the photographs introduced in evidence by the city

were taken, in which case only a view of the locality under similar conditions as existed at the time of the accident could determine the value of such photographs as evidence. The jury could best pass upon that matter after their view.

Then, too, there were the other circumstances mentioned in the statement preceding this opinion which bear upon the question of fact as to whether the plaintiff was exercising ordinary care immediately preceding and at the time of the accident—as to whether her failure to detect the real condition of the obstruction in the sidewalk evidenced lack of exercise by her of ordinary care. These are all subjects about which it is apparent in this case that the minds of reasonable men might differ. The very fact that the obstruction was not great, and the other circumstances aforesaid—i. e., of the defect only showing an unevenness of a half inch, if the glance of the eye fell upon the inner edge of the walkway with its gradual increase to two inches, so that it might have been mistaken for an ordinary groove in the walk as aforesaid until plaintiff was immediately upon it; the sunlight in the face of the plaintiff; her attention being attracted elsewhere until so near the defect that when, from facing sunlight, she glanced back ahead of her on the walkway more or less in shadow, she may have naturally failed to detect, or have naturally looked over and beyond the defect, being unsuspecting of its character—all these and the other circumstances in the case are peculiarly matters for the consideration of a jury, and about which the minds of reasonable men may differ in conclusions as to whether the plaintiff exercised ordinary care.

[14] As said in 28 Cyc. 1420, 1421:

"Whether or not the person, injured by reason of a defect or obstruction, exercised ordinary care and diligence at the time of the accident, depends upon the surrounding circumstances existing at that time and place, and upon the danger reasonably to be apprehended, and is ordinarily a question of fact for a jury."

As said in 4 Dillon on Mun. Corp. § 1719, on the subject of contributory negligence in cases such as that we have under consideration:

"\* \* \* Although the facts are not controverted, yet, if different minds may reasonably draw therefrom different conclusions, the question is for the jury as one of fact, and not for the court as one of law. This statement of the law is substantially taken from the judgment of the Supreme Court of the United States, and in the author's opinion it gives the true rule on the subject"—citing *Sioux, etc., R. Co. v. Stout*, 17 Wall. 657, 21 L. Ed. 745.

As said in *Bashford v. Rosenbaum*, 120 Va. 1, at page 8, 90 S. E. 625, at page 628:

"The jury's verdict was for the plaintiff, under instructions \* \* \* which submitted

both the questions of the defendants' negligence and that of the plaintiff's contributory negligence to them, and, after a view by the jury of the premises, allowed by the court; therefore, to disturb this finding, it was necessary for the trial court to have taken the view that there could be no difference of opinion amongst reasonable men as to the plaintiff's contributory negligence."

On the subject of contributory negligence the following of the cases cited for the city approach nearest in their facts to the case in judgment, namely: *Richmond v. Schonberger*, supra, 111 Va. 168, 68 S. E. 284; *Gosport v. Evans*, 112 Ind. 133, 13 N. E. 256, 2 Am. St. Rep. 164; *Lerner v. Philadelphia*, 221 Pa. 294, 70 Atl. 755, 21 L. R. A. (N. S.) 614; *Richmond v. Courtney*, supra, 73 Va. (32 Grat.) 792.

The *Schonberger* Case involves a street crossing, and is distinguishable for that reason, as above noted.

The other cases just cited all involve similar defects in the sidewalk, consisting of displacement of bricks. In the *Evans* and *Courtney* Cases, the plaintiff's fall was caused by striking a foot against a brick projecting above the level of the surface on which the plaintiff was walking; but in both of those cases the plaintiff was well acquainted with the existence of the defect prior to the time of the accident, and both decisions turn on that fact, which differentiates those cases from that in judgment. While in the *Lerner* Case the plaintiff's fall was occasioned by losing her balance and falling on stepping into a depression in the sidewalk. There the "defect in the pavement was the displacement of some bricks," as stated in the opinion. Over how large an area does not appear from the report of the case. The opinion states that—

"Into the depression caused by the displacement plaintiff stepped, with the result that she fell and injured herself."

The opinion then proceeds:

"In bringing her action she assumed the burden of exhibiting a case clear of contributory negligence. Having testified that she stepped into the depression without having observed it, and having shown conditions which should have been sufficient, nothing intervening, to secure one exercising ordinary care from such accidents, she would be entitled to recover only as she explained in a way consistent with ordinary care on her part, how and why she failed to see what was directly before her. Failing in this, it could not be said that her injury resulted exclusively from the defendant's negligence. It was insisted upon by counsel representing her that she was prevented from seeing the depression into which she stepped by the crowded condition of the pavement at the time. No other explanation is attempted. Unfortunately for the plaintiff, this explanation advanced by counsel is without support in the evidence."

The court entered a compulsory nonsuit.

[15] From what is above quoted from the opinion of the court in the *Lerner* Case, we see that the holding is partly placed upon the ground that the burden of proof is upon the plaintiff to show affirmatively that he is not guilty of contributory negligence. This is not the rule in Virginia. Here the burden of proof of showing contributory negligence on the part of the plaintiff is upon the defendant, unless it appears affirmatively from the evidence for the plaintiff. And, further, there were no circumstances whatever shown in evidence in the *Lerner* Case on which the plaintiff could rely as explaining the accident in accord with her exercise of reasonable or ordinary care for her own safety, other than that she was prevented from seeing the defect in the way by the crowded condition of it at the time, which proof, as the court held, failed. The case in judgment is a very different one in this regard, as appears from the statement preceding this opinion.

On the whole, therefore, while the case is a close one on the question of contributory negligence, we are of opinion that upon the evidence in this particular case, this question was for the jury, and that there was sufficient evidence to support the verdict of the jury, had the demurrer to evidence not been interposed, in finding, in effect, that the plaintiff was not guilty of such negligence as barred her right of recovery. Hence we must think upon this point also, as did the learned judge of the trial court, that, on the demurrer to evidence aforesaid, the question of contributory negligence aforesaid must be considered as concluded against the city.

The judgment under review will therefore be affirmed.

BURKS, J., absent.

PRENTIS, J. (dissenting). I am constrained to express my dissent from the conclusion of the majority in this case, because I think that conclusion is inconsistent with the controlling legal doctrine which is expressed in the opinion itself. That doctrine is that a city is not an insurer against accidents upon its streets, is not bound to keep its streets perfectly smooth and level, and that slight defects which are not dangerous are not actionable. The legal duty of the city is discharged when it exercises reasonable care to keep its sidewalks in a reasonably safe condition for pedestrians using them with ordinary care. In this case, inasmuch as there is no conflict in the evidence, and there was a demurrer to the evidence, the facts are established, and the question presented is a question of law arising out of those facts. In my view, an elevation of two inches on the outside and one-half an inch on the inside of a concrete pavement three feet wide, the

pavement being otherwise perfectly smooth and free from defects, constitutes no actionable negligence, which should sustain a recovery by this plaintiff, who stumbled and fell thereon not later than 2 o'clock in the day, when the sun was shining brightly, and there was nothing to obscure her view of this unevenness in the pavement. To hold otherwise, as it seems to me, is equivalent to holding that the city must exercise the very highest degree of care, and that the pedestrian is under no duty to observe and avoid the obvious.

(127 Va. 14)

**COMMONWEALTH v. PATTERSON et al.**

(Supreme Court of Appeals of Virginia.  
March 18, 1920.)

**TAXATION** ~~896~~(1)—**TRANSFER TAX DETERMINED BY VALUE OF ESTATE PASSING TO EACH BENEFICIARY, AND NOT BY VALUE OF WHOLE ESTATE.**

The amount of the inheritance tax, under Acts 1916, p. 812, c. 484, should be determined by the value of the estate passing to each beneficiary, and not by the value of the whole estate; the beneficiary's share not being subject to the tax until the statutory exemption has been deducted therefrom.

Error to Chancery Court of Richmond.

Proceeding by A. W. Patterson and others for an order fixing transfer tax. Order rendered, and the Commonwealth brings error. **Affirmed.**

The Attorney General and E. Warren Wall, of Richmond, for the Commonwealth.

A. W. Patterson, of Richmond, for defendants in error.

**KELLY, P.** This case involves the correctness in amount of an inheritance tax assessed against A. W. Patterson, M. C. Patterson, and J. T. Patterson, as legatees and devisees under the will of their brother, R. F. Patterson. Acts 1916, p. 812, c. 484. The trial court fixed the amount of the tax, by dividing the estate into three equal shares, deducting the statutory exemption of \$15,000 from each share, and applying to the residue of each share the scale of rates provided for in the act, thus holding that the amount of the tax should be determined by the value of the estate passing to each beneficiary, and not by the value of the whole estate. Since the argument and submission of the instant case, the question involved has been decided by this court in favor of the view adopted by the court below. *Commonwealth v. Carter*, 126 Va. —, 102 S. E. 58; *Withers v. Jones*, 126 Va. —, 102 S. E. 68. Upon the authority of these cases the order complained of is affirmed.

**Affirmed.**

**CHESAPEAKE & POTOMAC TELEPHONE CO. OF VIRGINIA v. CARLESS.**

(Supreme Court of Appeals of Virginia.  
March 18, 1920.)

**1. TELEGRAPHS AND TELEPHONES** ~~67~~(1)—**COMPENSATORY DAMAGES HELD RECOVERABLE FOR PHYSICAL HARDSHIP AND INCONVENIENCE FROM DISCONTINUANCE OF SERVICE.**

In an action by a nurse for damages for wrongful discontinuance of telephone service, resulting in one instance in physical hardship of exposure to cold for several hours, and in inconvenience and annoyance in the conduct of her calling, compensatory damages held properly allowed, although the evidence failed to affirmatively show actual pecuniary loss.

**2. DAMAGES** ~~184~~—**ABSOLUTE CERTAINTY IN PROVING QUANTUM NOT REQUIRED.**

Where the existence of a loss is established, absolute certainty in proving its quantum is not required.

**3. TELEGRAPHS AND TELEPHONES** ~~67~~(1)—**ANNOYANCE HELD PROPER MATTER FOR JURY'S CONSIDERATION IN FIXING DAMAGES FROM DISCONTINUANCE OF SERVICE.**

In an action by a nurse for damages for wrongful discontinuance of telephone service, where there was proof of physical discomfort by being exposed to cold weather in an unheated station for several hours, and inconvenience in her business, the additional injury suffered by her from annoyance, when considered as mental in its character only, was proper matter for the consideration of the jury in fixing damages.

Error to Circuit Court of City of Norfolk.

Action by J. B. Carless against the Chesapeake & Potomac Telephone Company of Virginia. Judgment for plaintiff, and defendant brings error. **Affirmed.**

This is an action in tort by notice of motion by the defendant in error, Miss J. B. Carless, against the plaintiff in error to recover damages for injury occasioned her by a wrongful suspension of telephone service.

The material and uncontroverted facts in the case are as follows:

Miss Carless, a householder and trained nurse by profession rented a telephone from the telephone company for which the rental was \$2 per month, payable monthly in advance, and for which bills were rendered accordingly. It was the custom of the company not to suspend the service for nonpayment of a single month's rent, but in cases of such default it would include such rent in arrears in the bill for the next succeeding month's rent, and if that bill was not promptly paid it would discontinue, or "suspend," the service some time during such second month of default of the subscriber. A bill for \$2 for the October, 1917, rental was paid at the office of the company on November 19, 1917, and the receipted bill taken. Notwithstanding

ing such payment the phone service was discontinued on that day. A bill for \$4, including the same \$2 October rental aforesaid and the November rental of \$2, was paid at the office November 22, 1917, by the mother of Miss Carless, and the receipted bill taken. At this time complaint was made by Miss Carless, through her mother, to the same employé of the company to whom the latter bill was paid, of the service having been discontinued and of the October rental having to be paid twice. Notwithstanding such second payment, which, in effect, paid the phone rent both for November and December, the service was not then restored, but continued suspended until December 4, 1917, a period of 16 days. During such period very numerous complaints were made to the company of its continuing suspension of such service, such complaint being made by Miss Carless, her mother, a lodger, and also by an old friend of the family, who had frequent occasion to communicate with Miss Carless or her mother, and such complaints were practically made to the company daily, and sometimes two or three times a day, and its attention was repeatedly called to the fact that the rental aforesaid had been paid and was not in arrears. But the company persisted in its claim that the rent was in arrears under such circumstances as evidenced very gross negligence and carelessness on its part in the premises, and indifference to the inconvenience and annoyance being occasioned to the plaintiff by the discontinuance of the service aforesaid. The service was not restored until an attorney was employed by Miss Carless and the case was taken up with the company by him.

The evidence in the case proves that the discontinuance or suspension of the telephone service aforesaid was the proximate cause of actual serious inconvenience and annoyance to the plaintiff in the conduct of her calling as a nurse and in her affairs generally, and on one occasion was the proximate cause of her being exposed to the physical hardship of remaining alone in a waiting room on a steamboat wharf, in which there was no fire, from about 5:30 to 7 o'clock, on a very chilly morning in December.

The evidence falls short of showing any actual loss or damage of the plaintiff of any certain number of dollars and cents.

There was a verdict and judgment for the plaintiff for the amount of \$600 damages, and the defendant brings error.

Loyall, Taylor & White, of Norfolk, for plaintiff in error.

B. A. Banks, Tazewell Taylor, and E. S. Merrill, all of Norfolk, for defendant in error.

SIMS, J. (after stating the facts as above). The ultimate question, and that on which the decision must turn, which is presented

for our determination by the assignments of error, is the following:

[1] 1. Is the plaintiff, in an action of tort such as this, entitled to recover compensatory damages for physical hardship of exposure to cold weather, and for inconvenience and annoyance in the conduct of her calling as a nurse and in her affairs generally; the evidence failing to affirmatively show any actual pecuniary loss or damage of the plaintiff as measured in dollars and cents?

The better opinion and the holding of the weight of authority on this subject seems to be that such damages may be recovered in such an action in such condition of the proof.

In *Sommerville v. Chesapeake & Potomac Telephone Co.* (App. D. C.) 258 Fed. 147, in the opinion of the Court of Appeals of the District of Columbia delivered by Smyth, Chief Justice, it is said:

"Here the company acted in good faith, believing that *Sommerville* [one of the telephone subscribers and the plaintiff] was indebted to it and that it had the right to put an end to his service. But \* \* \* it does not seem reasonable that in these days, when a telephone is an indispensable adjunct to every line of business, the inevitable inconvenience, annoyance, and loss of time caused to a subscriber by the wrongful action of the company in cutting off his service without notice should not be regarded as a proper subject for compensatory damages. To prove that one lost a certain number of dollars by reason of the company's action might be very difficult, and yet, we think, all reasonable men would say that he was injured thereby. That the company may for just cause, such as the failure to pay his bills when the same become due, refuse to further serve a patron, we may concede [citing authority]; but, when the company takes such action, it must know at its peril that it has a valid reason for doing so."

The opinion further proceeds as follows:

"Nor is authority wanting for the proposition that the company must respond in damages for its action in a case like this.

"The damage sustained by the loss of a telephone in its very nature is largely composed of inconvenience and annoyance. That a person deprived of the use of a telephone is materially damaged, all will concede. What is the amount of damages in dollars and cents cannot be accurately stated by the party suing, for the reason that his damage consists not only in pecuniary losses, but it consists in inconvenience, discomfort, and an annoyance, and it must be left to the jury to determine what is the damage sustained, taking into consideration the discomfort, the annoyance, and inconvenience suffered, together with actual and pecuniary losses." *Telephone Co. v. Hobart*, 89 Miss. 252, 262, 263, 42 South. 349, 351, 119 Am. St. Rep. 702."

The opinion also cites *Carmichael v. Telephone Co.*, 157 N. C. 21, 72 S. E. 619, 39 L. R. A. (N. S.) 651, Ann. Cas. 1913B, 1117.

In the *Sommerville* Case the proof of damages consisted solely in this: The outgoing

service was cut off, but Sommerville's customers could talk with him when they "called him up." "Some 40 to 50 per cent. of Sommerville's business, that of selling engine room supplies, was done over the telephone." Sommerville testified that:

"If he desired to initiate a call he was not permitted to do so. In such case he was compelled to visit the patron with whom he wished to communicate and explain why he was not allowed to use the telephone. This, he says, caused him annoyance, inconvenience, and humiliation."

There was no evidence to prove any damages in dollars and cents.

In the Hobart Case, the only pecuniary loss of the plaintiff testified to in dollars and cents was this: The plaintiff said "that, to his recollection, he spent \$25 or \$30 for messengers to send things home." But there were numerous other occasions as to which he testified that he suffered annoyance and inconvenience by reason of being deprived of the telephone service, and he was allowed to recover \$150 damages.

In the Carmichael Case there was no evidence to prove any damages in dollars and cents, but only personal inconvenience and annoyance.

The Sommerville Case was decided in 1919; the Hobart Case in 1906; the Carmichael Case in 1911.

There is only one authority to which our attention has been called which is contrary in its holding to that of the authorities above mentioned, and that is the case of Cumberland Tel. & Teleg. Co. v. Hendon, 114 Ky. 501, 71 S. W. 435, 60 L. R. A. 849, 102 Am. St. Rep. 290, decided in 1903, which is cited and relied on by the defendant in the case before us. In that case the plaintiff was deprived of the telephone service only from 6 o'clock one afternoon until the next morning. When he went to the office of the defendant next morning, the mistake was at once corrected and the telephone service restored. The evidence showed that only one person sought to reach the plaintiff by telephone that night, and he in fact reached the plaintiff by walking to see him in time to answer every purpose of the call over the telephone.

We do not consider the case of Connelly v. Western Union Tel. Co., 100 Va. 51, 40 S. E. 618, 56 L. R. A. 663, 93 Am. St. Rep. 919, which is cited and relied on by the defendant telephone company, to be in point. The principle on which that case rests is that there no injury or damage whatsoever, other than mental suffering, anxiety, or annoyance, was occasioned; whereas in the case in judgment there can be no doubt that there was some pecuniary loss occasioned, as by loss of time of the plaintiff in her fruitless effort to communicate with others over the telephone while the service was suspended, and by oth-

er serious and repeated inconveniences extending over a period of 16 days, caused by the wrongful action of the company in cutting off her service, which, while very difficult to measure in dollars and cents, are, nevertheless, pecuniary losses. And, in addition, in the case before us, there was the physical injury of the hardship occasioned the plaintiff, which is mentioned in the statement preceding this opinion, of causing her to have to remain alone in a waiting room on a steamboat wharf, in which there was no fire, from about 5:30 to 7 o'clock, on a very chilly morning in December.

[2] As said in Sedgwick on Damages (9th Ed.) § 170a:

" \* \* \* Where the existence of a loss is established absolute certainty in proving its quantum is not required. The true rule on the subject is announced by the Supreme Court of Michigan in a well-reasoned case (Allison v. Chandler, 11 Mich. 542, 555). 'Shall the injured party \* \* \* be allowed to recover no damages (or merely nominal), because he cannot show the exact amount with certainty, though he is ready to show, to the satisfaction of the jury, that he has suffered large damages by the injury? Certainty, it is true, would be thus attained; but it would be the certainty of injustice. \* \* \* Juries are allowed to act upon probable and inferential as well as direct and positive proof. And when, from the nature of the case, the amount of the damages cannot be estimated with certainty, or only a part of them can be so estimated, we can see no objection to placing before the jury all the facts and circumstances of the case having any tendency to show damages, or their probable amount, so as to enable them to make the most intelligible and probable estimate which the nature of the case will admit.'"

" \* \* \* When the amount of damages is susceptible of proof, proof must be offered; and if in such a case no proof of the quantum of damages is offered, recovery can be had for a nominal sum only." Id. § 171.

"But while this is the doctrine generally accepted, there are nevertheless many cases (often from the same jurisdiction where the stricter rule has been laid down), in which, no evidence of value having been offered, the jury is allowed to find the value upon their general knowledge. This is, of course, necessarily so in cases where no evidence of value can be given, as in case of pain and suffering, physical or mental, inconvenience, or loss of society; but it has been extended to cover cases of purely pecuniary injury." Id. § 171a.

"But inconvenience amounting to physical discomfort is a subject of compensation." Id. § 42.

"If a cause of action exists independently of the mental suffering, so that an action will lie at any rate, there can be no doubt of the right to compensation for any mental suffering which proximately follows." Id. § 43i.

[3] The principles involved in the quotations from the learned work last above cited are the same as underlie the decisions in the

telephone cases first above cited; and those principles are applicable, as we think, to the case in judgment. In such case, there was sufficient proof of some pecuniary loss and also of physical discomfort suffered by the plaintiff as proximately caused by the tort complained of. That being true, there was sufficient proof to sustain the action for the recovery of more than mere nominal damages, independently of the annoyance occasioned to the plaintiff. And that being so, the additional injury suffered by the plaintiff from the annoyance, when considered as mental in its character only, was proper matter for the consideration of the jury in fixing the total amount of damages.

On the whole, therefore, we find no error in the judgment under review, and it will be Affirmed.

(127 Va. 16)

### CUMMING v. CUMMING.

(Supreme Court of Appeals of Virginia. March 18, 1920.)

#### 1. DIVORCE $\S$ 37(22)—CRUELTY OF WIFE, NOT CAUSING HUSBAND'S DESEPTION, MUST BE DISREGARDED IN HER SUIT.

Where the conduct of a wife, relied on by the husband as constituting cruelty to him, did not originally cause their separation, nor in any way cause its continuance, both wholly due to willful desertion by the husband, the wife's conduct must be disregarded as justification or excuse for the desertion by the husband.

#### 2. CONTRACTS $\S$ 111 — ANTENUPTIAL CONTRACT BETWEEN PARENTS OF ILLEGITIMATE CHILD ILLEGAL, BECAUSE CONTEMPLATING IMMEDIATE SEPARATION.

Antenuptial contract between father and mother of illegitimate child, whereby mother agreed to accept small weekly payments in full of her claims against the father's estate, having been actually made in contemplation of an immediate separation and desertion of the mother by the father, held illegal and void, and unenforceable against either party.

#### 3. HUSBAND AND WIFE $\S$ 278(3)—POSTNUPTIAL CONTRACT, CONTEMPLATING SEPARATION, ILLEGAL.

A postnuptial contract between husband and wife, contemplating their immediate separation, is illegal and void.

#### 4. EVIDENCE $\S$ 437—PAROL EVIDENCE ADMISSIBLE TO SHOW THAT ANTENUPTIAL CONTRACT CONTEMPLATED SEPARATION.

In suit for divorce by the mother of an illegitimate child, who had made an antenuptial contract with her husband, the child's father, in fact intended to enable the father to separate from the mother and escape his obligation to support the child by making small weekly payments, parol evidence held admissible to show the illegality of the contract, in that it was intended to validate a separation after marriage.

#### 5. DIVORCE $\S$ 186—EFFECT OF DEATH OF SUCCESSFUL DEFENDANT PENDING APPEAL.

Defendant husband having died pending the wife's appeal in her divorce suit, which had resulted in decree of divorce for the husband on his cross-bill, no decree will be entered by the Supreme Court, except to reverse the original decree under review in such of its holdings as are found to be erroneous, to which extent the decree of the Supreme Court will still be effective, as there can be no abatement of the original decree by reason of the death of party after appeal, while, under Code 1919,  $\S$  6167, the appellate court in its discretion may enter its decree dealing with the adjudications of the original decree as if no death had occurred.

Appeal from Circuit Court, Elizabeth City County.

Suit for divorce by Mittie Ann Cumming against S. Gordon Cumming, wherein defendant husband filed cross-bill. From a decree granting him absolute divorce, plaintiff wife appeals. Reversed and remanded.

The original bill in this cause was exhibited by the wife, the appellant, against the husband, the appellee, for divorce on the statutory ground of willful desertion. The husband filed his answer and cross-bill, and later, after more than three years had elapsed, filed his amended and supplemental answer and cross-bill, alleging cruelty on the part of the wife and praying that the divorce be awarded to him on that ground.

Following the filing of the second cross-bill, there was ancillary pleading on the part of the wife by petition praying for suit money and alimony pendente lite.

The suit also involves the custody, maintenance, and education of an infant son of the parties, who was born out of wedlock, and was about 19½ months old at the time of the marriage; but those matters, being reserved for further consideration by the court below, are not involved in the appeal.

There was an antenuptial contract between the parties, which is as follows:

"This agreement, made this 18th day of March, in the year 1914, between S. Gordon Cumming, of the one part, and Mittie N. Jester, of the other part, both of the county of Elizabeth City, Virginia, Witnesseth:

"That for and in consideration of the mutual agreements and covenants and conditions herein contained, and the sum of money heretofore paid and agreed to be paid as hereinafter set forth, and of the consummation of the marriage now contemplated by the said parties, it is mutually covenanted and agreed between the said parties as follows:

"First. That the said S. Gordon Cumming hereby does release and renounce any and all claims or interests of any kind whatsoever growing out of the said proposed marriage in and to any property now owned or which may hereafter be owned by the said Mittie N. Jester, and that whatever property she now owns



or may hereafter own shall be held by her as her own individual separate estate, free from any claims or rights, marital or otherwise, on his part.

"Second. And that he, the said S. Gordon Cumming, doth further covenant and agree to pay to the said Mittie N. Jester the sum of ten dollars (\$10.00) per week from the consummation of the said marriage for a period of six months; one-half of the said money to be paid her for her own use and benefit and support, and the remaining half to be paid for the support and maintenance of Kenneth Gordon, the infant son of the said Mittie N. Jester and the said S. Gordon Cumming. And the said S. Gordon Cumming doth further recognize the legal liability imposed upon him for the support and maintenance of the said child, and the execution of this paper on his part is not intended to operate and does not operate to relieve him of the duty imposed upon him by law to maintain, care for, and support his said child after the expiration of the said six months; but he hereby recognizes said obligation on his part, and covenants and agrees to contribute to the support of the said child five dollars (\$5.00) per week for the period of six months above described, and doth further covenant and agree to continue said payments until the said child is of sufficient age and size to earn his own living, or until said child shall have reached the age of sixteen. The above payments to be made so long as the possession of the said child is not given to the said S. Gordon Cumming; but should the mother of the said child, Mittie N. Jester, give up possession of the said child, and the same be delivered to the said S. Gordon Cumming, then he covenants and agrees to provide, care for, and maintain the said child.

"Third. The said Mittie N. Jester doth hereby release and renounce any and all claims or interests of any kind whatsoever growing out of the said proposed marriage, or in consequence thereof, in any property now owned or hereafter acquired by the said S. Gordon Cumming, and doth accept in lieu of her rights therein the sums of money heretofore paid her by the said S. Gordon Cumming and the payment of the sum of ten dollars per week, five dollars per week to her for her own use and benefit, for the period of six months, and five dollars per week for the maintenance and support of her said child, and in full satisfaction of any and all claim on her part upon the said S. Gordon Cumming, both for her support and maintenance, and any other marital rights.

"This instrument embraces all agreements, promises, or covenants of any sort on the part of the said parties growing out of or relative to the said proposed marriage, and its terms shall not be changed, except in writing and signed by both parties thereto.

"Witness the following signatures and seals the day and year first above written.

"[Signed] S. Gordon Cumming. [Seal.]

"[Signed] Mittie Ann Jester. [Seal.]"

There were depositions and documentary evidence filed in behalf of both husband and wife.

By the decree under review said contract was "sustained, upheld, and confirmed as the

free act and deed of the parties, made for a valuable consideration and in conformity with law," and the court, being of opinion, as recited in the decree, that the husband "is entitled to an absolute divorce \* \* \* on the grounds of desertion and cruelty, \* \* \* three years having elapsed, \* \* \*" decreed an absolute divorce, and that each party should "be absolutely divested of any right, title, interest, and estate of any character whatsoever in any property now owned or hereafter acquired and held by the other," making no allowance to the wife of any alimony, either pendente lite or for the future.

By an interlocutory order in the cause the husband was ordered to pay \$50 to an attorney for the wife "on account of his fee for legal services in conducting this suit," and by the decree under review the husband was ordered to pay the costs of the suit, including a fee of \$50 to the same attorney "in full of his fee for services as such counsel." No other allowance of suit money and no alimony pendente lite was made by the court below.

Pending the appeal this, the appellate court, ordered that the husband pay the expense of printing the record, which amounted to \$——.

The material facts in the case are as follows:

The child aforesaid was recognized by the father before the marriage, and it is an unquestioned fact, shown in evidence, that the purpose of the husband in entering into the marriage relationship in question was to legitimate the child under the statute in such case made and provided (Code 1887, § 2553; Code 1919, § 5269), and to confer upon the mother of the child the status of a married woman, "to give her a chance," to use the words of a witness in the case, "to straighten out her life and settle down to normal, reasonable, hopeful existence"; but that status was to be that of a married woman deserted by her husband. For reasons which need not be stated here, except to say that they chiefly grew out of disparity in education, culture, tastes, and stations in life and the opposition of the family of the husband to such marriage, the latter was unwilling to cohabit with the wife in the relationship of marriage, and this he made clearly known to the prospective wife at the time of the antenuptial contract aforesaid. He also made it clearly known to her at the same time that he would not take the marriage vows—would not be a party to the marriage ceremony—unless the wife-to-be would enter into the antenuptial contract aforesaid, and thereby agree to release him, except as to the trivial money payments provided for therein, from the financial burden of the obligation which the marriage status would impose on him of providing for the maintenance and support of the wife and child. The contract was

made with the specific object of providing a contract limitation of the legal obligation aforesaid which should govern the rights of the wife in the premises following the desertion of the wife by the husband after the marriage.

The attitude of the wife, at the time of the antenuptial contract and at the time of the marriage, was that of taking all that she could get for herself and child. She was not asked to agree to the desertion by the husband, and as a matter of fact did not do so, either before or after the marriage. She did, however, understandingly and knowingly agree to the terms of the antenuptial contract in order to obtain the marriage, and thereby, in substance, agreed that, if deserted by the husband, she would go her separate way, and, as she had no property whatever, and as the members of her family were not able, even if willing, to support her (which facts are also shown in evidence), that she would work for her own living and for her own support and maintenance and that of her child so long as she kept him with her, except for the trivial assistance provided for in the contract.

Accordingly the antenuptial contract aforesaid was executed, and on the same night the marriage was celebrated, and immediately thereafter the husband went to his own home, and then and there willfully deserted the wife, with the fixed purpose never to cohabit with her in the marriage relationship. In that purpose, as the evidence in the cause, including his own testimony, clearly shows, he never wavered, and from that time until the decree under review was entered, as such evidence also clearly shows, he continued such desertion, being longer than the statutory period of three years giving ground for absolute divorce. It also clearly appears from such evidence, including the testimony of the husband, that the conduct of the wife which is relied on by the husband as constituting cruelty did not occur until after his desertion aforesaid, and hence did not originally cause such action on his part, and, further, that such conduct did not in any way cause him to continue his desertion aforesaid.

The conduct of the wife, which is relied on by the husband as constituting cruelty to him, grew out of the controversy which arose between the husband and wife over the binding force of the antenuptial contract aforesaid; he insisting that the contract measured and limited his duty to her and the child in the matter of maintenance and support, and she that their need for the actual necessities of life was such that she could not abide, and was not bound, by the contract.

Other matters of pleading and proof are mentioned in the opinion below.

R. E. Byrd and Richard B. Gwathmey, both of Richmond, for appellant.

C. V. Meredith, of Richmond, and C. Vernon Spratley, of Hampton, for appellee.

SIMS, J. (after stating the facts as above). The following questions which are involved in this cause will be disposed of in their order as stated below:

[1] 1. Is the decree under review erroneous in its adjudication that the husband is entitled to an absolute divorce on the grounds of desertion and cruelty?

We are of opinion that this question must be answered in the affirmative.

As appears from the facts set forth in the statement preceding this opinion, the conduct of the wife, relied on by the husband as constituting cruelty to him, did not originally cause the separation of the husband and wife, nor did it in any way cause its continuance. That separation and its continuance was wholly due to the willful desertion of the wife by the husband, and would have existed, just as it did, had the conduct of the wife been blameless. Hence, as a justification or excuse for the desertion by the husband, the conduct of the wife, even though it were considered to be misconduct, must be disregarded, being immaterial to the issues before the court in this suit. Such desertion on the part of the husband continued for a period of more than three years, as appears from the statement preceding this opinion. The wife, therefore, was entitled to an absolute divorce on the ground of desertion, and not her husband.

Of course, if the husband had repented of his desertion of the wife, and had made any overture with the intention of ending the separation, and any conduct on her part amounting to cruelty to him had prevented his cohabiting with her in the relationship of man and wife, that would have justified his thereafter continuing to live apart from the wife, and, so long as such situation continued, the wife, in contemplation of law, would have been considered as guilty of desertion; but no such case is presented by the record before us.

[2] 2. Is the decree under review erroneous in its adjudication that the antenuptial contract set forth in the statement preceding this opinion was valid?

We are of opinion that this question must be answered in the affirmative.

As appears from the facts set forth in the statement preceding this opinion, the specific object and the actual result of the antenuptial contract was to encourage or facilitate a separation after the marriage. Such a contract is illegal and void. Hence it is not binding upon, and cannot be enforced against, either party. 1 Bishop on Mar., Div. & Separation (1891) § 1277; Watson v. Watson, 87 Ind. App. 548, 77 N. E. 355; Neddo v. Neddo, 56 Kan. 507, 44 Pac. 1.

As said in Bishop on Mar., Div. & Sep. § 1277:

"\* \* \* Any agreement encouraging a separation is void. \* \* \* Even if made before marriage, in view of a possible living apart, it is invalid."

In *Watson v. Watson*, supra, 37 Ind. App. 548, 77 N. E. 355, there was an antenuptial contract, which provided for a certain dower for the wife in the event that she should survive the husband; but it also provided that, "in case the parties \* \* \* fail to agree, and shall, for any cause, separate and continue to live \* \* \* apart," the husband should pay the wife the sum of \$200, and that neither party should have "any claim, interest, nor right to and in the separate property of the other, either in the lifetime of the parties or at the death of either." The agreement was followed by marriage and cohabitation of the parties as man and wife for three years, when they separated, and the husband brought suit for divorce on the ground of the conduct of the wife which he alleged amounted to cruelty. The wife filed an answer and cross-bill, in which she made the countercharge of cruelty and nonsupport, and prayed that the divorce and alimony be awarded to her. The court below held the wife to be entitled to the divorce, decreed accordingly, and allowed the wife alimony and attorney's fees, and the husband appealed. As stated in the opinion, the sole question before the appellate court was "the effect of an antenuptial contract on the question of alimony." In the opinion of the court it is further said:

"Appellant insists that \$200 is the limit of his liability to appellee in case of a separation for any cause, and that the decree should be modified, so that the amount of appellee's recovery for alimony shall not exceed that sum. \* \* \*

"If we should adopt appellant's construction of the antenuptial contract, it would be in effect affirming a rule of law authorizing parties contemplating marriage to fix in advance the husband's liability for alimony in case either shall obtain a divorce. This we cannot do. While the law in this state is firmly fixed, giving parties the right to adjust and settle property interests by antenuptial contract [citing authorities], yet such settlement must be free from fraud and imposition [citing authorities], and not against public policy. *Neddo v. Neddo* (1896) 56 Kan. 507, 44 Pac. 1.

"It is \* \* \* equally well settled that the husband is bound to support his wife [citing authorities]. This legal obligation is a part of every marriage contract. It is the duty imposed upon the husband by law, and from this obligation he cannot shield himself by contract. To hold otherwise would be to invite disagreement, encourage separation, incite divorce proceedings, and commend a principle which would be a menace to the welfare of society, contrary to public policy, and tending to overthrow and destroy every principle of the law of marriage, requiring that husband and wife shall live together during their natural lives, and that the husband, within his financial ability, shall furnish the wife with reasonable necessities for her

support, and home comforts in sickness and in health, as by law he is required to do. \* \* \* The case at bar furnished a good illustration where a settlement under the contract would be an incentive to a separation. \* \* \* By the payment of the insignificant sum of \$200 he would be relieved from [the legal obligation aforesaid]. \* \* \* Such a contract is contrary to public policy and cannot be enforced. We must not be unmindful of the fact that the public have an interest in causes of this character, aside from the parties, and for this reason the question of alimony is a matter for the court, and not a subject of agreement between the parties, whereby the action of the court is to be controlled.

"A decree of divorce, not only terminates the marital obligation, but, from the nature of the litigation, property rights growing out of the marriage relation are necessarily included in such proceedings and there settled. This rule applies to all cases alike, regardless of any contract the parties in contemplation of marriage may have made."

In *Neddo v. Neddo*, supra (56 Kan. 507, 44 Pac. 1), there was an antenuptial contract which provided that if the—

"parties should fail to live together amicably as husband and wife, and they should separate, either by abandonment or by divorce being granted to either or both of said parties, then the property \* \* \* held and owned by either of said parties \* \* \* shall be and remain" their separate property, "and the parties hereby release and forever quitclaim any right, title, or interest acquired by reason of said marriage in the property" aforesaid, "and also waive any claim to alimony or other rights acquired or liabilities incurred by reason of said marriage, in the event of such separation or divorce. \* \* \*"

The parties married and lived together for 14 years, when they separated. The husband brought suit for divorce on the ground of adultery as charged in this third amended petition, and set up the antenuptial contract as in bar of any claim for alimony on the part of the wife. The wife filed her answer and cross-bill, alleging desertion on the part of the husband. The court below decreed in favor of the wife, granted an absolute divorce (under the statute similar to ours, except that the period therein named is shorter than that provided in our statute as ground for an absolute divorce), and held the contract to be void, and awarded the wife counsel fees and alimony, both pendente lite and permanent. The appellate court affirmed the case and in its opinion said:

"Contracts or settlements in consideration of marriage, which are reasonable, equitable, and not against public policy, are recognized as valid by the statutes of this state and the decisions of this court. \* \* \* We hold that it [the antenuptial contract aforesaid] contains provisions contrary to public policy. \* \* \* They seem to invite disagreement and abandonment, and make the same productive of profit

to the party having the greater amount of property. The law of marriage \* \* \* required them to live together as husband and wife during their natural lives; but, by the violation of that law, \* \* \* the party having the bulk of the property might derive pecuniary profit. No marriage settlement ought to be upheld which invites and encourages a violation of the marriage vow, and this contract is of that character. By the abandonment of the wife in violation of the law of marriage, it was in effect stipulated that the guilty party should be relieved from the duty of support which that law enjoins. A contract which incites the hope of financial profit from the separation of married people should not be enforced."

[3] The same principle is applicable to postnuptial contracts. 1 Bishop on Mar., Div. & Sep. § 1261; 2 Bishop, § 696; 1 Elliott on Contracts, § 414; 1 Page on Contracts, § 429; Pereira v. Pereira, 156 Cal. 1, 103 Pac. 488, 23 L. R. A. (N. S.) 880, 134 Am. St. Rep. 107; 9 Cyc. 521.

As said in Bishop on Mar., Div. & Sep., supra, § 1261:

"\* \* \* Since the law makes the public a party to every suit for dissolution or separation, and forbids either form of divorce on the mutual agreement of the parties, \* \* \* any bargaining between them for a future separation, \* \* \* or tending to the like end, being contrary both to the law and legal policy, is void."

And again (2 Bishop, supra, § 695) the same learned author says:

"Therefore any agreement for divorce, or *any collateral bargaining promotive of it*, is unlawful and void." (Italics supplied.)

As said in 1 Elliott on Contracts, supra, § 414:

"Contracts between husband and wife, looking to a future separation, \* \* \* are invalid."

As said in Pereira v. Pereira, supra, 156 Cal. 1, 103 Pac. 488, 23 L. R. A. (N. S.) 880, 134 Am. St. Rep. 107:

"Any contract between the parties, having for its object the dissolution of the marriage contract, or *facilitating that result*, \* \* \* is void as contra bonos mores." (Italics supplied.)

[4] It is true that the contract in the cause before us contains no express statement that its provisions, limiting the husband's legal obligation to support the wife and child, are meant to go into effect upon his desertion of the wife, so as to enable him to accomplish such desertion, and yet escape the legal obligation aforesaid, except to the trivial amounts stipulated in the contract. But that such was the specific object of the contract clearly appears from other evidence in the cause. Including the testimony of the husband. Such evidence, although parol, is

admissible to show the illegality of the contract. 9 Cyc. 766; 13 C. J. 770, 771. And certainly in a divorce suit, in which it is the duty of the court, of its own motion, if need be, "to go into the investigation of the facts," although "not contested by the pleadings" (2 Bishop on Mar., Div. & Sep. § 663), the mere omission of such a contract to express its real object, cannot close the eyes of the court to that object, when it is unmistakably disclosed by other evidence in the cause. We must regard the contract, therefore, as if its real object aforesaid had been written in it. So regarding it, it was illegal and void.

Such a contract is distinguishable from bona fide antenuptial and postnuptial contracts (such as are involved in all of the cases cited in the brief for appellee), not made with the specific object of providing a contract limitation of the legal obligation aforesaid, with a view to controlling the action of the parties or of the court on the subject in any future proceeding for divorce or alimony, and in which the ground or grounds relied on for divorce arise from the action of the husband or wife after the contract is executed. The two features last mentioned are those which render such contracts invalid, and distinguish them from antenuptial and postnuptial contracts which are valid. It is true that some postnuptial contracts which precede separation are in most jurisdictions held to be valid; but they are so held only where they contemplate an immediate separation for some ground existing prior to the contract which is sufficient of itself to bring about the separation. Such holding proceeds upon the principle that the parties have already irrevocably determined upon a separation for a pre-existing cause, and hence the upholding of an agreement as to property rights with a view to such an inevitable separation does not in such case encourage or facilitate the separation. Speck v. Dausman, 7 Mo. App. 165; 9 Cyc. 520, 522; 13 C. J. 465, 466. And the weight of authority and better opinion, indeed, is that even bona fide antenuptial and postnuptial contracts, valid in all other respects, cannot bind the action of the court on the subject of alimony. The court will usually adopt such contract provisions, if just and reasonable; otherwise, it will not do so. 1 Page on Contracts, § 430.

But it is urged that in the case before us the husband would not have entered into the marriage status, but for the contract aforesaid, limiting the resultant liability upon him aforesaid, which would otherwise flow therefrom; that the act of the husband in entering into the marriage for the purpose of legitimating the child under the statute was a laudable act in itself, and that public policy demands that such action in the direction of just reparation should be encouraged,

and not discouraged. This argument can lead only to the position (which, however, is not so stated in the argument for the husband) that the husband in such case should be allowed by contract to limit his resultant liability aforesaid, because otherwise he would not accord, and others so situated will not accord, such reparation at all. But it is apparent upon but slight reflection that the courts have no power to so hold. That would be to allow parties by private agreement to establish such marriage status as they may wish. The requirement of the statute for the legitimating of a child born out of wedlock is that the father shall intermarry—enter into the marriage status—with the mother of the child. There is but one marriage status known to the law, and from it flows the legal obligation of the husband aforesaid to maintain and support the wife and child. The benefit of the statute cannot be obtained without the payment of the price therefor therein fixed. The courts are powerless to abate that price.

[5] We had intended to follow the conclusions reached above by consideration and adjudication upon the further questions of whether, in the state of the pleadings, an absolute divorce could be decreed on the ground of the desertion of the wife by the husband aforesaid, and, in any case, to have adjudicated that the wife is entitled to an allowance of alimony, both pendente lite and permanent, and to have remanded the cause to the court below for further proceedings, to the end that such court should fix the amounts of the allowances of alimony and also of further reasonable attorney's fees pendente lite; but since the case was argued and submitted to this court, and after the portion of this opinion preceding this paragraph had been written, the death of the husband occurred. This fact is conceded by counsel representing both husband and wife, and of itself brings about a situation in which any decree we might enter, granting a divorce or allowing alimony, would be inoperative. Hence no decree will be entered by us on those subjects, except to reverse the original decree under review in such of its holdings as are found to be erroneous. To such extent the decree of this court will still be effective, for there could be no abatement of the original decree by reason of the death of any party to the cause after the appeal had been allowed (*Reid's Adm'r v. Strider's Adm'r*, 7 Grat. [48 Va.] at page 84, 54 Am. Dec. 120); and by virtue of the statute (Code 1919, § 6167) the appellate court may, in its discretion, enter its decree dealing with the adjudications of the original decree as if no death of any party to the cause had occurred. There remains, therefore, in issue upon this appeal, the subject of the provisions of the decree under review which held

the antenuptial contract aforesaid to be valid, granted an absolute divorce on the prayer of the husband, and further decreed, in effect, that the wife should be absolutely divested of any right, title, interest, and estate of any character whatsoever in any property then owned or thereafter acquired and held by the husband. For the reasons stated above we are of opinion that all of such provisions of such decree were erroneous, and to such extent the decree will be reversed. No order dismissing the cause will be entered here, as we are not advised whether any action has been taken by the court below on the subject of the custody of the child pending the appeal and prior to the death of the husband.

Reversed and remanded.

(127 Va. 34)

### DUNCAN v. BROADWAY NAT. BANK.

(Supreme Court of Appeals of Virginia. March 18, 1920.)

#### 1. CONTINUANCE ¶51(5)—FURTHER CONTINUANCE FOR ABSENT WITNESSES HELD PROPERLY REFUSED.

Where case had been continued three times, chiefly for defendant's benefit, refusal to again continue the case on defendant's motion for absence of witnesses, two of which were nonresidents and one a resident whose whereabouts were unknown, and for all of whom a summons had been issued and returned unexecuted, held within court's discretion, in absence of showing of reasons for the belief of counsel as to the materiality of the witnesses or as to probability of securing their testimony at a subsequent trial.

#### 2. CONTINUANCE ¶51(5)—FOR ABSENCE OF WITNESSES WITHIN DISCRETION OF COURT.

The granting or refusal of a further continuance for absence of witnesses is discretionary with the trial court.

#### 3. CONTINUANCE ¶51(8)—REQUIRING COUNSEL TO DISCLOSE FACTS TO BE PROVED BY ABSENT WITNESSES HELD PROPER.

Action of court in requiring counsel for defendant, on their motion for further continuance for absence of witnesses, to testify as to the facts which they expected to prove by the absent witnesses and the reasons upon which their expectation was based, held proper.

#### 4. APPEAL AND ERROR ¶1047(5) — REFUSAL TO PERMIT EXAMINATION OF BOOKS BEFORE INTRODUCTION HARMLESS, WHERE DEFENDANT GOT BENEFIT OF THEM AT TRIAL.

Refusal to permit defendant to inspect books and papers produced by witness, pursuant to summons under Code 1904, § 3371 (Code 1919, § 6237), before they were introduced in evidence by plaintiff, held harmless, where the witness who had the custody of the books and papers was thereafter fully examined with reference to them, so that defendant got the benefit of everything they contained.

**5. TRIAL ⚡59(2)—COMPELLING TAKING OF TESTIMONY OUT OF ORDER NOT IMPROPER.**

In action by a bank, where defendant had summoned as witnesses so many of the bank's officers that bank, 90 miles from place of trial, would probably have had to close up if all attended, action of court in requiring defendant to proceed with examination of the bank officers present was not error, as order of proof is discretionary.

**6. BILLS AND NOTES ⚡97(3)—NOTES GIVEN FOR STOCK AND AGREEMENT TO RESELL HELD NOT VOID FOR FAILURE OF CONSIDERATION.**

Where maker, in return for execution of notes, received corporate stock, together with seller's agreement to resell the stock at maker's option 12 months from date of sale, *held*, in action on notes prior to expiration of the 12 months, that there was no failure of consideration.

**7. CORPORATIONS ⚡120—NOTES FOR CORPORATE STOCK HELD NOT TO HAVE BEEN PROCURED BY FRAUD.**

Notes given for corporate stock and agreement to resell on maker's option 12 months after sale *held* not to have been procured by fraud.

**8. BILLS AND NOTES ⚡445 — ACTION ON NOTES HELD NOT PREMATURELY BROUGHT.**

Where notes were given as consideration for stock and agreement to resell at maker's option 12 months after sale, action on the notes prior to expiration of such 12-month period was not premature.

**9. BILLS AND NOTES ⚡370, 373—FAILURE OF CONSIDERATION AND FRAUD NOT DEFENSES AGAINST BONA FIDE PURCHASER.**

The defenses of failure of consideration and fraudulent procurement of notes, even though good as against payee, were not available as against a bona fide holder in due course and for value.

**10. BILLS AND NOTES ⚡525—EVIDENCE HELD TO SHOW PLAINTIFF A BONA FIDE PURCHASER.**

In action on notes, defended on ground of failure of consideration and fraud, evidence as to the caution exercised by plaintiff before accepting notes *held* to show plaintiff a bona fide holder in due course and for value.

**11. BILLS AND NOTES ⚡353 — NOTES FOR WHICH BANK ISSUED CERTIFICATE OF DEPOSIT GOOD, WHERE BANK HAD NO NOTICE OF INFIRMITY.**

Where bank, holder of notes, gave payee certificate of deposit, it was entitled to recover thereon, under Code 1919, § 5616, even though there was an infirmity, good as a defense as against payee, where bank had no notice of infirmity until after certificate of deposit was paid.

Error to Circuit Court, Culpeper County.

Action by the Broadway National Bank against E. P. Duncan. Judgment for plaintiff, and defendant brings error. Affirmed.

Hidden & Bickers and S. M. Nottingham, all of Culpeper, for plaintiff in error.

F. T. Sutton, Jr., of Richmond, for defendant in error

KELLY, P. The Broadway National Bank of Richmond, being the holder of three negotiable notes executed by E. P. Duncan to his own order and indorsed by him, obtained a judgment thereon against Duncan, which is now under review.

[1, 2] 1. The refusal of the trial court to grant the defendant a continuance because of the absence of three witnesses, Arrington, Evans, and Smith, is assigned as error. Arrington and Smith were nonresidents; Evans was "supposed to be" in the United States army, but his whereabouts were unknown. A summons had been issued for these witnesses a short time before the trial and returned unexecuted. There was also an unexecuted subpoena duces tecum, requiring Smith to produce certain books and papers. The case had been regularly called on the docket of the court at the April term, 1918, and continued to the June term. At the June term it was again called, and passed to July 8th, and then finally set for July 15th, when it was tried. These successive delays appear to have been chiefly in the interest of the defendant; the plaintiff being ready at the April term and at all times thereafter. The bill of exceptions shows that the motion for continuance was in the first instance supported by the affidavits of counsel, who, upon being required by the court to submit to examination as to what they expected to prove by the absent witnesses and the books and papers called for in the subpoena duces tecum—"showed that the statements in the affidavits were based upon belief and not upon actual knowledge, and that neither of the affiants knew the witnesses personally, had never talked with them, and had no actual knowledge of what they would say, nor what the books, papers, etc., \* \* \* contained."

The affidavits did not give any reasons for the belief of counsel as to the materiality of the witnesses, or as to the probability of securing their testimony at a subsequent trial; and the oral testimony of counsel did not substantially alter the situation in these respects. It would have been a pure experiment, based upon conjecture, if the court had granted the continuance, and its action in refusing the same was a proper exercise of the well-known discretion which, under a wise rule of practice, belongs to the trial court.

[3] Nor do we find that the court erred, as alleged, in requiring counsel, who had made the affidavits above mentioned, to go on the witness stand and testify as to what they expected to prove by the absent witnesses. The gravamen of this assignment seems to be that the action complained of was taken by the court, not on its own motion, but on motion of counsel for plaintiff. What the court would have done, in the absence of a motion by counsel, may be left to conjecture, although its probable action on its own motion under such circumstances would per-

haps be easy to forecast. What it actually did, disclosed that counsel for defendant were laboring under the mistaken idea that they could reasonably ask the court to continue the case upon a mere surmise as to what they could prove by Arrington, Evans, and Smith, and by the books and papers in question. See *Hewitt's Case*, 17 Grat. (58 Va.) 627; *Harman v. Howe*, 27 Grat. (68 Va.) 686; *Burks' Pl. & Pr.* 465. From these authorities it will clearly appear that the court did not err in requiring the affiants to disclose the facts which they expected to prove by the absent witnesses and the reasons upon which their expectation in this respect was based. The record before us contains a voluminous stenographic report of all that transpired with reference to the strenuous efforts of the defendant to continue the case, and this report shows that the trial judge was exceedingly patient, cautious, and considerate, and only ruled against the motion for a continuance after the fullest hearing.

[4] 2. The president of the plaintiff bank was in court with certain books and papers pursuant to a summons issued against him in accordance with section 3371 of the Code of 1904 (Code 1919, § 6237), which had been served upon him at the instance of the defendant. Before announcing ready for trial, the defendant moved the court to require the plaintiff to allow him to inspect these books and papers before putting them in evidence. The plaintiff objected, the court sustained the objection, and the defendant excepted and assigns error. The question, however, becomes moot and immaterial, in view of the fact that counsel did subsequently introduce the witness who had custody of the books and papers, the same were produced, the witness fully examined with reference to them, and the defendant got the benefit of everything material which they contained.

[5] 3. It is assigned as error that "the court permitted counsel for plaintiff to dictate the order in which" the defendant should introduce his witnesses. The record discloses a state of facts in which the court, although apparently following the suggestion of counsel for plaintiff, ought to have, and undoubtedly would have, taken exactly the same course on its own motion. The situation was this: A summons had been served on Clyde W. Saunders to testify on behalf of the defendant. He was not present, but was in Richmond, 90 miles from Culpeper, where the trial was being held, and had explained to the court that he was engaged in important work for the United States Army Draft Board, and would be unable to reach the place of trial for two days. The court had also been informed of the substance of the testimony which Saunders was expected to give, and it was of such character as that the order of its introduction could not have been material. The defendant had summoned as

witnesses a number of the officers of the plaintiff bank—so many, in fact, that it would probably have been necessary to close the bank if all of them had attended the trial at one time. Three of these officers were in attendance upon the court; three others were in Richmond attending to the important public duty of keeping the bank open, but were ready to come as soon as they could be relieved by the return of those already at court. Counsel for defendant insisted upon using Saunders as their first witness, and moved for a postponement until his presence could be procured. The court, on motion of the plaintiff, very properly held that, if the defendant expected to use the bank officers then in attendance, they must do so at that time, so as to allow them to return to Richmond and relieve the other bank officers then under summons. Counsel for defendant stated that under these circumstances they did not care to examine the bank witnesses at all, but would simply save the point. Later on, however, they did call to the stand all three of the bank officers who were present, to wit: H. N. Phillips, president, F. L. McConnell, vice president and cashier, and A. M. Smith, vice president, and examined them fully along, with the books and papers for which they had called in the summons above mentioned. Counsel for plaintiff and defendant then agreed upon what the testimony of Clyde Saunders would be if he were present, and he was not required to come to the trial at all.

In view of the foregoing facts, there would seem no room for doubt as to the correctness of the ruling of the court. The general rule is that the order of proof should be left to the preference and judgment of counsel, but a due and efficient administrative control of proceedings in court requires that the trial judge shall have a wide discretion in all matters of this kind. That he does have such discretion is perfectly well settled by the authorities. The Virginia cases on the subject are numerous. No one of them, perhaps, is exactly like this one in its facts; but the reason and principle in all of them is the same. As applied to this case, the rule is very well stated in the language used by Judge Keith in *Wickham v. Leftwich*, 112 Va. 225, 228, 70 S. E. 503, 504, as follows:

"We have frequently held that the trial court has a large discretion with respect to the order in which testimony is to be admitted before it, and, while we have never held that this court will in no case undertake to control that discretion, we do not find in the record before us any occasion to depart from the practice usual in such cases. This ground of error is therefore overruled."

4. We come now to the merits of the controversy. The plaintiff, having introduced in evidence the three notes sued on, rested its case. The defendant then produced his evidence, and the plaintiff demurred thereto.

The court sustained the demurrer, awarding judgment for the plaintiff, and the defendant excepted.

The execution, delivery, and negotiation of the notes were not denied. The defenses stated were: (a) Failure of consideration; (b) fraud in procurement; (c) that the plaintiff was not a bona fide holder for value and in due course; and (d) that the action was premature, because one of the defenses had not matured (meaning a defense under the contract for resale hereinafter set out).

The evidence, regarded from the standpoint of a demurrer thereto by the plaintiff, discloses the following material facts: Duncan was a man of means and business experience. He was a farmer and cattle dealer, residing on his own farm near the town of Culpeper, and he had also been for a number of years a director in one of the Culpeper banks. In August, 1917, he was solicited by W. H. Arrington, secretary and treasurer of the Washington-District of Columbia Taka-Kola Bottling Corporation, to take stock in that corporation. Arrington was accompanied by E. V. Evans, a sales agent of the company, but Arrington seems to have conducted the negotiations. There is some contention that Duncan understood Arrington as offering stock in another company, to wit, the "Taka-Kola Company," but no substantial foundation exists for any such contention. Duncan does say once or twice in his testimony that Arrington solicited him to take stock in the "Taka-Kola Company," but he could not have failed to understand that this was merely an abbreviation for the full name of the corporation with which he was dealing. Nowhere in the record is there any evidence to show that the Taka-Kola Company had any existence as a separate corporation, or that, if there was such a separate corporation, it was any better or more solvent than the one represented by Arrington.

Duncan at first declined to take the stock on the ground that he had no money with which to pay for it, and thereupon Arrington said:

"If you will take this stock, I will sell the stock for you again, and we will divide the profits on it."

This offer appealed to Duncan, and as a result he executed and delivered to Arrington the three notes sued on in this case, and Arrington gave him a written agreement for the resale of the stock. It appears that there were two sales by Arrington to Duncan, the first on August 19, 1917, for 50 shares, for which Duncan delivered to Arrington his note for \$500, payable to his own order and indorsed by him, due six months after date, with interest, and the second on August 22, 1917, for 500 shares, for which Duncan delivered to Arrington his two notes in like form for \$2,500 each, due 6 months after date, with

interest. In return for these notes Duncan received and had in his possession at the time this suit was brought the following papers: (1) Receipt for \$500, dated August 19, 1917, "in full payment for 50 shares of the capital stock of the Washington-District of Columbia Taka-Kola Bottling Corporation of Richmond, Va., pursuant to the application therefor bearing the same number and date as this receipt and referred to and made a part hereof." (2) A like receipt, dated August 22, 1917, for \$5,000, covering the payment for 500 shares of the stock. (3) A certificate for 550 shares of the capital stock of the Washington-District of Columbia Taka-Kola Bottling Corporation. (4) An agreement dated August 22, 1917, signed by W. H. Arrington, secretary and treasurer, in the following words and figures:

"In the event E. P. Duncan desires to dispose of his stock (\$5,000.00 in this corporation Washington-District of Columbia Taka-Kola Bot. Corp.) after 12 months from date, I agree to resell same for as much as twelve dollars and fifty cents (12.50) per share or better, and all over the par ten dollars (\$10.00) to be equally divided between he and myself."

In testifying in regard to this last-mentioned agreement, Duncan was asked by his counsel the following question and gave the following answer:

"Please state, Mr. Duncan, if that was the inducement which made you sign these notes."

Answer:

"That was the only inducement. That was the reason I took them, for I had told him a thousand times that I did not want any stock in the Taka-Kola Company."

The foregoing answer, as well as the papers which were exchanged at the time between Duncan and Arrington, and indeed everything in the record bearing upon the question, show most convincingly that Duncan, not only could not have been left in any doubt as to the name of the corporation in which he was to have stock, but also that he was influenced only by the agreement of Arrington to resell the stock at a profit.

A day or two later Arrington disposed of the notes to the plaintiff, Broadway National Bank of Richmond. The negotiations on the part of the bank were conducted by H. N. Phillips, president, who, in the course of his examination by counsel for the defendant, said:

"Mr. Arrington was not a stranger. But, had he been a stranger up to that time, he came to me with a letter from a most esteemed citizen of Culpeper county and town, which would have given him a most respectful hearing."

The letter here referred to was dated August 23, 1917, and was from John J. Davies, cashier of the Culpeper National Bank, ad-



dressed to W. H. Arrington, and to the following effect:

"We regret that we cannot use the three notes of E. P. Duncan, aggregating \$5,500. We would be glad to do so, if we were not now carrying Mr. Duncan's paper to our limit. We regard the notes genuine, good, and collectable. Mr. Duncan owns considerable real and personal property, being worth at least \$150,000. Regretting our inability to use this paper, we are," etc.

Before concluding the transaction, the plaintiff bank addressed inquiries to the Second National Bank of Culpeper and to the Culpeper National Bank (both doing business at the home of the defendant), and received from them, in the order here named, the following telegraphic replies:

(1) "E. P. Duncan fifty five hundred I consider good. Seems to be investing too freely."  
(2) "E. P. Duncan note fifty five hundred good collectable."

Thereupon the bank purchased the notes. It was Arrington's own proposition, accepted by the bank, to sell them at a discount of 5 per cent., and to accept in payment a 6 months certificate of deposit for the face of the notes, less the discount. In this way the bank realized a discount of 5 per cent., and in addition thereto the 6 per cent. interest which the notes provided for, and also got the benefit of the use of the money represented by the time deposit, upon which, however, it had to pay 3 per cent. interest. The bank officers testified that, while the time deposit made the purchase more attractive, the deposit itself was in no way taken or held as security for the notes. Upon the contrary, the certificate of deposit was a negotiable instrument, and as soon as it was delivered to Arrington was in such form as that he could have disposed of it and put the proceeds entirely beyond the control of the bank, except as to the time of payment. When it matured on February 27, 1918, it was paid in due course through the clearing house upon the joint indorsement of Arrington and the Washington-District of Columbia Taka-Kola Bottling Corporation.

[6-8] None of the defenses relied upon are, in our opinion, well founded. Duncan got exactly what he contracted for, the stock in the Washington-District of Columbia Taka-Kola Bottling Corporation, and a contract to resell. The time for the performance of the latter contract had not arrived when this case was tried. So far as the record shows, Duncan himself had never made any effort to ascertain the value or availability of that contract up to February 27, 1918, the date on which the bank made the certificate of deposit.

[9, 10] But, if any of the defenses claimed would have been good as between Duncan and the corporation, they were cut off by the

fact that the bank was clearly and plainly a bona fide holder of the notes in due course and for value. The evidence, as stated above, contains a fair recital of what transpired between Arrington and the bank, and of the caution with which the bank proceeded before it purchased the paper.

[11] We are referred to sundry authorities for the general proposition found in section 5616 of the Code, being a part of our Negotiable Instrument Law, as follows:

"Where a transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount therefore paid by him."

If it were conceded that delivery of the certificate of deposit at the time the transfer was made did not amount to a payment in full, the position of the defendant is not improved, because the plaintiff did not have notice of any alleged infirmity in the notes until after the certificate of deposit itself was paid. On January 25, 1918, Duncan wrote the bank as follows:

"Your letter received, reference to some notes of mine which I have a contract with the agent when I gave the notes that they were to sell the stock for me so I could get the money to meet the notes, and they have not done it, and I have not nor will I have the money soon unless something turns up not expected."

To this letter the bank replied that when it bought the notes it was assured that they would be promptly met, and that it would have to insist on payment, and Duncan answered:

"Your letter received and I am sorry I cannot comply, and don't see how any one could tell that but one could not expect any more from them if they were the same persons whom I gave them to they have told and promised me that they would resell the stock for me at a profit to meet these notes. I have not the money nor will I have it for quite a while, unless I sell something. I have the stock that those notes was given for that I would exchange for the notes if you can handle it."

On February 21st, the notes being then about due, the plaintiff sent the same to the Culpeper National Bank for collection, and the reply of that bank to the plaintiff, which was introduced in evidence without objection, stated:

"Mr. Duncan says he will arrange to pay these notes in about ten days."

The certificate of deposit was presented for payment through a clearing house and paid on the 27th of February, and at that time nothing had transpired to indicate anything more than that Mr. Duncan regretted his trade with Arrington.

We have held more than once that those who execute commercial paper and set it afloat are chargeable with greater care and diligence than those who purchase it in the regular course of business. The defendant, a man of affairs and a bank director for 10 years or more, can hardly be heard to ask for a relaxation of this rule, especially in view of the fact that the notes he gave were in conspicuously and punctiliously negotiable form, and that, further, the reason for splitting the payment for the \$5,000 subscription into two notes of \$2,500 each must have been to facilitate their negotiation. The case falls within the doctrine of *Bank v. Hundley*, 112 Va. 51, 70 S. E. 494, and *Fleshman v. Bibb*, 118 Va. 582, 88 S. E. 64.

The judgment is affirmed.  
Affirmed.

(127 Va. 74)

**HOPEWELL HEIGHTS DEVELOPMENT  
CO., Inc., v. KAGAY-MARSHALL  
REALTY CO.**

(Supreme Court of Appeals of Virginia.  
March 18, 1920.)

**BROKERS' 75—CONTRACT HELD TO REQUIRE  
PAYMENT OF COMMISSION ON EXCESS SELLING  
PRICE BEFORE FULL COLLECTION.**

Under a real estate brokerage contract giving the broker a commission of 20 per cent. on the list prices and one-half of the overage on the prices obtained above the list price, said commissions to be paid from three-fourths of the collections received on sales, the provision for payment of commissions applies to the half of the excess as well as to the percentage of the list price, broker is entitled to his full compensation when three-fourths of the collections are sufficient to pay them, though the collections to that time are not equal to the list price.

Error to Circuit Court of City of Petersburg.

Action by the Kagay-Marshall Realty Company against the Hopewell Heights Development Company, Incorporated. Judgment for plaintiff, and defendant brings error. Affirmed.

This case involves the question of whether the defendant in error (the plaintiff in the court below), the sales agent of the vendor, under a certain contract in writing, has the right to demand payment by the vendor, out of certain collections of purchase money, of certain compensation to the agent for making sale of certain land.

The vendor is the plaintiff in error, having been the defendant in the court below, and the parties will be hereinafter referred to as vendor and agent.

The contract is as follows:

"This memorandum of agreement, made and entered into this 23d day of September, 1915,

by and between the Hopewell Heights Development Company, Incorporated, by Walter Saks, president, party of the first part and the Kagay-Marshall Realty Company of Illinois, party of the second part:

"Whereas, the said party of the first part are the owners of a tract of 36 acres at Hopewell and desire to sell the same as lots; and

"Whereas, the parties of the second part are equipped to sell, advertise and conduct lot sales on the said tract:

"It is hereby agreed that the said Kagay-Marshall Realty Company are hereby appointed exclusive agents for said lots for a period of 6 months from date herein and upon the following terms and conditions:

"First.—The parties of the first part agree to have the property surveyed and platted and suitable lot markers and street signs erected, and to furnish maps and blueprints of said subdivision; to have the streets and avenues graded and the property cleaned of all weeds and underbrush, and to construct sidewalks on the main street, with the understanding that sidewalks are to be constructed on other streets, providing all lots are sold on those streets; to build an office and depot station on the property and to erect such other buildings as they may deem advisable and render the premises generally in shape for a sale.

"Second.—The parties of the second part agree to furnish the necessary advertising matter and transportation of prospects to show the lots, and will conduct and manage the sale and make all arrangements proper, in their judgment, for a successful sale of this property, and agree to maintain an organization of five high-class salesmen and to devote their best efforts and use every legitimate means to dispose of the above-mentioned tract.

"Third.—The party of the first part agrees to donate two lots, to be given away for advertising purposes, and to furnish and deliver and execute such contracts, deeds, and other evidences of title as all persons securing lots may at that time be entitled to receive, said lots to be free and unincumbered with covenants of general warranty. It is agreed that failure to deliver or execute contracts, deeds, or other evidences of title, or to make the improvements mentioned above, shall not stand as a bar for collection of commissions due sales agents under this contract.

"Fourth.—It is agreed that the subdivision of 36 acres will be platted into approximately 400 lots and will be priced on an average of \$200 a lot, except lots fronting on street car line to average \$300 a lot or any one street that the party of the first part designates.

"Fifth.—It is agreed that the said Kagay-Marshall Realty Company shall have the exclusive sale of this property and shall receive a commission of 20 per cent. on the above prices and one-half of the overage on the prices which may be placed upon said lots over and above the prices mentioned herewith, said commissions to be paid three-fourths of the collections received on sales until they are paid in full, lots to be sold on terms of one-fourth cash and the balance 4, 8, and 12 months, with 6 per cent. interest on deferred payments, or on terms of one-fourth cash and the balance at \$10 per month with 6 per cent. interest on deferred payments.

"Sixth.—The Kagay-Marshall Realty Company guarantee that they will not handle or conduct sales on any subdivisions adjoining or in the immediate vicinity of Hopewell Heights, during the life of this contract. They also guarantee that after the opening sale that they will sell at least 25 lots every 30 days during the period of this contract, or that they will forfeit the same.

"The party of the second part also guarantees that they will spend at least \$1,000 to advertise and promote the opening sales on this property by November 15, 1915.

"Seventh.—It is agreed that the stockholders in the Hopewell Heights Development Company will be allowed a commission of 5 per cent., which will be deducted from the commissions to be due the sales agents, on all sales which the said stockholders make personally without the assistance of the said sales agents or their representatives.

"Executed in duplicate the day and year first above mentioned."

After the contract was executed the land was platted into 426 lots. The vendor exercised the option given it in the fourth clause of the contract and designated that the lots fronting on Fifth avenue, shown on the plat, should sell for an average of \$300 a lot, instead of the lots stipulated in the contract to sell for that price and mentioned therein as fronting on the street car line (which was on another street), leaving the other lots to be sold for an average of \$200 a lot as stipulated in the contract. There were 90 lots on Fifth avenue and 336 other lots. These prices as agreed upon in the contract would produce the following totals:

90 Fifth avenue lots, at \$300 each.....	\$27,000 00
336 other lots, at \$200 each.....	67,200 00
Total, 426 lots.....	\$94,200 00

These were the minimum average prices at which the agent was authorized by the contract to sell the lots, and on which he was to receive the minimum compensation of 20 per cent. commission provided for in the fifth clause of the contract. There is no controversy in the case about these matters.

The contract evidently contemplated that, subsequent thereto, a minimum price list would be made of all the lots, in which it was expected that some of the prices of the respective classes of lots would be below and some above the \$300 and \$200 prices mentioned in the contract, but such varied prices were to average the \$300 and \$200 prices of the two classes of lots aforesaid respectively. Hence the word "average" was used in the contract.

But after the lots were platted the only price list which was made of the lots was a selling price list, by which various prices were put upon each of all of the lots; all of such prices, however, except in a few instances, being much in excess of the minimum prices of \$300 for the Fifth avenue lots and \$200 for the other lots.

There was in fact no minimum price list of the lots made, but all of the lots on Fifth avenue were regarded as having a minimum price of \$300, and all the other lots as having such price of \$200, except in the few instances in which the selling price list aforesaid allowed lower prices. The lots were in fact "priced" in this way and the minimum prices were in fact fixed in this way. Such minimum prices are referred to in the record, however, as the "list price" or "list prices."

The selling price list of the lots resulted in the following totals:

90 Fifth avenue lots.....	\$ 30,515 00
336 other lots.....	97,385 00

Total selling prices..... \$127,900 00

The difference between said "list prices" and said "selling prices" is what is referred to in the record as "overage," and is as follows:

Total selling prices.....	\$127,900 00
Total list prices.....	92,200 00

Difference, or "overage"..... \$ 35,700 00

With some trivial exceptions, which it is conceded in argument do not affect the result in controversy, all of the lots were sold by the agent in accordance with the contract, and sold at their selling prices fixed by the selling price list aforesaid.

At the time of suit brought the vendor had collected a little over one-half of the total purchase money for which the lots were sold. Such collections did not amount to as much as said total of the "list prices" of the lots, of approximately \$94,200 aforesaid. But three-fourths of such collections, however, did amount to more than the total compensation claimed by the agent under the contract, which was 20 per cent. commission on the total of the list prices, of approximately \$94,200 aforesaid, and one-half of the "overage" aforesaid of approximately \$33,700.

But the vendor took the position that, according to the proper construction of the contract, the agent was not entitled to any compensation on account of the "overage" provided for in the fifth clause of the contract until the vendor had actually collected purchase money to the amount of the \$94,200 (approximately) total of list prices, or minimum price for the whole property, aforesaid. The agent, however, took the position that according to the proper construction of the contract none of the agent's compensation was dependent upon collections actually made, except to the extent of the limitation stipulated in the contract, namely, that all of it was to be paid out of three-fourths of the collections of purchase money which the vendor had actually made as aforesaid, and that hence the one-half of the "overage," as well as the 20 per cent. commission aforesaid, was due and payable. Hence this action was instituted to recover the amount of

such "overage" claimed to be due and payable to the agent.

There is much controversy in the case over the fact that the vendor from time to time made payments to the agent on account of the compensation claimed by the latter under the contract, and that such payments very much exceeded the amount of the 20 per cent. commissions on the \$94,200 figures aforesaid, and were, in part, expressly made on account of said "overage," thus evidencing, as the agent claims the construction put upon the contract by the vendor. But the vendor claims that such payments of "overage" were merely advances on that account, made under a bookkeeping arrangement which it was expressly understood between the parties should not prejudice their rights under the contract.

Neither party demanding a jury, the court below proceeded to hear and determine the case; and, as appears from the record, being of opinion "that twenty per cent. (20%) of the list price and one-half of the overage together constitute the commissions provided for in the contract," the court found for the plaintiff, the agent, and assessed the agent's damages at \$11,000, with interest from July 1, 1916, till paid, "in full of all commissions."

It satisfactorily appears from the record that the agent was entitled to recover at least the amount of this judgment, if the court was correct in the construction given to the contract.

Plummer & Bohannon, of Petersburg, for plaintiff in error.

Charles Hall Davis, of Petersburg, and Mann & Tyler, of Norfolk, for defendant in error.

SIMS, J., after making the foregoing statement, delivered the following opinion of the court:

In the view we take of this case we shall consider it upon the assumption that the rights of neither party under the contract were prejudiced by the payments made by the vendor to the agent, which were in excess of the 20 per cent. commission admittedly due the latter, and—

1. The sole question before us is whether the proper construction of the contract itself is that given to it by the learned judge of the court below, namely:

"That 20 per cent. of the list price and one-half of the overage together constitute the commissions provided for in the contract."

The material facts and what is meant by "list price," or "list prices," and by "overage," as such terms are used in the record in this case, all appear from the statement preceding this opinion.

That part of the contract of which the construction is drawn in question before us is

contained in the fifth clause thereof, and is as follows:

"It is agreed that the [agent aforesaid] shall receive a commission of 20 per cent. on the above prices [referring to the list prices aforesaid] and one-half of the overage on the prices which may be placed upon said lots [referring to the actual selling prices aforesaid] over and above the prices mentioned herewith [referring to the said list prices], said commissions to be paid three-fourths of the collections received on sales until they are paid in full. \* \* \*"

There is a manifest typographical error in the omission of the words "out of," or words of similar meaning, between the words "paid" and "three-fourths" in the clause last quoted. There is no controversy in the case as to that.

The position of the vendor is, in substance, that the words "said commissions to be paid [out of] three-fourths of the collections received on sales until they are paid in full" refer only to the "commission of 20 per cent." on the list prices aforesaid; that the contract, it is true, provides for an additional compensation to be paid the agent for making sale of the lots, namely, one-half of the "overage" aforesaid, but that the contract does not provide when such compensation is to be paid, and that the true meaning of the contract is that such part of the overage is to be paid by the vendor only after it has first actually collected the total minimum amount of the list price of all of the lots (approximately \$94,200 as aforesaid), and out of the actual collections of such "overage" made thereafter; that, in other words, as to the "overage," the contract is, in effect, that the vendor will pay the agent one-half of any amount over and above the sum of \$94,200 (approximately) which the agent might succeed in obtaining for the property; and the cases of *Peters v. Anderson*, 88 Va. 1051, 14 S. E. 974, *Munroe v. Taylor*, 191 Mass. 483, 78 N. E. 106, *Hinds v. Henry*, 36 N. J. Law, 328, and other cases, which involve such character of contracts, are cited to support the position that the "overage" compensation to the agent in the case before us is not due or payable, except out of the excess collections by the vendor over and above the said total of the list prices aforesaid for which as a minimum the property was to sell (viz., \$94,200, approximately, as aforesaid).

These authorities are applicable and controlling in favor of the vendor if such was the nature of the contract. But we do not so construe the contract.

We must construe the language which the parties use in the contract. That language, as used in the fifth clause of the contract, seems plainly to fix all of the compensation to be paid the agent by the prices at which the agent may and does sell the lots. The agent is to receive a minimum compensation

of "a commission" (in the singular number), "of 20 per cent." on the total of the list prices of the lots sold, and, in addition thereto, one-half of the difference between the total of list prices and the total of the actual selling prices of the lots sold, "said commissions" (in the plural) "to be paid [out of] three-fourths of the collections received on sales until they" (in the plural) "are paid in full." The agent was entitled to no commissions, except on the lots actually sold; and the minimum compensation of the agent, as fixed in the contract, is based on selling prices, not collections, except as affected by the limitation that such compensation should not exceed "three-fourths of the collections received on sales." Similarly, the additional compensation to be paid the agent, of the one-half of the "overage," as fixed in the contract, is based on the selling prices, not collections, except as affected by the same limitation that such compensation, together with the minimum compensation aforesaid, should not exceed "three-fourths of the collections received on sales." There is no distinction made in the language of the contract between the "collections" out of which any of the compensation to the agent is to be paid. The compensation which is to be paid out of three-fourths of the collections is referred to in the contract in the plural (as "commissions"); whereas, the minimum percentage compensation is referred to as "a commission," and "they" are to be paid as aforesaid, as provided in the contract, "until they are paid in full."

We are of opinion, therefore, that the contract is not silent as to when the "overage" compensation to the agent is to be paid, but is a complete contract on that subject, as well as on the subject of the 20 per cent. commission provided for therein. We think that the contract on the face of it provides how and when the whole compensation to the agent is to be paid, namely, out of three-fourths of all collections of purchase money made by the vendor.

Hence we find no error in the judgment under review, and it will be  
**Affirmed.**

(127 Va. 140)

**STANDARD ACCIDENT INS. CO. v.  
 WALKER.**

(Supreme Court of Appeals of Virginia. March 18, 1920.)

**1. INSURANCE §455—ACCIDENT INSURER LIABLE FOR DEATH FROM HOMICIDE; "ACCIDENTAL KILLING BY VIOLENCE."**

A homicide resulting from bad feeling is an "accidental killing by violence," for which an accident insurer is liable, in the absence of any provision in its policy relieving it from liability.

**2. APPEAL AND ERROR §173(14)—DEFENSE THAT BENEFICIARY HAD GUILTY KNOWLEDGE OF INTENT TO KILL INSURED RAISED TOO LATE ON ERROR.**

In an action on an accident policy on the life of one who was killed by his son, the contention that his wife, the beneficiary, had guilty previous knowledge of her son's intention to murder his father, was raised too late, when not suggested in the trial court.

**3. INSURANCE §665(3)—EVIDENCE HELD NOT TO SHOW BENEFICIARY'S PARTICIPATION IN MURDER OF INSURED.**

Evidence that insured's son, after shooting him, went downstairs and said to his mother that he had "got him," or "shot him," and that she replied, "I told you not to do that," would have been insufficient to show guilty knowledge or participation on her part, preventing recovery on the policy.

**4. INSURANCE §146(3)—CONDITIONS INTENDED TO CAUSE FORFEITURE ARE CONSTRUED AGAINST INSURER.**

As insurance contracts are prepared by the insurer, conditions therein intended to cause a forfeiture are construed most strongly against the company.

**5. INSURANCE §296—REPRESENTATION THAT APPLICANT'S DUTIES WERE THOSE OF SUPERVISION ONLY NOT FALSE.**

Though a contractor, whose chief duty was to supervise the work of his servants in brick construction, sometimes would take the trowel and lay bricks to show them how the work was to be done, a representation by him, in applying for insurance, that his duties were those of "proprietor-supervising only" was not a false representation, avoiding the policy or reducing the insurance.

**6. INSURANCE §301—FAILURE TO DISCLOSE WEEKLY BENEFITS IN OTHER ORDERS HELD NOT MATERIAL.**

The failure of an applicant for accident insurance to disclose, in response to an inquiry concerning other insurance, his membership in a social club which provided a weekly sick benefit of \$4, and to report a policy providing a weekly benefit of \$5 subsequently taken out by his wife, was not material, within Code 1904, § 3344a, as modified by Code 1919, § 4220, so far as the insurance against death was concerned, and hence did not avoid the policy, when not due to a willful purpose to deceive or defraud.

Error to Law and Equity Court of City of Richmond.

Action by Maggie L. Walker against the Standard Accident Insurance Company. Judgment for plaintiff, and defendant brings error. **Affirmed.**

L. Q. Wendenburg, of Richmond, for plaintiff in error.

Smith & Gordon and J. T. Hewin, all of Richmond, for defendant in error.

PRENTIS, J. The question in this case is whether or not the Standard Accident In-

insurance Company of Detroit, Mich., Incorporated, is liable to Maggie L. Walker for the amount of an accident insurance policy upon the life of her husband, Armstead Walker, who was killed by their son, who apparently mistook him for a burglar. A jury was waived in the trial court, and all matters of law and fact having been submitted to the judge, there was a judgment in favor of the plaintiff against the company.

[1] 1. The first assignment of error is based upon the refusal of the court to permit the introduction of evidence to the effect that there was bad feeling between the father and son, and that the homicide was a crime which resulted from this bad feeling. It is conceded, however, that, whether this be true or not, it constitutes no valid defense, so far as the deceased and the beneficiary are concerned. Such a killing is an accidental killing by violence, for which the company is liable under its policy. In the absence of any provision in the policy relieving it in such a case, the company is clearly liable by the great weight of authority. 14 R. C. L. § 437, p. 1260; *Richards v. Travelers' Ins. Co.*, 89 Cal. 170, 26 Pac. 762, 23 Am. St. Rep. 455; *Accident Ins. Co. of North America v. Bennett*, 90 Tenn. 256, 16 S. W. 723, 25 Am. St. Rep. 685; *Button v. American Mut. Accident Ass'n*, 92 Wis. 83, 65 N. W. 861, 53 Am. St. Rep. 900; notes, 30 L. R. A. 207, 208, and 8 Am. St. Rep. 766.

[2, 3] The company, however, apparently for the first time in this court, for there was no suggestion of it as a defense in the trial court, also seeks to show that the beneficiary, the plaintiff, had some guilty previous knowledge of her son's alleged intention to murder his father. This claim is based upon the refusal to allow the defendant to prove that the killing was not accidental, but intentional on the part of the son, by showing that immediately after the killing he came downstairs and said to his mother, "I have got him," or "I have shot him," and his mother replied, "I told you not to do that." We are of opinion that this point—that is, the guilty knowledge of the mother—is not only raised too late, but that the evidence recited, which is relied upon to show such guilty knowledge or participation on her part, is entirely insufficient for that purpose. As stated, there was no such claim or allegation made against the plaintiff at any time during the trial of the case, nor is there any suggestion that either the son or the mother were ever charged with the crime by the public authorities, while it appears that the coroner of the city of Richmond reported the homicide as accidental. The assignment, therefore, is clearly without merit.

2. The second ground of error is based upon the statements or warranties in the policy showing the occupation of the insured. He stated that he was a member of the firm

of Walker Bros., whose business was that of contractors, and that the duties of his occupation are fully described as "Proprietor—supervising only." The evidence shows that he was a contractor, doing a substantial business; that his profits were estimated at from \$175 to \$200 a month; that he frequently had several houses under construction at the same time; that he performed the duties which are usually performed by contractors for brick work, which involved the making of contracts, the buying and assembling of material, the employment of journeymen bricklayers to do the actual work, supervision of the work as it progressed, and that at times, when the bricklayers were not sufficiently expert to understand or to execute the plans, he would take the trowel and lay bricks, for the purpose of showing them how the work was to be done—this especially with reference to laying off foundations, constructing the corners accurately, and setting window and door frames. It is claimed for the company that, because he did actually lay bricks under these circumstances, he was not entitled to a preferred class rating, that he should have been classed as a journeyman bricklayer, which is a more hazardous occupation, and that, if he had been thus classified as a bricklayer, instead of as a contractor, he could not have secured such a large policy, and that the premium rate would have been higher.

[4, 5] In considering a question of this sort, it must be borne in mind that it has long been determined by the courts, and we believe without dissent, that such contracts, being prepared by the insurer, the company, the conditions therein being conditions intended to cause a forfeiture of the policy, are construed most strongly against the company. So construed in this case, in connection with the testimony offered by the plaintiff (though there is some conflict), it is perfectly clear that the occupation of the assured was that of contractor, whose chief duty was to supervise the work of his servants in brick construction, and although in the performance of his duties as a contractor, in the way in which contractors generally perform their duties, he actually laid bricks, in connection with his supervision, that this was merely incidental and customary and would not have changed his classification. It is also apparent that he made no false representation as to his occupation which induced the company to give him a preferred classification. He was, in fact, a preferred risk, and received the classification to which he was entitled. That one holding a policy under a preferred classification might nevertheless be injured in an occupation classed by the company as more hazardous is foreseen and provided for in article 9 of this policy, which provides that if such a one is injured in some more haz-

(102 S.E.)

ardous occupation, the company's liability shall be reduced to such proportion of the principal sum as the premium paid will purchase at the rate fixed by the company for such increased hazard. If the assured here had lost his life in the pursuit of some more hazardous business, then perhaps the company could have taken advantage of the clause above referred to; but inasmuch as his death was not caused by the pursuit of any more hazardous occupation, the clause has no application. We are clear in our view that this assignment is also without merit.

[8] 3. The policy also provided for weekly payments in case of accident or sickness. Walker had stated that his income per week exceeded the gross amount of weekly indemnity under all policies carried by him, and also that he had—

"no accident or sickness insurance issued by stock companies, assessment or fraternal associations, except as follows: St. Luke, \$3.00; Odd F., \$3.00; So. Aid, \$5.00; Rich. Benf., \$4.00."

At that time the assured was a member of a local organization known as the Independent Beneficial Club, Richmond, Va., the members of which, among other privileges, were entitled to a weekly sick benefit of \$4, and this was not disclosed to the agent of the company.

As has been indicated, when an insurance company has received its premiums, its efforts to escape liability, when the contingency upon which its liability is created happens, are closely scrutinized. This organization was, as its name indicated, a social club; its membership was limited; no one could be admitted against whom there were three adverse votes; no policies were issued; and we are asked to say that, because the assured failed to report his membership in this club, therefore the policy insuring his beneficiary against his accidental death by violence shall be forfeited. It may well be doubted whether his membership in such an organization would ever occur to the average man who was asked to state what policies he held providing for accident or sickness insurance issued by stock companies, assessment or fraternal associations. It is said by one witness in this case that the weekly benefits provided for in this club were frequently refused by its well-to-do members.

Then, in addition to this, it appears that his wife, several years after this accident policy was secured, took out a weekly sick benefit policy in the Home Beneficial Association, which provided for a weekly benefit of \$5, and it is claimed that this also forfeited the policy. The evidence shows that it had not been procured at the time this accident policy was issued, and that the as-

sured did not know of its procurement for a long time thereafter, for it had been taken out by his wife; she having signed the application, paid all the premiums, and he had no information about it until a little over a year before his death. It is urged that his failure to disclose the existence of this policy when he paid his last annual premium for the accident policy bars any recovery in this action.

The question cannot be determined without a consideration of Code 1904, § 3344a, as modified by Code 1919, § 4220. The provision, as it existed before the new Code became effective, reads thus:

"No answer to any interrogatories made by an applicant for a policy of insurance shall bar the right to recover upon any policy issued upon such application, by reason of any warranty in said application or policy contained, unless it be clearly proved that such answer was willfully false or fraudulently made or that it was material."

There is no word or suggestion in the testimony from which it can be maintained that the failure to make these disclosures was because of any willful purpose to deceive or defraud the company. Whether or not they were material is a question about which there may be a fair difference of opinion. The cases which could be cited are numerous, for similar questions have frequently been presented to the courts. It may be said, however, that the result of these decisions leads to this conclusion, as stated in 14 R. C. L. § 202, p. 1022:

"A fair test of the materiality of a fact is found in the answer to the question whether reasonably careful and intelligent men would have regarded the fact communicated at the time of effecting the insurance as substantially increasing the chances of the loss insured against, so as to bring about a rejection of the risk or charging an increased premium."

Considering the facts of this case, and giving the assured the benefit of all fair doubts, it seems to us perfectly clear that this man was a desirable risk, and that the company would have so regarded him, even if the disclosures had been made with the strictest accuracy. The reason the company desired to know the amount of the weekly benefits which the assured would receive was to determine whether it would be to his advantage to feign sickness rather than to keep on with his work. This consideration has no relation whatever to the danger of death from accident. It might have led to some reduction of the weekly benefit to be paid by this company, or to some special waiver with reference thereto, but that it had the slightest effect upon the desire of the company to assume the risk of insuring this man against accidental death is hardly probable. *Continental Ins. Co. v. Kasey*, 25 Grat.

(66 Va.) 272, 18 Am. Rep. 681; Penn. Mut. L. Ins. Co. v. Mechanics' Savings Bank, 72 Fed. 413, 19 C. C. A. 236, 38 L. R. A. 33, 70.

As the case comes to us then, bound as we are by Code 1919, § 6363, it is clear that, even if we had any doubt of the correctness of the conclusion of the trial judge, we are forbidden to set the judgment aside, unless it appears that it is plainly wrong or without supporting evidence. Our view is that it is plainly right.

Affirmed.

(127 Va. 87)

NORFOLK SOUTHERN R. CO. v. FENTRESS et al.

(Supreme Court of Appeals of Virginia. March 18, 1920.)

1. EVIDENCE §=113(8)—COST ADMISSIBLE AS A CIRCUMSTANCE ON QUESTION OF MARKET VALUE.

In fire damage cases evidence of the cost of the property destroyed is admissible, if purchase was not too remote in point of time, as a circumstance to be considered in determining market value of the property, but not as evidence sufficient in itself to establish such value; but such evidence may be overcome by other evidence that the property cost more than it was worth, or that since its purchase it had deteriorated in value.

2. WITNESSES §=267—SCOPE OF CROSS-EXAMINATION DISCRETIONARY WITH COURT.

A cross-examining attorney has very great liberty, and should not be improperly restricted; the scope of the cross-examination being within the discretion of the trial court, which should prevent waste of the time of the court by aimless, useless, and prolonged examination.

3. APPEAL AND ERROR §=1048(6)—REFUSAL TO PERMIT CROSS-EXAMINATION HARMLESS IN VIEW OF DIRECT EXAMINATION.

In action for damage from fire set by locomotive, where plaintiff had testified in detail as to the amount of his damages, refusal to permit cross-examination of plaintiff as to the price at which he had bought a three-fourths interest in the land from coheirs, three or four years prior to the fire, during which time his mother's dower had lapsed, if an abuse of discretion, was harmless.

4. WITNESSES §=37(1) — TESTIMONY AS TO IDENTITY OF LOCOMOTIVE SETTING FIRE KNOWN TO WITNESS NOT OBJECTIONABLE AS GUESSWORK.

Court's refusal to strike out testimony of witness, on the ground that, after having testified that he knew the locomotive had on another occasion set fire to a trestle, he testified that he did not see the locomotive when it went across, and in response to the question "how long it had been across" answered "I guess 15 or 20 minutes," held proper; such testimony not showing that witness was guessing as to the identity of the locomotive.

5. EVIDENCE §=20(2)—ELECTRIC LOCOMOTIVES AS PREVENTATIVE OF FIRES NOT MATTER OF COMMON KNOWLEDGE.

It is not a matter of common knowledge, dispensing with necessity of proof thereof, that

electric locomotives are best and safest for preventing fires.

6. TRIAL §=120(2)—ARGUMENT THAT ELECTRIC LOCOMOTIVES WOULD PREVENT FIRES, WITHOUT EVIDENCE THEREOF, IMPROPER.

In action for damages from fires claimed to have been set by electric locomotive, remark of railroad's counsel that "It is a matter of common knowledge that electric locomotives are best and safest for preventing fires," held objectionable, in the absence of testimony as to the comparative merits of such locomotives with regard to setting of fires.

7. APPEAL AND ERROR §=1060(1)—SUSTAINING OF OBJECTION TO REMARKS OF COUNSEL HELD HARMLESS.

In action for damages from fire set by electric locomotive, action of court in sustaining objection to remarks of railroad's attorney that it was a matter of common knowledge that electric locomotives are the best and safest for preventing fires, made in absence of evidence of the merits of such locomotives, if error, was harmless.

8. APPEAL AND ERROR §=1001(1)—VERDICT SUPPORTED BY EVIDENCE NOT DISTURBED.

Verdict will not be disturbed where not plainly wrong or without supporting evidence.

Error to Circuit Court, Princess Anne County.

Action by C. H. Fentress and another against the Norfolk Southern Railroad Company. Judgment for plaintiffs, and defendant brings error. Amended and affirmed.

J. G. Martin, of Norfolk, for plaintiff in error.

J. E. Cole, of Norfolk, for defendants in error.

PRENTIS, J. The Norfolk Southern Railroad Company complains of a judgment for damages caused by a fire which damaged the woodland of C. H. Fentress, hereinafter called the plaintiff. There are four assignments of error.

1. The plaintiff, having testified in detail as to the amount of his damages on account of the destruction of pine straw (which is used by farmers in that vicinity for making compost), of fishpound poles (for which there is a local market), and of pine timber, as well as young pine having a prospective value for timber, and that, already having a one-fourth interest in the land, he, about three or four years before, had by purchase acquired the other undivided interests therein, his motive being to provide a home for his mother, who also had dower in the tract, and that his mother's dower had lapsed because of her death since that time, was on cross-examination asked, "How much did you pay the other heirs when she died?" to which the plaintiff's counsel objected, and the company's counsel stated: "I expect to prove



that he bought it for a very much less figure than they are claiming." The court sustained the objection, and exception was taken to this ruling.

[1] It has been held in fire damage cases that the plaintiff may prove the cost of the property destroyed as tending, at least, to show its market value. *Swanson v. K. & W. Ry. Co.*, 116 Iowa, 308, 89 N. W. 1088; *Southern Ry. Co. v. Williams*, 113 Ga. 336, 38 S. E. 744; *Amoskeag Mfg. Co. v. Head*, 59 N. H. 332; 1 Jones (Horowitz) on Evidence, § 168. The reasons therefor are said to be that, while the amount which the property cost when purchased is not the absolute and possibly not an approximate criterion of its value at the time of the fire, it is nevertheless one element or circumstance relating to such value which can properly go to the jury to be considered along with other evidence in determining value. Of course, evidence would also be admissible to show that it cost more than it was worth, or that since its purchase it had deteriorated in value; but notwithstanding this, its cost, if not too remote in point of time, is a circumstance which may be proved to the jury, not as establishing value sufficiently to authorize a recovery, but as a pertinent fact relating thereto.

In *Warren Co. v. Hanson*, 17 Ariz. 252, 150 Pac. 240, it is said that—

"Such evidence is admissible as a circumstance which may properly be considered by the jury in connection with other circumstances tending to prove the value of the property at the time it was destroyed."

The cost of the property may or may not be evidence of its value, and is never more than a circumstance tending to throw light upon the question. The lapse of time from the date of the purchase to the date of the inquiry should be considered, for the longer the period the less the significance of the price paid for the property. Then, such price is the subject of contract, while value is fixed without reference to the particular contract, which depends upon the wishes, convenience, or necessity of the contracting parties. Hence the price paid may have little weight upon the question of determining the value of the property at a given time. It may nevertheless be a circumstance to be considered, if not too remote, and as such is generally admissible under proper limitations.

[2] The witness was under cross-examination, and the cross-examiner has very great liberty, which the courts should be careful not to restrict improperly, for the right of cross-examination is invaluable in the search for truth. The liberty, however, is not entirely unrestricted, and in any given case its scope must be left chiefly to the discretion of the trial court.

In discussing a kindred question, Alderson,

B., in *Attorney General v. Hitchcock*, 1 Exch. 104, says:

"When the question is not relevant, strictly speaking, to the issue, but tending to contradict the witness, his answer must be taken (although it tends to show that he in that particular instance speaks falsely, and although it is not altogether immaterial to the issue), for the sake of the general public convenience; for great inconvenience would follow from a continual course of those sorts of cross-examinations which would be let in in the case of a witness being called for the purpose of contradiction."

And in the same case Rolfe, B., expresses himself thus:

"The laws of evidence on this subject, as to what ought and what ought not to be received, must be considered as founded on a sort of comparative consideration of the time to be occupied in examinations of this nature and the time which it is practicable to bestow upon them. If we lived for 1,000 years, instead of about 60 or 70, and every case were of sufficient importance, it might be possible and perhaps proper to throw a light on matters in which every possible question might be suggested, for the purpose of seeing by such means whether the whole was unfounded, or what portion of it was not, and to raise every possible inquiry as to the truth of the statements made. But I do not see how that could be; in fact, mankind find it to be impossible. Therefore some line must be drawn. \* \* \*"

By way of contrast to English judicial style, this from Mr. Justice Holmes saves his time and expresses the same idea, together with the reason therefor, with his customary sententious emphasis:

"So far as the introduction of collateral issues goes, that objection is a purely practical one, a concession to the shortness of life." *Reeve v. Dennett*, 145 Mass. 28, 11 N. E. 938.

While the particular cross-examination under consideration is not worthy of any criticism whatever, it is a notorious fact that in many cases much time is unnecessarily consumed by aimless, useless, and prolonged cross-examinations, so that unless the discretion of the trial courts to limit counsel is firmly maintained, the evil which is already serious will be magnified. There is a vast amount of evidence which, in a certain legal sense, is relevant, but at the same time is so unimportant when compared with better evidence which is easily available as to be properly excluded. The admission or rejection of such evidence is not controlled by any inflexible rule, but by a sound, though undefined, judicial discretion, depending upon the circumstances of the particular case, and subject to review. *Rosenstein v. Fair Haven, etc., R. Co.*, 78 Conn. 34, 60 Atl. 1061. In the case in judgment, as it appeared that the plaintiff inherited one-fourth of the land upon which the fire occurred, and that in a

family settlement with the other heirs at law, in order to provide a home for his mother, with which commendable purpose the other owners doubtless sympathized, the precise price paid by him for their interests, subject to his mother's dower, three or four years before the fire occurred, could have little probative value. Whether great or small, its effect in discrediting the testimony of the plaintiff as to the specific items of his damage would necessarily have been insignificant. If the inquiry had been pursued to its logical end, it would have led to the introduction of many immaterial and collateral facts as to the circumstances of the purchase, which would not have aided the jury but would have tended to divert their attention from the issue to be determined.

Cross-examination, which is said to be an art, certainly as practiced in many instances becomes a burden to the courts and juries as a great waster of valuable time. It is also frequently so aimless as to be inexcusable, while it sometimes reacts against the litigant whose attorney persists in indulging therein too freely as a pastime. There should be some better reason therefor than that it is his privilege, and that nobody can stop him until it is too late.

[3] We conclude, as to this assignment, that even if there be doubt as to whether the trial judge properly exercised his discretion in excluding this testimony, the error is harmless.

[4] 2. The second assignment of error grows out of the refusal of the trial court to strike out the testimony of the witness Robbins, upon the ground that after having testified that he knew that the electric locomotive, which is alleged to have set out this fire, had on another occasion set fire to a trestle during a dry spell, answered two questions thus:

"How long had the engine been across? A. I guess 15 or 20 minutes, possibly. Q. Did you see the engine when it went across? A. No, sir."

The ground of this exception is that the witness was guessing as to the identity of the engine. It is clear that this is not the fair interpretation of his testimony. His guess, or estimate, clearly referred to the time which had elapsed since the engine had crossed, and the fair inference from his testimony, taken as a whole, is that he heard the train, and that, although he did not ac-

tually see the engine when it went across the trestle which caught fire, he identified it, and had no doubt whatever of the facts to which he had testified positively. The court correctly overruled the motion.

[5-7] 3. The court sustained the objection of the attorney for the plaintiff when the attorney for the company stated to the jury that, "It is a matter of common knowledge that electric locomotives are best and safest for preventing fires." However well known this may be to some, it is not apparent that the common knowledge of the public has progressed as far as this, and if certainly true it can be certainly proved. There was no evidence introduced making any comparison between steam or any other locomotives with electric motors as to danger of setting out fires. The evidence was entirely confined to the locomotive which it was alleged had set out this fire. One witness had testified that it had set out one fire which he had himself extinguished. Even the defendant's witnesses had stated that if the rails were surrounded with shavings there was danger of fire. There was testimony that the track and right of way had combustible matter on them, chiefly dried grass and rubbish; that under certain conditions the coils under the electric motor might become red hot, and that sometimes, because of friction with the wheels of the engine, the iron rails would be blistered and the sparks would fly. Under these circumstances, the remark of counsel was objectionable, in the absence of testimony making the comparison which the attorney undertook to make in his argument to the jury. Its exclusion certainly does not constitute reversible error.

[8] 4. The fourth assignment of error is that the verdict is contrary to the law and the evidence. As to this, it is sufficient to say that while there was a conflict and the jury might have found a verdict in favor of the company, the verdict and judgment are not plainly wrong or without supporting evidence, and hence the assignment is without merit.

The motion was brought in the names of C. H. Fentress and J. M. Keeling, trustee. The trustee, Keeling, having died, his executrix has been made a party to the proceeding here. It does not appear that Mr. Keeling's executrix has any interest whatever in the litigation, and hence the judgment of the trial court will be amended and entered here in favor of C. H. Fentress alone.

Amended and affirmed.

(127 Va. 563)

(102 S.E.)

## BOICE v. FINANCE &amp; GUARANTY CORPORATION.

(Supreme Court of Appeals of Virginia.  
March 18, 1920.)1. CHATTEL MORTGAGES  $\S$ 225(1)—STATUTE MAKING PROPERTY OF DEALER LIABLE TO CREDITORS NOT APPLICABLE TO PURCHASERS.

Code 1904,  $\S$  2877, providing that, if any person transact business in his own name, all property acquired or used in the business shall as to creditors be liable for his debts, cannot be extended to purchasers, and hence is not determinative of the rights of a purchaser of mortgaged property from a dealer.

2. STATUTES  $\S$ 190—CONSTRUCTION NOT PERMISSIBLE WHEN NOT NEEDED.

It is not permissible to interpret statutory provisions which need no interpretation.

3. CHATTEL MORTGAGES  $\S$ 188(2) — VOID WHEN MORTGAGOR DEALER PERMITTED TO EXPOSE PROPERTY FOR SALE.

Property bought for the express purpose of daily indiscriminate sale to the general public, exposed for such sale at the place of business of a licensed dealer, and over which the dealer is permitted to exercise the dominion of an owner, cannot be made the subject of a valid chattel mortgage, though, as in the case of an automobile, it is of considerable size and value, and capable of identification.

4. CHATTEL MORTGAGES  $\S$ 188(2) — MORTGAGEE, PERMITTING SELLER TO ACT AS OWNER, ESTOPPED TO ASSERT TITLE.

An owner, who stands by and permits a seller, who is a licensed dealer in such goods, to hold himself out to the world as owner, treat the goods as his own, place them with other similar goods in a public showroom, and offer them indiscriminately with his own to the public, is estopped to assert ownership against a purchaser for value without notice, and constructive notice, furnished by a recorded mortgage or deed of trust, is insufficient.

5. CHATTEL MORTGAGES  $\S$ 219—PROVISION AGAINST SALE WAIVED BY PERMITTING VIOLATION.

Though a chattel mortgage on an automobile given by a dealer in automobiles expressly stipulated against sale, conversion, or removal without the mortgagee's written consent, the stipulation was waived, if its violation was knowingly permitted by the mortgagee.

6. PRINCIPAL AND AGENT  $\S$ 177(3)—KNOWLEDGE THAT MORTGAGOR WAS EXHIBITING CHATTELS FOR SALE CHARGEABLE TO PRINCIPAL.

Where plaintiff made loans on automobiles to a dealer, taking chattel mortgages, being represented in each transaction by an agent, his knowledge that the dealer was exhibiting them for sale was the knowledge of his principal.

Error to Law and Equity Court of City of Richmond.

Action by the Finance & Guaranty Corporation against C. Boice. Judgment for plain-

tiff, and defendant brings error. Reversed, and action dismissed.

Williams & Mullen, of Richmond, for plaintiff in error.

Munford, Hunton, Williams & Anderson, of Richmond, for defendant in error.

BURKS, J. Boice purchased an automobile of W. F. Gordon, a licensed dealer in automobiles in the city of Richmond, paid him the purchase price, and took possession of the automobile. Gordon had previously given a mortgage on the automobile, which was duly recorded, to secure a loan of money obtained from the Finance & Guaranty Corporation. The loan was not paid, and the Finance & Guaranty Corporation, hereinafter called the guaranty company, brought this action of detinue to recover possession of the automobile, and there was a judgment in its favor in the trial court. To that judgment this writ of error was awarded.

The facts of the case were agreed between the parties and are set forth in a written stipulation, signed by counsel for both parties and made a part of the record. So far as need be stated for the purposes of this opinion, they are as follows:

For some time prior to November 4, 1916, W. F. Gordon was a licensed dealer in automobiles and was engaged in business at 1631 West Broad street, Richmond, Va., where he conducted an automobile business and had a salesroom and showroom, where he displayed new and secondhand automobiles for sale, and during this time he was agent for National automobiles in Richmond. Some time prior to November 4, 1916, Gordon ordered two automobiles from the National Company, one of them being the automobile here in controversy, which the company shipped subject to their order, "notify Gordon," and drew a sight draft on him for the purchase price, with a bill of lading attached. When Gordon was notified of the arrival of the automobiles, he obtained a loan from the guaranty company, of Baltimore, for the sum of \$2,148, which, together with other money of his own, he used to take up the draft. The draft was paid, the bill of lading obtained, and possession of the two automobiles delivered November 10, 1916. In order to secure the loan aforesaid, Gordon executed his notes to the guaranty company, and a chattel mortgage on the automobiles, dated November 4, 1916. The mortgage was duly recorded November 4, 1916. The mortgage and the notes were then delivered to Cary P. Carr, of Richmond, who had looked after the execution and the acknowledgment of the mortgage, and who is conceded in briefs to have been the agent of the guaranty company, and he forwarded them on November 4, 1916, to the guaranty company in Baltimore, Md. On November 6,

1916, the guaranty company issued its check payable to the order of Gordon for the net amount of the loan, and forwarded it to their agent, Cary P. Carr, at Richmond, who delivered it to Gordon on November 10, 1916. Gordon, as stated, paid the draft on him and took possession of the automobiles November 10, 1916. Boice bought the car of Gordon and paid for it in the latter part of January, 1917, but at that time had no actual knowledge of the existence of the mortgage. The guaranty company loaned Gordon money on chattel mortgages on eight cars, six of which are the subject of suits. There were four of these mortgages, each covering two cars, and they were dated, respectively, November 4, 1916, December 28, 1916, January 30, 1917, and March 12, 1917. The loans in each of these cases were negotiated through Cary P. Carr. Some time early in May, 1917, the guaranty company sent its agent to Richmond to check up the cars in Gordon's possession upon which it held mortgages. Gordon then admitted that he had sold cars to other persons upon which the guaranty company held mortgages, and, upon demand, furnished a list of persons to whom he had made such sales, the dates of the sales, and the identification numbers of the cars. This list embraces eight cars and among them the car sold to Boice. The mortgage on the latter car is still unsatisfied and unreleased of record.

It is fairly plain from the record that Carr was a resident of the city of Richmond; that he negotiated the loans to Gordon; that he knew of Gordon's place of business and that he was a licensed dealer in automobiles; that he knew that Gordon was fairly exposing and offering for sale to the general public the automobiles placed in his showroom or salesroom, and that the automobiles upon which he took the mortgages were bought for sale, and were placed in said salesroom for that purpose. While all of these facts do not expressly appear in the record, they are fair inferences from what does appear. Gordon's place of business was on one of the principal business streets of the city. He had a large salesroom, from which he was actively engaged in selling automobiles, and Carr had negotiated loans from the guaranty company on at least four chattel mortgages. He looked after the due acknowledgment and recordation of the mortgages, and it is a fair inference that he was acquainted with the method in which Gordon was conducting his purchases and sales.

Gordon and his vendor are eliminated from this controversy. The sole question presented for our consideration is: Who has the superior claim to the automobile, the Finance & Guaranty Corporation, which advanced the money on the chattel mortgage, which was duly recorded, or Boice, who was a subsequent purchaser for value of the automobile

from Gordon, without actual notice of the existence of the mortgage?

[1, 2] Counsel have elaborately argued, both orally and in their briefs, several phases of the case which we have not undertaken to set forth specifically, and which will not be considered, because deemed unnecessary in the view we take of the facts. One of these views, however, will be briefly noticed. It was earnestly insisted that what is known as the Traders' Act was applicable to the case. That act is embodied in section 2877 of the Code of 1904. So much of that section as is invoked is in the following words:

"If any person transact such business in his own name, \* \* \* all the property, stock, and choses in action acquired or used in such business shall, as to the creditors of any such person, be liable for the debts of any such person."

The language of the statute plainly restricts it to *creditors* of such person, and the statute cannot by construction be extended to include *purchasers* from such person without reading into the statute language which the Legislature has not seen fit to place there. As has been often said, it is not permissible to interpret that which needs no interpretation. The statute has no application to the case.

The substantial question for our consideration is: Can a chattel mortgage be given on goods and chattels actively used in trade by one who continues to exercise the dominion of owner over the same? Or can one take from a retail dealer a chattel mortgage on goods and chattels which he knows the retailer intends to place in his stock and offer for sale indiscriminately to his customers in the usual and ordinary course of business, and thereafter claim them from a purchaser for value from the retail dealer, who had no actual notice of the existence of the mortgage, although the same was recorded?

From *Lang v. Lee*, 3 Rand. 410, decided in 1825, until the present time, it has been uniformly held by this court that such a mortgage as is first mentioned on a stock of goods, wares, and merchandise, or in fact any mortgage on that class of goods which contains provisions adequate to defeat its purposes, is "null and void as against creditors and purchasers" of the grantor. The cases are too numerous to cite, but see *Consolidated Tramway Co. v. Germania Bank*, 121 Va. 331, 93 S. E. 572; *Addington v. Etheridge*, 12 Grat. (53 Va.) 436; *Perry v. Shenandoah National Bank*, 27 Grat. (68 Va.) 755; *Brockenborough v. Brockenborough*, 31 Grat. (72 Va.) 590, and cases cited.

[3] The reason of the rule is that it is a fraud upon third persons. To uphold such a mortgage would give to the mortgagor a fictitious credit and allow him to pose before the world as the owner of goods when such is not

the fact. Purchasers from him and those who extend him credit on the faith of his ostensible ownership of the goods will not be subjected to loss on that account. It is manifestly unjust that they should be. Is there anything, then, in the character of automobiles, that should put them in a different category from ordinary goods, wares, and merchandise? It is true that they are bulky, and are easily susceptible of accurate description and continued identification through the medium of the registry laws. They also involve the expenditure of considerable sums of money. But this is the mere statement of a fact, not a reason for the supposed distinction. The same may be said of many articles of personal property not subject to such a mortgage. Neither size, value, nor identification marks can exempt an article from the application of the principle involved. Property bought for the express purpose of daily indiscriminate sale to the general public, exposed for such sale at the place of business of a licensed dealer, and over which the dealer is permitted to exercise the dominion of owner, cannot be made the subject of a valid chattel mortgage regardless of its size, value, or capacity for identification. The powers which the dealer is permitted to exercise over the property in such case are inconsistent with a mortgage thereon.

It is a matter of common knowledge, and will therefore be judicially noticed, that in the large cities there are department stores in which a customer can buy almost anything from a nut cracker to a threshing machine, from a doll carriage to an automobile. It would never occur to a customer that he must be on his guard to see whether the article was bulky, of large value, and easily susceptible of identification, and, if so, to examine the registry for liens thereon. Besides, many of the articles carried in such stores would be on the border line, and it would be unreasonable to require a purchaser to determine what could be mortgaged and what could not. To require an examination of the records for liens in such cases would break up the business, and indeed be an embargo on legitimate trade. Capital must seek a more substantial security for its protection. Otherwise it were better that the few should suffer than the general public, who have been lured into purchasing from a dealer who has been intrusted with the indicia of ownership. A purchaser in such case is not bound to see to the application of the purchase money.

[4] It is true that, as a rule, the seller of personal chattels cannot confer upon a purchaser any better title than he himself has; but if the owner stands by and permits a seller, who is a licensed dealer in such goods, to hold himself out to the world as owner, to treat the goods as his own, place them with other similar goods of his own in a public showroom, and offer the same indiscrimi-

nately with his own to the public, he will be estopped by his conduct from asserting his ownership against a purchaser for value without notice of his title. The constructive notice furnished by a recorded mortgage or deed of trust in such cases is not sufficient. The act of knowingly permitting the goods to be so handled and used by the seller in the ordinary and usual conduct of his business is just as destructive of the rights of the creditor as if such permission had been expressly granted in the mortgage or deed of trust.

It is well said in *McNeil v. Tenth National Bank*, 46 N. Y. 325, 329 (7 Am. Rep. 341, 343):

"It must be conceded that as a general rule, applicable to property other than negotiable securities, the vendor or pledgor can convey no greater right of title than he has. But this is a truism, predicable of the simple transfer from one party to another where no other element intervenes. It does not interfere with the well-established principle that where the true owner holds out another, or allows him to appear, as the owner of, or as having full power of disposition over the property, and innocent third parties are thus led into dealing with such apparent owner, they will be protected. Their rights in such cases do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner, which precludes him from disputing, as against them, the existence of the title or power which, through negligence or mistaken confidence, he caused or allowed to appear to be vested in any party making the conveyance."

In this, as in other cases, the principle is that, where one of two equally innocent persons must suffer, he should bear the burden whose conduct has induced the loss.

In *Saltus v. Everett*, 20 Wend. 267, 32 Am. Dec. 541, it was held that the owner of property could not reclaim it where he had—

"by his own voluntary act or consent given to another such evidence of the right of selling his goods as, according to the custom of trade, or the common understanding of the world, usually accompanies the authority of disposal; or, to use the language of Lord Ellenborough, when the owner 'has given the external indicia of the right of disposing of his property.' Here it is well settled that, however the possessor of such external indicia may abuse the confidence of his principal, a sale to a fair purchaser divests the first title, and the authority to sell so conferred, whether real or apparent, is good against him who gave it."

Again, in the same case, it is said:

"The owner may lose the right of recovering his goods against purchasers, by exhibiting to the world a third person as having power to sell and dispose of them; and this, not only by giving a direct authority to him, but by conferring an implied authority. Such an authority may be implied by the assent to and ratification of prior similar dealings, so as to hold such per-

son out to those with whom he is in the habit of trading as authorized to buy or sell. It may be inferred from the \* \* \* business of the agent with fit accompanying circumstances. 'If a man,' says Bayley, J., in *Pickering v. Buck*, 15 East, 44, 'puts goods into another's custody, whose common business it is to sell, he confers an implied authority to sell.' \* \* \* But this implied authority must arise from the natural and obvious interpretation of facts, according to the habits and usages of business; and it never applies where the character and business of the person \* \* \* do not warrant the reasonable presumption of his being empowered to sell property of that kind. If, therefore, \* \* \* a person intrusts his watch to a watchmaker to be repaired, the watchmaker is not exhibited to the world as an owner, or agent, and credit is not given as such, because he has possession of the watch; the owner, therefore, would not be bound by his sale."

See, also, note 25 Am. Dec. 611.

In *South Bend Iron Works v. Reedy*, 5 Pennewill, 361, 60 Atl. 698 (Delaware Superior Court, 1905), certain agricultural implements were consigned and sold to a purchaser for the express purpose of being resold by him as a retail dealer and jobber in such goods. There was no restriction on his power to sell except as to the territory. In the sale, however, the seller retained the title to the goods until they were paid for. It was held that a purchaser in good faith, who had no knowledge of the transaction between the parties, acquired good title as against the seller.

In *Sears v. Shrout*, 24 Ind. App. 313, 56 N. E. 728, there was a sale of a boiler and engine and a set of corn burrs and a cob crusher. At the time of the sale a chattel mortgage was given by the purchaser which was duly recorded. It was held by the court that—

"Where goods are sold and delivered, to be resold by the vendee, a reservation of title in the vendor is void as to purchasers from the vendee at retail, and in the ordinary course of business. Such a sale and delivery are inconsistent with the continued ownership by the vendor."

The court cites, in support of this proposition, *Mfg. Co. v. Carman*, 109 Ind. 31, 9 N. E. 707, 58 Am. Rep. 382, and *Hench v. Eacock*, 21 Ind. App. 444, 52 N. E. 85.

The same doctrine is announced and applied in *McCarthy v. Crawford*, 238 Ill. 38, 86 N. E. 750, 29 L. R. A. (N. S.) 252, 128 Am. St. Rep. 95; *Diaz v. Chickering*, 64 Md. 348, 1 Atl. 709, 54 Am. Rep. 770; *Levi v. Booth*, 58 Md. 305, 42 Am. Rep. 332. The principle involved is fully discussed in the last-mentioned case, but it is also said there that—

"The bare possession of goods by one, though he may happen to be a dealer in that class of goods, does not clothe him with power to dispose of the goods as though he were owner, or as having authority as agent to sell or pledge the goods, to the preclusion of the right of the

real owner. If he sells as owner, there must be some other indicia of property than mere possession. There must \* \* \* be some act or conduct on the part of the real owner whereby the party selling is clothed with the apparent ownership, or authority to sell, and which the real owner will not be heard to deny or question to the prejudice of an innocent third party dealing on the faith of such appearances."

It is unnecessary for us to pass upon the effect of bare possession, as the instant case, in our judgment, comes within the latter proposition stated in the above quotation.

*State Bank v. Johnson*, 104 Wash. 550, 177 Pac. 340, 3 A. L. R. 235, from the Supreme Court of the state of Washington, has been cited as taking a different view. The facts of that case are very different from those in the case at bar, but they are too lengthy to be here set forth. It was conceded in that case that the purchaser of the automobile had no constructive notice of the vendor's bill of sale, though recorded. The decision, which was adverse to the purchaser, was based upon the ground that the vendor had no title to the automobile and hence could convey none. The court said:

"If the vendor has no title, the vendee acquires none, unless the one having title has by act or neglect estopped himself from disputing the vendee's claim of title so acquired. It seems plain *there is no such estoppel here.*" (Italics supplied.)

It is further to be observed that Washington is one of a number of states which holds that a mortgage which permits the mortgagor to remain in possession and sell the mortgaged property in the usual course of trade does not render the mortgage fraudulent per se, and the existence of fraud in such cases is a question of fact to be submitted to the jury. *Ephriam v. Kelleher*, 4 Wash. 243, 249, 29 Pac. 985, 18 L. R. A. 604. This is in direct conflict with the settled doctrine of this state. The difference in the facts of the two cases and in the decisions of the two states is sufficient to show why we cannot follow the conclusion reached in that case.

[5] The chattel mortgage here in controversy expressly provided that if the mortgagor "should attempt to sell, secrete, convert, or remove the property without the written consent of the mortgagee," the latter might immediately enter the premises of the mortgagor or other place where the mortgaged property might be, "and take possession of the property, without notice or demand, \* \* \* and immediately sell the property at public or private sale, without notice," but this was not done. On the contrary, the property was put in the public salesroom, offered for sale indiscriminately to the public, and sold for cash to the plaintiff in error, to whom possession was immediately delivered. If the chattel mortgage

had contained a provision expressly permitting to be done what was in fact done, there can be no doubt, under our decisions, that it would have been held to have been void per se as to a purchaser from Gordon. But how is the case different, if at the time the mortgage was executed, or subsequently, the guaranty company consented that Gordon should make the use of the property which he subsequently made? It would be a travesty upon justice and a fraud on the rights of third persons to permit a creditor to take such a chattel mortgage as was taken in this case and immediately destroy its effect by permitting a use of the property inconsistent with the terms of the mortgage. It is immaterial whether the permission to use the property as owner was given contemporaneously with or subsequent to the mortgage. In either event it has the same effect as if it had been set out in the mortgage. The law on this subject is well expressed in 5 Am. & Eng. Encl. Law (2d Ed.) 994, as follows:

"Any agreement outside the instrument, permitting the sale and retention of the proceeds, whether contemporaneous with or subsequent to the execution of the instrument, will have the same effect as if stipulated in the mortgage."

Many cases are cited in the notes in support of the text.

[6] In the case at bar, the seller was a licensed dealer in automobiles in the city of Richmond. He had a large salesroom, where he exhibited automobiles for sale on one of the principal streets of the city and made numbers of sales there. The automobile in controversy was purchased from the manufacturers for sale. It was exhibited for sale at said salesroom, and was actually sold to Boice, who paid therefor in cash, without actual knowledge of any claim thereto of the guaranty company. The guaranty company took mortgages on machines purchased by Gordon on November 4, 1916, December 28, 1916, and January 30, 1917. Boice purchased in the latter part of January, 1917. So there had been at least two or three mortgages at the time of Boice's purchase. In taking each of these mortgages the guaranty company was represented by its agent, Cary

P. Carr, of Richmond, Va., and it cannot be doubted that, in these frequent dealings between Carr and Gordon, the former became acquainted with Gordon's methods of buying and selling automobiles. While the mortgage stipulates expressly against sale, conversion, or removal of the automobiles without the written consent of the guaranty company, the stipulation was waived if its violation was knowingly permitted by the guaranty company. It is not expressly stated in the agreed statement of facts that Carr, the agent of the guaranty company, had knowledge of the fact that the automobile was placed in the salesroom of Gordon for the purpose of sale, or that he knew of Gordon's methods of making his purchases and sales of automobiles; but we regard these facts as proper, if not necessary, inferences from the facts agreed. The knowledge of Carr was thus obtained in the course of his employment, and is chargeable to his principal. The guaranty company, in taking the mortgage under such circumstances, can stand on no higher footing than one who sells to a retailer and gives him the power of sale to his customers, or who accepts a mortgage containing provisions adequate to defeat its purpose.

We are of opinion that the mortgage given by W. F. Gordon to the Finance & Guaranty Corporation, dated November 4, 1916, is null and void as to the claim of C. Boice, the plaintiff in error, to the automobile in controversy, and therefore the judgment of the law and equity court of the city of Richmond, Va., will be reversed; and this court, proceeding under section 6365 of the Code to enter such judgment as to it seems right and proper, doth reverse the said judgment of the law and equity court of the city of Richmond, and doth order and adjudge that the action of the Finance & Guaranty Corporation (plaintiff in the trial court and defendant in error in this court) be dismissed, and that C. Boice (defendant in the trial court and plaintiff in error in this court) recover of the said Finance & Guaranty Corporation his costs expended in his defense in the trial court and also in this court.

Reversed.

(127 Va. 96)

**O'NEIL v. CHEATWOOD.**(Supreme Court of Appeals of Virginia.  
March 18, 1920.)**CHATTEL MORTGAGES §—188(2), 229(3)—BILL  
OF SALE TO LENDER ON AUTOMOBILE VOID AS  
TO BUYER WITHOUT NOTICE.**

Where bill of sale covering automobile was given by dealer to plaintiff, who had lent money to him to enable him to secure the car from the freight office, and the automobile was left for sale with the dealer, the bill of sale was void as to defendant, buyer of the car from the dealer, and unless she had some notice of the lender's title, other than that afforded by recordation of the bill of sale, she took good title as against him; the burden of proof being on the lender as to such notice, in his action of detinue.

Error to Law and Equity Court of City of Richmond.

Action by L. J. Cheatwood against Mrs. Hugh M. O'Neil. To review a judgment for plaintiff, defendant brings error. Reversed.

A. H. Sands, of Richmond, for plaintiff in error.

David Meade White and S. A. Anderson, both of Richmond, for defendant in error.

BURKS, J. Cheatwood, in an action of detinue, recovered an automobile from Mrs. O'Neil, and to the judgment of the trial court this writ of error was awarded.

The evidence, so far as it need be recited, presents the following case:

William F. Gordon was a licensed dealer in automobiles in the city of Richmond on May 1, 1917, and had been engaged in that business for 14 or 15 months prior to that time. His place of business was at 1631 West Broad street. He was the representative in Richmond of the National automobile. About May 1, 1917, he had a National car in the depot, but did not have money enough to pay the draft attached to the bill of lading and get the car out. He thereupon applied to Cheatwood for a loan of \$800 for an hour or so, saying he wished to get the car out, and deliver it to Mr. Dominski, to whom he had sold it, and would return the money. Cheatwood made the loan; his son attending to it, as he had to leave the city. He left the city and was absent for several days. Upon his return he found a letter from Gordon acknowledging the loan of \$800 and promising to return the sum of \$825 as soon as he sold the car. In this letter, Gordon further says:

"I have a number of prospects for the sale of this car, one of which I can close up to-morrow; but, owing to the fact that it may be a case of trade-in, I will hold the car subject to your order for a day or two until I can get the best price for same."

Cheatwood testified that nothing was said about any \$25 when he made the loan. This letter made Cheatwood uneasy about his loan, and he at once consulted counsel, who advised him that he had no security for his money. In company with his counsel he went at once to see Gordon, and, according to his testimony, Gordon told him he might take the automobile for his debt of \$800, and gave his counsel the make, number, and description of the car. His counsel thereupon prepared a bill of sale of the car from Gordon to Cheatwood, dated May 8, 1917, and it was acknowledged and admitted to record May 10, 1917. The automobile was not removed from Gordon's possession. On May 12, 1917, Gordon sold and delivered the automobile to Mrs. O'Neil, who had no actual knowledge of the bill of sale, for the price of \$1,450 cash. Gordon's testimony is to the effect that the cost price of the machine was about \$1,200, and that the bill of sale was intended only as a mortgage to secure the loan of \$800, and the jury took this view of it, though Cheatwood's testimony was very positive that it was an out-and-out sale of the automobile for the \$800 debt. On May 18, 1917, Cheatwood went to Gordon's place of business and demanded possession of the automobile. Gordon mentioned different places at which the car could be found, "and he finally told us late in the evening that it was at Mrs. O'Neil's." He then went to Mrs. O'Neil's and found the car, claimed it as his, and demanded possession thereof. Possession was refused, and this action was brought for its recovery the next day. Cheatwood testifies that Mr. and Mrs. O'Neil said "that the man who sold them the car said that he had to sell the car, so that he could pay off the mortgage on it, and was willing to sell it cheap." He further testified that he found out afterwards from the record that, the same day that Gordon sold the car to him, he mortgaged it, but that his bill of sale was recorded before the mortgage. He does not say that they gave any intimation of any knowledge of this bill of sale. Mr. O'Neil, the only witness examined on behalf of the defendant, except Gordon, denies positively making the statement about the mortgage attributed to him by Cheatwood. He says:

"No, sir; I never told Mr. Cheatwood there was a lien on the car, because I never knew there was a lien on the car."

Again he says:

"As to any mortgage or anything else on the car, I didn't know it."

The sale of the car to Mrs. O'Neil was negotiated through her husband, acting on her behalf, and a man named Brown, acting on behalf of Gordon, who brought the car to



Mrs. O'Neill's place of business and offered it for sale.

The errors assigned arose mainly on instructions granted and refused; but, in the view we take of the case, it will not be necessary to review the rulings thereon specifically, nor to consider several legal propositions discussed by counsel, both orally and in the briefs. Instruction No. 1, given for the plaintiff, is plainly in conflict with the views entertained by this court. That instruction is as follows:

"(1) The court instructs the jury that, if they believe from the evidence that the bill of sale for the automobile in the suit was executed by W. F. Gordon to the plaintiff for a valuable consideration, and was regularly recorded before the defendant purchased the automobile from Gordon, then the law imputes to the defendant notice of the terms of the bill of sale, although she had no actual notice thereof, and the right to the automobile so acquired by the plaintiff takes priority over the right of the defendant purchaser, and they should find for the plaintiff."

The case is not essentially different in principle from *Bolce v. Finance & Guaranty Corporation*, 102 S. E. 591, in which opinion was handed down to-day, and hence the views there expressed need not be here repeated. The bill of sale to Cheatwood was void as to Mrs. O'Neill, and unless she had some notice of Cheatwood's title, other than that offered by the recordation of the bill of sale, she took good title as against him. On the question of such notice the burden of proof was on Cheatwood, and he has not sustained it. The result is she acquired good title against him.

The judgment of the law and equity court will therefore be reversed, and this court, proceeding to enter such judgment as to it seems right and proper, will set aside the verdict of the jury and the judgment entered thereon, and will enter judgment that the action of Cheatwood be dismissed, and that Mrs. O'Neill, the defendant therein, recover of him her costs expended about her defense in the trial court and also in this court.

Reversed.

(127 Va. 148)

VAUGHAN v. MAYO MILLING CO.

(Supreme Court of Appeals of Virginia. March 18, 1920.)

**1. NEW TRIAL §1—LAW ACCORDS LITIGANT ONLY ONE FAIR TRIAL.**

Under a sound public policy, the law accords to every litigant one fair and regular trial, but only one.

**2. APPEAL AND ERROR §977(3)—STRONGER CASE REQUIRED TO DISTURB GRANT OF NEW TRIAL THAN WHEN NEW TRIAL IS REFUSED.**

As a general rule, a stronger case must be made in order to justify an appellate court in

disturbing an order granting a new trial than where a new trial has been refused.

**3. APPEAL AND ERROR §978(1)—GRANT OF NEW TRIAL FOR ERROR IN INSTRUCTIONS IN FACT CORRECT REVERSED.**

Where the trial court has expressly confined its action in granting a new trial to alleged errors in the instructions, appellate court must reverse such order where it finds that the court did not in fact commit error in its instructions.

**4. LANDLORD AND TENANT §160(3)—LESSEE NEED NOT REBUILD STRUCTURES DESTROYED WITHOUT HIS FAULT.**

Covenant to pay rent and leave the premises in good repair, natural wear and tear excepted, imposed upon tenant, in absence of stipulation to the contrary, the duty of paying rent and rebuilding the structures, even though they be destroyed without fault on his part, but Code 1919, § 5180, changed the rule so that a lessee need not now rebuild structures destroyed without his fault, unless there be other words showing it to be the intention of the parties that he should be so bound.

**5. LANDLORD AND TENANT §160(4)—LESSEE COVENANTING TO REPAIR MUST SHOW THAT COLLAPSE OF BUILDING WAS NOT DUE TO HIS FAULT.**

The burden is upon a lessee covenanting to leave the premises in good repair to prove that collapse of the building was not due to fault or negligence upon his part, under Code 1919, §§ 5179, 5180, in an action by the lessor to recover the cost of rebuilding.

**6. TRIAL §105(2)—INSTRUCTION SUBMITTING ISSUE RAISED BY IMPROPER EVIDENCE INTRODUCED WITHOUT OBJECTION, PROPER.**

In an action by a lessor on a covenant to leave premises in good repair, lessor could not complain of an instruction to the effect that lessee had a right to rely on oral statements made by the lessor prior to the execution of the lease constituting warranty, where he did not object to the introduction of the evidence upon which the instruction rested.

**7. TRIAL §243—INSTRUCTIONS AS TO LIABILITY OF LESSEE HELD NOT CONTRADICTORY.**

An instruction basing nonliability on proof that lessee did not overload a building so as to cause its collapse is not in conflict with an instruction basing nonliability on overloading caused by warranty of strength of building.

**8. LANDLORD AND TENANT §160(4)—MEASURE OF DAMAGES FOR BREACH OF COVENANT TO LEAVE BUILDING IN GOOD REPAIR STATED.**

In an action by a lessor under a covenant to leave the premises in good repair, the building on the premises having collapsed by reason of overloading, the measure of damages is the cost of replacing a building of equal size, character, and construction, deducting therefrom a proper and just amount for the age and depreciation of the destroyed building and any amount which the lessor received or should receive from the sale of the material salvaged from the building, less such expense as the lessor was put to in producing the salvage.

**9. EVIDENCE  $\Leftrightarrow$  113(10) — COST OF RECONSTRUCTION ADMISSIBLE TO PROVE VALUE OF PROPERTY DESTROYED.**

In actions of tort for the wrongful destruction of a building, evidence as to the cost of reproduction is admissible as tending to prove the value of the property destroyed.

Error to Circuit Court of City of Richmond.

Action by Emma Lee Vaughan against the Mayo Milling Company. Judgment for defendant, and plaintiff brings error. Reversed and rendered.

Leake & Buford and O. V. Meredith, all of Richmond, for plaintiff in error.

Smith & Gordon, of Richmond, for defendant in error.

**KELLY, P.** Emma Lee Vaughan, being the owner of a four-story and basement brick building in the city of Richmond, leased the same as a factory and storage plant to the Mayo Milling Company for one year from October 1, 1915, at an agreed rental of \$2,000. The lease was under seal and contained a covenant to pay the rent and "to leave the premises in good repair, natural wear and tear excepted." Possession was given at once, and the lessee proceeded to store in the building large quantities of grain. On the 21st day of October, 1915, the building collapsed, resulting in a complete destruction thereof and considerable damage to the contents.

Each party claimed that the other was responsible for the loss. The lessor, after the expiration of the term, brought a motion for judgment against the lessee based upon the covenants to pay the rent and to leave the premises in repair, seeking to recover the year's rent and an amount equal to the cost of replacing a building similar in size and character, less an allowance for depreciation; the aggregate amount claimed being \$28,642.90. The lessee entered a general denial, and also a special defense alleging that the collapse was due to structural weakness known to the plaintiff, but unknown to the defendant, and setting up a counterclaim of \$6,771.54 for loss and damage.

There were three trials of the case. At the first the jury failed to agree; at the second there was a verdict in favor of the plaintiff for \$17,314.37, which the court set aside for alleged error in the instructions; at the third there was a verdict against the plaintiff and for the defendant in the sum of \$595.63, and judgment was entered accordingly. This writ of error brings under review the action of the court: (1) In setting aside the first verdict; and (2) in rendering judgment on the second verdict.

[1-3] Each of the trials occupied more than a week, and at each many witnesses were examined, and the testimony was volu-

minous and in many respects conflicting. The record before us (which omits, of course, the evidence taken at the first trial, but contains sufficient general reference thereto to indicate that it was much the same as on the other two) comprises nearly 1,200 printed pages. Nothing profitable would be accomplished by any attempted recital of the evidence. Suffice it to say that at each trial the respective theories of the parties were supported by sufficient evidence to have warranted a verdict in favor of either. This is our view of the case after a careful study of the record, aided by exceedingly full and clear oral arguments and printed briefs of counsel. This was manifestly also the view of the learned judge below, who set aside the verdict on the second trial for what he conceived to be errors in the instructions, and expressly held that he did so on that ground alone, although the motion before him challenged the sufficiency of the evidence to sustain a verdict for the plaintiff. That verdict was rendered by a special jury of 12, ordered upon motion of the defendant, and upon a view of the premises had upon motion of the plaintiff, and they reached a conclusion which, however we ourselves might have viewed the evidence, we cannot disturb unless there was some error in law. Under a sound public policy, the law accords to every litigant one fair and regular trial, but only one. We do not overlook the fact that as a general rule a stronger case must be made in order to justify an appellate court in disturbing an order granting a new trial than where a new trial has been refused; the reason usually assigned for this rule being that the refusal to grant a new trial operates a final adjudication of the rights of the parties, while the granting of a new trial simply invites further investigation. We applied this rule in *Trauerman v. Oliver's Adm'r*, 125 Va. —, 90 S. E. 647, and that, too, was a case in which the court in setting aside the verdict based its decision upon the instructions. In the *Trauerman* Case, however, not only were the alleged errors in the instructions of such a character as to necessarily involve the same principle as if the court had set aside the verdict for insufficient evidence, but it was further true that the errors as alleged had clearly been committed. It is obvious that we cannot carry the rule in question far enough to apply it in a case where the trial court has expressly confined its action to the instructions, unless we find that it has in fact committed error in that respect.

This brings us to a consideration of the instructions in the instant case.

1. The trial court was of opinion that it had erred in giving instruction No. 4 for the plaintiff and instruction No. 11 for the defendant, not because it considered either of these instructions wrong in itself, but be-

cause it thought the former defective in directing a verdict for the plaintiff without embodying a certain view of the evidence upon which the defendant would have been exempt from liability. Whether the court was right in this conclusion can best be determined by considering these two instructions separately and then making the comparison. This course, too, will enable us to dispose of a cross-assignment of error by the defendant essentially involving the correctness of instruction No. 4, and an incidental attack by the plaintiff upon the correctness of instruction No. 11.

Instruction No. 4, given for the plaintiff, was as follows:

"The court instructs the jury that they must, under the terms of the lease, find for the plaintiff, unless they believe that the defendant has proved by the greater weight of the evidence that the collapse of the building was not caused by its fault or negligence. The jury are instructed that, in considering any defense offered in this case for the purpose of showing that the house collapsed without fault or negligence on the part of the defendant, the burden is on the defendant to prove such defense by the greater weight of the evidence."

This is a correct statement of law, and notwithstanding the attack upon it by the defendant, the court gave it again at the third trial.

[4] It is well settled, and not disputed here, that at common law a covenant to pay the rent and leave the premises in good repair, natural wear and tear excepted, imposes upon the tenant, in the absence of a stipulation to the contrary, the duty of paying the rent and rebuilding the structures on the leased premises even though they be destroyed without fault on his part. 2 Min. Inst. (4th Ed.) 923; 1 Min. Real Prop. § 416; *Ross v. Overton*, 3 Call (7 Va.) 309, 319, 2 Am. Dec. 552; *Scott's Ex'r v. Scott*, 18 Grat. (59 Va.) 167, 168; *Moses v. Old Com. Iron & Nail Works*, 75 Va. 95, 100; *Richmond Ice Co. v. Crystal Ice Co.*, 99 Va. 239, 243, 244, 37 S. E. 851; *Id.*, 103 Va. 465, 472, 49 S. E. 650.

This rule of the common law was long since changed by statute in Virginia, and the law now is that—

"No covenant or promise by the lessee to pay the rent, or that he will keep or leave the premises in good repair, shall have the effect, if the buildings thereon be destroyed by fire or otherwise, in whole or in part, without fault or negligence on his part, or if he be deprived of the possession of the premises by the public enemy, of binding him to make such payment or repair or erect such buildings again, unless there be other words showing it to be the intention of the parties that he should be so bound." Code 1919, § 5180.

[5] The defendant contends that instruction No. 4 erroneously placed upon it the burden of proving that the collapse of the build-

ing was not due to fault or negligence upon its part, and argues that for this reason, as well as for the reasons assigned by the trial judge, the verdict should have been set aside. The question thus arising has been settled adversely to the contention of the defendant by the decision of this court in the case of *Richmond Ice Co. v. Crystal Ice Co.*, 103 Va. 465, 473, 49 S. E. 650, 652. That was a case in which the plaintiff, by an action brought before the end of the term, was seeking to recover a balance of rent, and the defendant filed a special plea of set-off. In the course of the opinion Judge Buchanan said:

"At common law, where there was an express agreement to pay rent, as in this case, there could be no reduction of the rent on account of the destruction of the buildings on the leased premises. One of the reasons for that rule was that such liability was requisite to stimulate the tenant to the proper care of the premises, and to guard against frauds which the landlord is often not in a condition to establish. 2 Min. Inst. 60, and cases cited.

"Section 2455 of the Code [Code 1919, § 5180] modifies the common-law rule so as to allow a reduction of the rent on account of the destruction of buildings where they were destroyed without fault or negligence on the part of the tenant. It is not sufficient to entitle him to a reduction in the rent that the buildings on the leased premises have been destroyed, but it is made a condition to that right that they were destroyed without fault or negligence on his part.

"It was therefore necessary for the tenant in its pleadings to aver (as it does) and prove that fact. That it was required to prove a negative does not affect the question, since the existence of that fact was necessary to the relief sought. 1 Greenleaf on Ev. §§ 78, 81; 1 Taylor on Ev. §§ 364 to 366. See, also, *Reusens v. Lawson*, 91 Va. 226, 253, 21 S. E. 347, and authorities cited."

An effort is made to show that the *Ice Company Case* cited above is not in point as authority here; the argument being that the language of the opinion there used was with reference to the affirmative plea set up by the defendant under which it had to prove the negative matter introduced into the covenants of the lease under section 5180, and could have no reference to an action in which the plaintiff was seeking affirmatively in his pleading to give effect to those covenants. We do not think, however, that any substantial difference exists in principle between that case and the one at bar. If there could be any question as to the meaning of the clear and strong statement of Judge Buchanan, it would be set at rest by the authorities to which he refers, one of which was *Reusens v. Lawson*, 91 Va., the reference being to page 253 of that report (21 S. E. 355), and the pertinent language there used being as follows:

"One of the rules of pleading is that, where there is an exception incorporated in the general

clause, whether it be in a statute or in a private contract, unless that exception in such general clause be negated in pleading the clause, no offense or cause of action will appear in the indictment or declaration when compared with the statute or contract; but, when the exception or provision is in a subsequent substantive clause, the case contemplated in the enacting or general clause may be fully stated without negating the exception or proviso, as a *prima facie* case is stated; and it is for the party who relies upon the matter of excuse or defense furnished by the statute or contract to bring it forward in his defense. *United States v. Cook*, 17 Wall. 168-173 [21 L. Ed. 538]; *Land Grant Co. v. Dawson*, 151 U. S. 586-604 [14 Sup. Co. 458, 38 L. Ed. 279]. This is not always a rule of pleading, but is sometimes a rule of evidence. *Land Grant Co. v. Dawson*, *supra*; *Osburn v. Lovell*, 36 Mich. 246-250 (Judge Cooley)."

We are of opinion that the authority here quoted, when applied to sections 5179 and 5180 of the Code, must be construed to mean that the latter section constitutes an exception to the former and imposes upon the party relying on it the burden of proof. Section 5179 declares that, subject to the qualification in section 5180, a covenant to "leave the premises in good repair" shall have "the same effect as a covenant that the demised premises will, at the expiration or other sooner determination of the term, be peaceably surrendered and yielded up to the lessor, his representatives or assigns, in good and substantial repair and condition, reasonable wear and tear excepted." Section 5180 is a subsequent substantive enactment, providing for a defense which must be set up and proved; and this was the clear effect of the holding in *Richmond Ice Co. v. Crystal Ice Co.*, *supra*. It follows, therefore, that the trial court was right in giving instruction 4 on the second trial and in adhering to it on the third trial.

Instruction No. 11, given for the defendant, was as follows:

"The court instructs the jury that the defendant had a right to rely on the statement made to Messrs. Mayo and Selden by Mr. Vaughan as to the character and strength of the building in the absence of any actual knowledge on the part of the defendant that the building was subject to any structural defects; provided the jury shall believe from the evidence that such words were used by said Vaughan as a warranty of the strength of the building and so relied on by the lessee, and were not used as mere words of commendation and praise, and if the jury believe from the evidence that there was such a warranty, and that the warranty was not true, then the jury cannot allow any damages to the plaintiff, but must find for the defendant against the plaintiff, and assess its damages at the amount claimed in the plea of set-off, less the sum of \$578.62."

This instruction was based upon the testimony of the defendant's witnesses George

D. Mayo, president, and W. T. Selden, vice president, of the milling company, who had stated that when looking over the building before making the lease I. N. Vaughan, the agent of the lessee, represented that it was unusually strong, that the first floor was unusually well built, and that they could run a railroad train through it if they desired to load one there. Vaughan in his testimony admitted that he had recommended the building as being good and strong, but denied any recollection of and said he did not think he made any statement with reference to running a railroad train through it, and his testimony tended very strongly to show that in any event his statements were not intended as a warranty, but merely as commendatory of the leased premises.

[8] The plaintiff, while denying that there is any conflict between instructions 4 and 11, insists that, if such conflict were conceded, the defendant could not complain, because the latter instruction is erroneous and ought not to have been given at all, the point made against it being that the alleged warranty was by parol, antedated the written lease, and could not, therefore, be used to defeat the plaintiff's recovery. A strong and convincing array of authorities is cited in support of the legal proposition on which this argument is based. See 1 *Tiffany, Landlord & Tenant*, 559, 560, § 86b; *Naumberg v. Young*, 44 N. J. Law, 331, 334, et seq., 43 Am. Rep. 380; *Stevens v. Pierce*, 151 Mass. 207, 208, 209, 23 N. E. 1006; *Dutton v. Gerrish*, 9 Cush. (Mass.) 89, 92, 94, 55 Am. Dec. 45; *Wilcox v. Cate & Bunher*, 65 Vt. 478, 26 Atl. 1105; *York v. Steward*, 21 Mont. 515, 55 Pac. 29, 43 L. R. A. 125; and the long line of Virginia cases in accord, though not so directly in point as the foregoing, of which *Towner v. Lucas*, 13 Grat. (54 Va.) 705, and *Slaughter v. Smither*, 97 Va. 202, 33 S. E. 544, are conspicuous types. The argument, however, is fatally defective because the evidence on which the instruction rested was not objected to at the time it was offered, or at any other time before the judgment was rendered.

"When a party who is entitled to the benefit of the rule prohibiting the admission of parol evidence to vary or contradict a writing waives the benefit thereof by allowing such evidence to be received without objection and without any effort to have it stricken from the minutes or disregarded by the trial court, he cannot, after the trial has closed and the case has been decided against him, invoke the rule in order to secure a reversal of the judgment by an appellate court." 17 Cyc. 752.

In *Newberry v. Watts*, 116 Va. 730, 736, 82 S. E. 703, 705, Judge Buchanan, speaking for the court, said:

"The general rule is that the failure to object or otherwise raise the question of the admissibility of evidence on the trial is a waiver of all

objection thereto. If secondary evidence is admitted without objection, instead of primary, or a witness incompetent because of the death of the other party to the contract or transaction is permitted to testify without objection, the jury must consider and give due weight to such evidence. The same rule would seem to apply to hearsay evidence. See *Damon v. Carroll*, 163 Mass. 404, 40 N. E. 185; *Elliott on Ev.* §§ 330, 381, and cases cited in notes.

"Rules of law exclude much evidence which is of a character to satisfy a jury of some fact in issue, because it belongs to a class of evidence which experience has taught is more liable to mislead than to aid in the ascertainment of truth. But if a litigant sits by and permits evidence to go to the jury which the court, if it had been objected to, would have excluded, the jury have the right and it is their duty to consider it along with all the evidence and give it such weight as they think it is entitled to. They may or may not believe it, but so far as they do or do not their judgment is not controlled by rules of law."

We think, therefore, that the instruction was in itself proper. It may be observed that the question does not arise in this form upon the third trial, because at that trial the evidence was objected to and the court excluded it as tending to show a warranty, but permitted it to go to the jury on the question of negligence. The defendant got the benefit of it in its strongest possible aspect at the second trial, but in the state of the record on that trial the plaintiff is in no position to say that the evidence was inadmissible, and the instruction therefore erroneous.

[7] We are, however, further of opinion that there was no conflict between the two instructions in question. They were harmonious. The first sentence of No. 4 covers the whole case from the defendant's standpoint. If the defendant proved that it did not overload the building, a verdict in its favor had to follow under instruction No. 4. If it proved that it did overload the building, but did so because of a warranty as to the strength of the building, a like verdict had to follow under this instruction. In either of these events the loss was "not due to the fault or negligence" of the defendant, but in both aspects of the case the burden was on the defendant, and in neither aspect can it be said that there was any conflict between these two instructions, or that the jury could have failed to understand them.

[8] 2. The other ground upon which the court set aside the verdict at the second trial was that it had erred in giving the plaintiff's instruction No. 14 with reference to the measure of damages. That instruction was as follows:

"If your verdict be for the plaintiff, you should fix her damages at:

"(1) The rent reserved in said lease, namely, \$2,000, with interest upon each monthly installment thereof from the date the same became

due and payable according to the terms of said lease.

"(2) The cost of replacing upon the lot a building of equal size, character, and construction, deducting therefrom a proper and just amount for the age and depreciation of the destroyed building and any amount which the plaintiff has received or should receive from the sale of the material salvaged from the building, less such expense as the plaintiff has been put to in producing such salvage."

It was the view of the trial court that this instruction stated an incorrect rule for measuring damages in an action of this character, and the case of *O. & O. Ry. Co. v. May*, 120 Va. 790, 92 S. E. 801, is cited as showing that the true rule is the value of the property destroyed, and not the cost of replacing the same. The case cited follows the rule for the measure of damages in actions for tort which is generally approved in this state and elsewhere, but this is an action for breach of covenant to do a specific thing, namely, to pay a certain amount of rent and to leave the premises in good repair. By a long and practically unbroken line of authority the rule for the measure of damages for breach of a covenant of this character is substantially as stated in instruction No. 14 quoted above.

In *Watriss v. Bank*, 130 Mass. 343, 345, the court, per Gray, C. J., said:

"As a general rule, the measure of damages for the breach of a lessee's covenant to keep in repair, and to surrender the demised premises at the end of the term in as good order and condition as they are in at the beginning of it, is the sum it would cost to repair the premises and put them in the condition they ought to be in. In the time of Lord Holt this was the rule even in an action brought before the expiration of the lease. \* \* \*

"According to later cases, when the lessor sues on the covenant to repair, pending the lease, and so before he is entitled to possession of the premises, the damages may perhaps be limited to the diminution in the market value of his estate. \* \* \* But when the action is brought after the end of the term, the measure of damages is still held to be such a sum as will put the premises in the condition in which the tenant is bound to leave them."

In the note to *Boardman v. Howard*, 64 L. R. A. 665, it is said:

"While several rules have been advocated for the measure of the damages in actions for breach of covenants to leave premises in any specified condition, the one upon which the great majority of the decisions has settled as the proper one is that the lessee is liable to the extent of the amount required to do what he covenanted to do, but did not do."

Again, in a note to *Appleton v. Marx* (N. Y.) 16 L. R. A. (N. S.) 210, it is said:

"As is there shown [64 L. R. A. 665, supra], the great majority of the decisions hold the

proper rule to be that the tenant is liable to the extent of the amount required to do what he covenanted to do, but did not do. This, it will be observed, is the rule laid down in *Appleton v. Marx* [the principal case], and is also followed by the recent cases involving the question."

The rule is stated thus in 18 Am. & Eng. Ency. L. (2d Ed.) p. 256:

"Where the action is brought after the expiration of the term, the measure of damages is the cost of putting the premises in the required state of repair, even though the repairs have not been made by the landlord and he does not intend to make them."

In 24 Cyc. 1098, it is said:

"In an action by the lessor on a breach of covenant to repair brought before the expiration of the lease, the measure of damages to which the lessor is entitled is not the cost of repairing, but the injury done to the reversion. However, where such action is brought after the end of term, the measure of damages is held to be such sum as will put the premises in the condition in which the tenant is bound by his covenant to leave them."

In 8 Sutherland on Damages (3d Ed.) § 858, p. 2558, the author says:

"As has been already incidentally mentioned, if a tenant bound to repair, or under a covenant to leave and deliver up in repair, leaves the premises at the end of his tenancy in a state of dilapidation, he is liable in damages for what it will reasonably cost to put them in the state in which he was bound to leave them."

To the same effect is the text in 16 Ruling Case Law, p. 1094, § 612, where it is said:

"In an action for the breach of a tenant's covenant to keep the premises in repair, brought after the expiration of the term, the plaintiff's measure of damages is the cost of putting the demised premises into the state of repair contemplated by the broken covenant."

The rule stated in *Tiffany on Landlord & Tenant*, § 118g, pp. 783, 784, was as follows:

"The measure of damages for breach of a covenant by the lessee to leave in repair or in the same condition as at the time of the demise is, at least as a general rule, the reasonable cost of putting the premises in the required condition."

There appears to be no case directly in point in Virginia; but the multitude of cases cited in the texts above quoted show that the rule as stated therein is established by the overwhelming weight of judicial decision.

The case of *Moses v. Old Dominion Iron & Nail Works*, supra, was one in which the action was brought before the end of the term to recover damages for overloading a building and causing it to fall. The action there was in case, and not in covenant, but the court held that the landlord (who on

the lessee's refusal to make the repairs had made them himself) might bring his action in either form, and might sue before the end of the term, and then proceeded to say:

"It has been said, however, the lessee ought not to be held to answer for all the fanciful or extravagant outlays the lessor may choose to make in repairing the buildings. That is very true. The measure of the lessee's liability is not what the lessor may think proper to expend, but what is necessarily expended in restoring the property to its former condition, or perhaps such sum as will be sufficient to compensate the lessor for the damage and loss sustained by the injury to the property."

It thus appears that Judge Staples, who rendered the opinion of the court in that case, was inclined to the view adopted in some of the older decisions that, even in actions brought before the end of the term, the measure of damages was the cost of making the repairs rather than the damage to the value of the property. There can be no doubt that he would have approved the former as the rule if the action had been brought after the end of the term.

[8] Throughout the second trial the plaintiff's evidence to prove damages was addressed to the question of the cost of replacing the building, and there was no objection or suggestion that this was not proper. Even in actions of tort for the wrongful destruction of property, evidence of this character is admissible as tending to prove the value of the property destroyed. In the absence of other evidence of value, and without objection from the defendant as to the sufficiency of such evidence, it would seem that proof of the cost of replacing the buildings would warrant the jury in fixing the damage accordingly. However this may be, we are of opinion that as an independent proposition instruction 14 was correct. It simply required the defendant to do what its covenant demanded, and made due allowance for depreciation and salvage, so as not to require the substitution of a new for an old building.

The view which we have taken as to the burden of proof, as fixed by plaintiff's instruction 4, disposes of the defendant's cross-assignment of error to the action of the trial court in overruling a demurrer to the notice. There were certain other cross-assignments relating to the other instructions in the case. These have all been considered and are deemed without merit. The important and decisive questions are those which we have already discussed.

We are of opinion that the court erred in setting aside the verdict at the second trial, and we will therefore enter here the order which we think should have been entered below, awarding judgment to the plaintiff for the amount of the verdict and the costs of this appeal.

Reversed.

BURKE, J., absent.

(85 W. Va. 736)

**HUNT v. AJAX COAL CO. (No. 3926.)**(Supreme Court of Appeals of West Virginia.  
March 9, 1920.)*(Syllabus by the Court.)***1. NEW TRIAL  $\S$  77(1)—MISTAKE OF FACT DISCLOSED ON FACE OF VERDICT IS GOOD GROUND FOR NEW TRIAL.**

A mistake of fact in a verdict, disclosed on its face or by analysis thereof in the light of the issues and evidence in the case, constitutes good ground for award of a new trial.

**2. NEW TRIAL  $\S$  77(1)—CONTRADICTION AND UNCERTAIN VERDICT ATTRIBUTABLE TO JURY'S MISTAKE IN THEIR CALCULATIONS IS GROUND FOR NEW TRIAL.**

A verdict in an action of assumpsit, involving a claim for purchase money of lumber, cross-ties, and mine posts, on the one side, and a demand for purchase money of merchandise asserted by way of set-off, on the other, which treats both accounts as having been sufficiently proved, but allows all of that of the plaintiff and less than half of that of the defendant, on the theory of a settlement between the parties, as of a certain date, is contradictory, uncertain, and attributable to a mistake on the part of the jury, made in their calculations.

**Error to Circuit Court, Fayette County.**

Action of assumpsit by F. W. Hunt against the Ajax Coal Company, with cross-claim by defendant. Verdict for plaintiff, motion to overrule it set aside, and judgment rendered thereon for a certain amount, and defendant brings error. Reversed, verdict set aside, and cause remanded for a new trial.

Osenton & Horan, of Fayetteville, for plaintiff in error.

J. L. Ryan, of Fayetteville, and Thos. P. Ryan, of Spencer, for defendant in error.

POFFENBARGER, J. In this verdict in an action of assumpsit, involving cross-claims, the plaintiff's account being one for lumber, ties, mine posts, etc., amounting to \$705.30, and the defendant's one for general merchandise, coal, and feed for stock, amounting to \$597.35, exclusive of a check hereinafter to be mentioned, the jury allowed the plaintiff his entire claim and rejected a large part of the defendant's. On the verdict for \$515.89 in favor of the plaintiff, the court rendered a judgment, after having overruled a motion to set aside.

[1] The plaintiff's statement begins with a small balance due him on February 4, 1915. That of the defendant commences on December 28, 1914. Although no settlement was made in December, 1915, the defendant ascertained from its books, on December 14, 1915, that there was due the plaintiff \$100.50, and accordingly made out a voucher and check in his favor for that amount, on the same paper, and sent them to him, but he never signed the

the voucher nor cashed the check. Nor was the paper ever returned to the defendant, but it was put in evidence on the trial and is no longer in the plaintiff's hands. The defendant's account, made after the date of the check, amounted to \$290.31, as shown by its books regularly kept and proved by the clerks and bookkeeper. Deduction of said sum of \$290.31 from plaintiff's entire account and addition of the amount of the check to the remainder make exactly the amount of the verdict, but this result is accomplished by omission of \$307.04 of the defendant's account.

In resistance of the account of set-offs, the plaintiff filed two statements of what he had purchased from the defendant, one for the year 1915, amounting to \$63.77 and the other for 1916, amounting to \$74.85—total \$138.62. Although he can write, he says his wife kept these accounts or made up these statements for him. She was not called as a witness, however. Most of the items of both were credits for feed and coal. The mathematical demonstration given above tends very strongly to prove the rejection of these two statements by the jury. In no way can they be so combined with other figures as to produce the amount of the verdict. It also tends clearly to prove the defendant's statement of its own account, made after the date of the check was accepted by the jury, as being correct, for it fits into the demonstration perfectly. If the jury could have correctly found or assumed a settlement as of the date of the check, extinguishing the plaintiff's claim up to that date, the addition of the amount of the check would have been proper, inasmuch as it would have represented a balance due the plaintiff and had not been paid and was surrendered in the course of the trial. But, as the whole of the plaintiff's demand was allowed in the verdict, the part preceding the date of the check as well as the part following it, no such settlement and balance could have been found or assumed; wherefore the whole of the defendant's account, save the amount of the check, should have been allowed also.

[2] No intelligent, just and reasonable combination of the figures shown by the statements, contentions, and evidence of the parties will produce the result of the verdict. The only possible mathematical reconciliation of the figures with the verdict approves the plaintiff's entire demand against the defendant, condemns his statement of credits, and accepts as correct the latter part of the defendant's account. As both parts of the defendant's statement stand upon the same kind of evidence, there was no reason for accepting one part of it and rejecting the other. On the theory of a settlement showing a balance on a certain date, no part of the plaintiff's demand existing prior to that date could have been allowed. Manifestly, therefore, the verdict, as to its amount, was the

result of a mistake on the part of the jury, made in their calculations.

New trials are not often awarded on the ground of such a mistake, because that particular ground either does not exist or is undiscoverable, but, when it is plainly revealed, it constitutes good ground for the award of a new trial. *Woods v. Macrae, Wythe (Va.) 253; Deems v. Quarrier, 3 Rand. (Va.) 476.* Viewed in the light of the evidence, this verdict is contradictory, uncertain in its bases, and apparently excessive. Both uncertainty and excessiveness are grounds for a new trial.

The judgment will be reversed, the verdict set aside, and the case remanded for a new trial.

(85 W. Va. 720)

**MILLS v. VIRGINIAN RY. CO. (No. 3920.)**

(Supreme Court of Appeals of West Virginia.  
March 9, 1920.)

(Syllabus by the Court.)

1. MASTER AND SERVANT §258(9)—DECLARATION UNDER FEDERAL EMPLOYERS' LIABILITY ACT CONSTRUED TO SUFFICIENTLY STATE CAUSAL CONNECTION BETWEEN NEGLIGENT ACTS AND INJURY.

A declaration in an action for damages for alleged wrongful death, brought under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), which, in each of its two counts, sets forth several charges of negligence, and then alleges that, by reason of all the matters and things therein previously set forth, the plaintiff's decedent came to his death, sufficiently states causal connection between the acts of negligence and the injury complained of.

2. MASTER AND SERVANT §265(11), 286(41)—MINOR OVER FOURTEEN PRESUMED TO HAVE CAPACITY TO APPRECIATE DANGERS INCIDENT TO EMPLOYMENT AND WHETHER HE DID IS FOR JURY.

Although a minor servant over 14 years old is presumed to have capacity to comprehend and duly appreciate the dangers ordinarily incident to his employment, the inquiry as to whether he did actually comprehend and fully appreciate such a danger, in any case in which he has suffered injury therefrom, in the course of his employment, is one for jury determination, unless all the facts and circumstances, including his age, intelligence, experience, and warning of the danger and advice as to means of avoidance thereof, if any, make his possession of such knowledge and appreciation so clear as to leave no room for a reasonable and intelligent opinion to the contrary.

3. MASTER AND SERVANT §286(41)—WHETHER SECTION HAND EIGHTEEN YEARS OLD APPRECIATED DANGER ON FRONT END OF HAND CAR IN ABSENCE OF WARNING WAS FOR JURY IN ACTION UNDER FEDERAL EMPLOYERS' LIABILITY ACT.

Whether a minor servant 18 years old, working as a section hand on a railroad, comprehended and fully appreciated the danger at-

tendant upon his standing on the front end of a lever hand car of standard make and working the lever, while the car was under way, in the absence of warning thereof and advice as to means of avoiding it, is a question proper for jury determination, and their findings that he did not and that the failure of the employer, through its foreman, to give him warning of such danger, or to put him in a safer place on the car, in view of his immaturity and inexperience, was negligence on its part and the proximate cause of the injury, cannot be disturbed by the trial court.

4. WITNESSES §379(2)—PREVIOUS CONTRADICTORY STATEMENTS ARE ADMISSIBLE TO IMPEACH WITNESS.

If, in the trial of an action for damages for wrongful death, brought under the federal Employers' Liability Act, occasioned by a fall of an immature and inexperienced workman, from a hand car, while standing on the front end of it and working the lever, the defendant proves by its section foreman under whom the decedent was working at the time that he had observed nothing in the decedent's conduct calling for admonition against danger arising therefrom, the trial court may properly admit proof of contradictory statements previously made by the witness and tending to impeach such testimony.

Error from Circuit Court, Wyoming County.

Action by A. L. Mills, administrator of James Allen Mills, deceased, against the Virginian Railway Company. From a judgment setting aside a verdict for plaintiff, he brings error. Reversed, verdict reinstated, and judgment rendered thereon.

Toler & Moran, of Mullens, for plaintiff in error.

M. P. Howard, of Pineville, Loyall & Taylor, of Norfolk, and Hall, Wingfield & Apperson, of Roanoke, for defendant in error.

POFFENBARGER, J. A verdict for \$10,000, obtained in an action for alleged wrongful death, brought under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), was set aside by the judgment complained of, as being contrary to the law and the evidence. Argument to sustain this ground of the motion to set aside and also to sustain the court's action on the ground of erroneous admission of evidence, is found in the brief for the defendant in error. It also contains a cross-assignment of error predicated on the overruling of a demurrer to the declaration and each of its two counts.

[1] The gravamen of the cause of action as set forth in the first count of the declaration is the failure of the defendant to warn the decedent of the ordinary dangers of the employment upon which he entered on the third day preceding his death; he being only 18 years old and having had no previous experience in the work he was employed to perform, namely, track repairing and incidental



travel on, and operation of, a lever hand car of standard size and construction. On the third day of his employment, while assisting in the operation of the hand car and standing on the front end thereof between two other men, with only one hand on the lever, his hand became detached in some way, and he fell from the car and was run over by it and instantly killed. This count asserts, among other things, duty on the part of the defendant, in view of his youth, inexperience, and lack of knowledge of the danger incident to his work, to give him warning, instruction, and advice respecting them, and then states the situation of the decedent immediately before he fell, and avers that "by reason of all the matters and things" thereinbefore "set forth, he, the said James Allen Mills, was violently thrown and hurled from the platform of the said car" and killed as above stated. The second count repeats practically all of the allegations of the first, except failure of duty to warn, instruct, and advise, including requirement by the foreman, and necessity on the part of the decedent, owing to the crowded condition of the car, to stand on its edge, in the manner above indicated, while assisting in the working of the lever, and then attributes the fall and injury to his inexperience and lack of knowledge and information and neglect and refusal of the defendant to use due and reasonable care and caution to prevent injury to him and to provide him reasonably safe and secure appliances and tools and a reasonably safe and secure place in which to work. It then avers that, by reason of all the matters and things previously alleged, he was thrown and hurled from the car to his death.

Manifestly, the first count seeks recovery on the ground of failure, as omissive negligence, to warn, instruct, and advise respecting the danger of the employment, in view of alleged youth and inexperience, and that negligence is one of the things included in the generally stated reasons or causes of the injury. One of the grounds of action clearly disclosed by the second is requirement or necessitation, as active or affirmative negligence, of an immature and inexperienced servant, to work in an insecure and dangerous place, and the causal connection between it and the injury is alleged in the same way and the same terms. Lack of such connection is the only contention set up in support of the demurrer and is clearly untenable.

[2, 3] The minority and inexperience of the decedent are undisputed. Omission to warn him of the dangers incident to his employment and to advise him how to avoid them is also established. Although the space between the front handle bar of the car and the front end of the car was only eight or ten inches, it might not have been, as matter of law, a dangerous place in which to stand when the car was in motion, if the handle bar had remained fixed and not in motion, or if there

had been something else the decedent could have grasped and held to; and, if it was, the danger might have been so open and apparent that he, a person against whom there was a presumption of capacity to appreciate danger, would be deemed to have duly appreciated and assumed it, in which case, his own deliberate act, with full knowledge of its almost certain consequences, would have been the proximate cause of his injury, and therefore, would preclude right of recovery under the statute relied upon here. *Keathley v. Chesapeake & Ohio Ry. Co.*, 102 S. E. —, not yet officially reported; *Chesapeake & Ohio Ry. Co. v. De Atley*, 241 U. S. 310, 38 Sup. Ct. 564, 60 L. Ed. 1016. But these conditions did not obtain. The handle bar was in constant and more or less violent motion, when the car was running. Its momentum kept the lever in motion, even on downgrades when the application of manual power or force was unnecessary. If an operator of the lever did not accommodate his own motion to that of the handle bar, his hand necessarily came into conflict with the force emanating from the car's momentum, and applied to the lever, or that applied by his associates, and, in consequence thereof, his hold upon the handle bar might be broken and his body, at the same time, thrown out of its equilibrium. The danger of a backward fall in front of the car, under such circumstances, is very much greater and not nearly so obvious, as in the supposed case of a fixed and stable support of some kind. It might not be observed at all, or, if observed, not fully appreciated, by an immature and inexperienced person.

Although the decedent, being over 14 years old, is presumed to have had capacity to comprehend open and obvious danger and warnings against obscure dangers, the law does not impute to him the closeness of observation, nor the degree of caution and wariness, that characterizes the conduct of men of mature age. Where minors are concerned, ordinary risks are, for evidential purposes, always treated at the outset of the inquiry as extraordinary, and the burden of establishment of the servant's actual comprehension of the particular risk rests upon the employer. *Adams v. Chesapeake & Ohio Ry. Co.*, 73 W. Va. 700, 80 S. E. 1115, 52 L. R. A. (N. S.) 175; *Williams v. Coal & Coke Co.*, 55 W. Va. 84, 101, 46 S. E. 802; *Giebell v. Collins Co.*, 54 W. Va. 518, 46 S. E. 569. Whether such a servant did fully comprehend it is a question of fact for the jury, unless the facts and circumstances tending to prove his actual knowledge of the danger and appreciation thereof, including his age and actual capacity, make out a case against him, so strong and clear as to leave no room for a reasonable and intelligent opinion in his favor. Over the age of 14 years, there is a presumption of capacity only, but none that a minor servant actually knew and appreciated the danger in-

cident to his service. *Ewing v. Lanark Fuel Co.*, 65 W. Va. 726, 65 S. E. 200, 29 L. R. A. (N. S.) 487; *Labatt's M. & Serv.* (2d Ed.) §§ 1156, 1203, and 1264. His actual knowledge and appreciation of the danger, however, may be placed beyond doubt, by proof of his age, his warnings, caution, and advice, his previous knowledge and experience, or the inherent character of the danger. *Williams v. Coal and Coke Co.*, 55 W. Va. 84, 100, 46 S. E. 802; *Laverty v. Hambrick*, 61 W. Va. 687, 57 S. E. 240; *Bare v. Coal Co.*, 61 W. Va. 28, 55 S. E. 907, 8 L. R. A. (N. S.) 284, 123 Am. St. Rep. 966; *Marklewitz v. Olds Motor Works*, 152 Mich. 113, 115 N. W. 999. None of the decisions of this court go beyond the propositions just stated. In *Ewing v. Lanark Fuel Co.*, the court held the questions of actual knowledge and appreciation to be within the province of the jury. In *Laverty v. Hambrick*, the proof of both knowledge and appreciation was so full and clear that the court could assert them as matter of law. The issue in *Wilkinson v. Kanawha, etc., C. & C. Co.*, 64 W. Va. 93, 61 S. E. 875, 20 L. R. A. (N. S.) 331, was whether an employer was guilty of negligence toward an injured servant, in the employment of a minor as the co-servant of the injured person, by whose oversight the injury was occasioned, and it is governed by a different rule. To impose liability in that case, it was necessary to prove negligent employment of an incompetent servant. There was a presumption of competence of the minor servant, which the plaintiff had not rebutted nor overthrown, competence to perform certain simple, though highly important, functions which he had repeatedly performed for a period of three days, not capacity to discover and fully appreciate something of which he had had no previous knowledge.

In view of the peculiarity of the danger incurred by the servant, without warning or advice, and his immaturity and presumptive as well as actual inexperience, we are of the opinion that the questions of his actual knowledge of the danger and appreciation thereof were properly allowed to go to the jury, and that, in the absence of any error in the conduct of the trial, the court could not properly set aside the verdict. In an action brought under an Iowa statute similar to the federal statute here involved, for an injury to a section hand, occasioned by contact of his feet with a cattle guard, or the rails or the snow, while riding on a hand car and holding a shovel on the rails of one side of the track and thereby removing the snow from them, a recovery was allowed. The judgment was reversed and the verdict set aside, on account of an error in the trial, but there was no suggestion of lack of right of recovery on the facts alleged. *C., M. & St. P. Railway Co. v. Artery*, 137 U. S. 507, 11 Sup. Ct. 129, 34 L. Ed. 747. On the contrary, the court said in the opinion filed:

"We are clearly of opinion that, in the present case, the defendant was liable, under section 1307 of the Code, for the injury to the plaintiff caused in the manner set forth in the petition, and in the evidence contained in the bill of exceptions. The plaintiff was upon a moving car propelled by hand power. The movement of the car, its speed, the position of the plaintiff upon it, and the duties he had to discharge in that position, were under the direction of the foreman, who was upon the same car."

Although there may be no evidence of a direction to the decedent to take the position he occupied, by the foreman, it was the duty of the latter either to give warning of the peculiar danger of that position, when he saw it taken by the boy, or to put him in a safer place and assign an experienced man to that one.

There is conflict in the evidence as to whether the arrangement of the men and tools on the car was proper, but the issue as to that was not decisive of the case. An expert witness swore it was unnecessary and improper to place men on the car in front of the front handle bar. Other witnesses flatly contradicted him and supported their contentions with apparently strong reason. If the jury believed and found it proper so to place them, they could consistently find negligence in the conduct of the defendant, respecting the decedent, on account of his youth and inexperience. In other words, it might have been permissible, to place an experienced man on the front of the car, without warning, but not so to place an inexperienced servant in that position.

[4] There was no error in the admission of evidence, justifying the award of a new trial. Britt, the section foreman, called as a witness by the plaintiff, was interrogated, without objection, as to whether he had not admitted, some time after the accident, that he was sensible of danger to Mills, when he saw him pumping with only one hand, and had debated in his own mind the propriety or expediency of an admonition to him and finally decided to withhold it. He answered that he did not remember whether he had made the statement or not. Of course, the subsequent admission of the agent of the defendant was not admissible as a part of the plaintiff's case, and the witness' answer constituted no basis for impeaching evidence. *Peterson v. Pain+ Creek Collieries Co.*, 71 W. Va. 334, 76 S. E. 664. But, later, the defendant itself put the witness on the stand and introduced his testimony as the subject-matter of the former interrogation, his observation of any conduct on the part of Mills, which, in his opinion, called for admonition, in the course of which he said he had not observed anything of that kind. This opened the way for impeaching evidence or contradiction, for the testimony then became a material part of the defend-

ant's case. It was not evidence of an admission. It was evidence tending to prove lack of knowledge of inexperience. Being material, it could be resisted by proof of contradictory statements of the witness previously made. *State v. Goodwin*, 32 W. Va. 177, 9 S. E. 85; *Peterson v. Paint Creek Collieries Co.*, cited; *Forde's Case*, 16 Grat. (Va.) 547.

The verdict having been erroneously set aside, the judgment will have to be reversed, the verdict reinstated, and a judgment rendered thereon, with costs to the plaintiff in error, in the court below as well as in this court.

(85 W. Va. 726)

CONLEY v. BREWER et al. (No. 3844.)

(Supreme Court of Appeals of West Virginia.  
March 9, 1920.)

(Syllabus by the Court.)

1. EASEMENTS §61(8) — DESCRIPTION OF WAY IN BILL TO ENJOIN OBSTRUCTION SUFFICIENT.

In a suit to enjoin obstruction of a road or way acquired over another's land the bill is sufficient if it describes such road or way in such terms as will enable one going upon the land to find and identify the same by reference to such description.

2. INJUNCTION §148(1) — DECREE MAKING TEMPORARY INJUNCTION EFFECTIVE WITHOUT REQUIRING BOND OF PLAINTIFF, ERROR.

It is error on decreeing a temporary injunction to make the same effective without requiring of the plaintiff a bond in such penalty as the court may prescribe, conditioned according to law.

3. INJUNCTION §191—PERPETUATING TEMPORARY INJUNCTION BEFORE CAUSE IS MATURED AND FINAL HEARING ON PROOF OF MATERIAL FACTS ALLEGED WILL BE REVERSED.

And a decree perpetuating such an injunction before the cause has been regularly matured for final hearing upon proper proof of the material facts alleged as a basis for such final relief, will be reversed on appeal.

Appeal from Circuit Court, Mingo County.

Bill for injunction by J. C. Conley against William Brewer and others. Temporary injunction granted, motion to dissolve overruled, and injunction made perpetual, and defendant William Brewer appeals. Temporary injunction modified and decree, finally adjudicating the right of the parties, reversed and cause remanded.

S. D. Stokes, of Williamson, for appellant.

R. Dennis Steed, of Charleston, for appellee.

MILLER, J. The decree below, on the bill, answer and ex parte affidavits filed by both parties, and submitted upon plaintiff's motion

for a temporary injunction, not only adjudged plaintiff entitled to the relief prayed for, but adjudged that he be and he was thereby awarded an injunction against defendant from obstructing or interfering with him in "the right and privilege of free ingress, egress and regress from the public road leading up the left fork of Marrowbone Creek and across to the public road leading up the right hand fork of Marrowbone Creek as described in the bill of complaint filed herein to and from the plaintiff's property therein described to the said public roads for all farming purposes of every kind and for all purposes attending the use and occupation of said property, for the purpose of conveying to and from said property all that would be necessary to be moved upon the road aforesaid pertaining to the property aforesaid, and that the gates erected across the road as described in the bill of complaint in this cause be removed or placed in such a condition that they can be easily and readily opened by the parties desiring to travel said road over which they have been placed and to give the plaintiff every right in traveling over said road that would be necessary for him to have for the purposes of successfully farming and operating his said farms and it is further ordered that the said defendant shall not in any wise obstruct the free passage of the said plaintiff over said road, until the further order of this court."

Upon the award of the temporary injunction, which was done without requiring of the plaintiff any bond, and by the same decree, the defendant interposed a motion to dissolve said injunction, which motion being resisted by plaintiff, was thereby also overruled, and without further motion of plaintiff the court proceeded by the same decree to perpetually enjoin defendant in accordance with the terms of the temporary injunction, and to adjudge costs to plaintiff, and specifically decreed that as the purposes of the suit had been accomplished, the same should be omitted from the docket.

[1] The point first urged by appellant for reversal is that his demurrer to the bill, overruled by the court below, should have prevailed. This point is predicated on the theory that the alleged right of way or easement upon defendant's land sought to be protected by the injunction prayed for, was not sufficiently and definitely located upon the ground; that the bill was too uncertain in its description of the road or way claimed. The allegations and theory of the bill are that such way or road existed as one of necessity as well as by prescriptive right acquired by long and continued user, so as to have ripened into one of absolute right. Plaintiff alleges that he is owner of two tracts or the surface thereof; one containing 63.58 acres, and the other 80 acres, both a part of a tract of about 600 acres located on said Marrowbone

Creek, once owned by Ellen Floyd and of which she had died seized twenty years or more before the suit, and which after her death had been divided and partitioned among her heirs by a decree of partition which provided for said road or right of way, and that the 5.6 acres owned by defendant, as well as the lands owned by plaintiff, were acquired by them respectively from one or more of the heirs of said Ellen Floyd, giving them a common grantor; and the bill alleges, not only right by such alleged partition decree, but that for many years before and since the death of the said Ellen Floyd, said road or way had been used by the owners and tenants of said larger tract continuously without obstruction for twenty to forty years, and by the public in general. The road as described in the bill is one "connected with and intersecting the public road leading up the left fork of Marrowbone Creek with the public road leading up the right hand fork of Marrowbone Creek, and which had been used and traveled and recognized as a passway upon the location above referred to and through said property for more than forty years, and which passes through the property of said William Brewer." And the bill specifically alleges that there is no way by which plaintiff can reach the public road or his home except over the road so alleged to have been established.

The point of uncertainty of description, we think, is not well founded in fact. While the bill is most inartistically formulated and the description of the road is not as clear as it might have been, we think the description is sufficient to satisfy the requirements of our decisions. All that is required in such cases is that the terms of description should be sufficient to enable one going upon the land to find and identify the road by reference thereto. *Roberts v. Ward*, 102 S. E. 96, and cases cited. Certainly a road so long in use, extending from one fork of Marrowbone Creek to another as described, and passing through the land of defendant and others, especially if existing on the ground, could easily be located from the description in the bill and decree.

On the other theory of the defendant's demurrer, that the bill does not make out a case calling for a way of necessity, for want of a common grantor, at least as to the 80 acre

tract the rights of the plaintiff do not depend on establishing a way of necessity but on a way already established and used for so long a period as to have ripened into a way by prescription. Such a road may have originated in a way of necessity, but having been long established and used it may now exist by prescription. Assuming the allegations of the bill to be true, we think it good on demurrer, and the demurrer was properly overruled. *Walton v. Knight*, 62 W. Va. 223, 58 S. E. 1025.

On the merits of the case, presented by the bill and answer, the *ex parte* affidavits, and the motion of the plaintiff for a temporary injunction, we are of opinion that as the record stood at the date of the decree, the court was warranted in awarding the temporary injunction. Plaintiff, it is true, had had time enough after the filing of his bill and the filing of the answer of defendant to have matured his case for final hearing, by proof regularly taken, but seems not to have done so. The temporary injunction was awarded without bond. This action of the court, as well as its pronouncement of the final decree before maturity of the cause therefor, are the other errors relied on for reversal.

[2] Our statute, section 10 of chapter 133 (sec. 4956) of the Code, denies the right of a court on awarding a temporary injunction to make it effective in advance of the giving by plaintiff of a proper bond conditioned as prescribed by the statute. *Chesapeake & Ohio Ry. Co. v. Patton*, 5 W. Va. 234; *Glen Jean, L. L. & D. R. R. Co. v. Kanawha, G. J. & E. R. R. Co.*, 47 W. Va. 725, 35 S. E. 978; *Lomax v. Picot*, 2 Rand. (Va.) 247. The decree below awarding the temporary injunction must therefore be so modified as to render it ineffective until the plaintiff has given bond in such penalty as the circuit court may prescribe, conditioned according to law.

[3] And without consent of the parties, not given, it was manifest error for the court below to have pronounced a final decree against the defendant. The answer put in issue the material facts, and without the cause having been properly matured for final hearing, the court should have withheld final action.

Our duty is therefore to modify the temporary injunction as indicated, and to reverse so much of the decree as finally adjudicates the rights of the parties, and to remand the cause for further proceedings.

(179 N. C. 407)

(102 S.E.)

**ETHERIDGE v. EAGLES-HOUSE REALTY CO. (No. 66.)**

(Supreme Court of North Carolina. April 7, 1920.)

**1. WILLS  $\S$  498—DEVISE TO WOMAN FOR LIFE, AFTER DEATH TO HER "ISSUE," EMPOWERED HER AND CHILDREN TO CONVEY.**

A woman to whom land is devised to have and to hold during her natural life, and after her death to her issue and their heirs, could at the age of 65, when she had two children, irrespective of the contingency of further children born to her, with her children convey good title to the land; the word "issue" in the devise meaning "children," in view of testator's manifest intention, which governs.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Issue.]

**2. WILLS  $\S$  439—INTENTION OF TESTATOR GOVERNS CONSTRUCTION.**

In all cases involving the construction of wills the intention of testator governs.

Appeal from Superior Court, Edgecombe County; Lyon, Judge.

Controversy without action between Claude Etheridge and the Eagles-House Realty Company. From judgment for plaintiff, defendant appeals. Affirmed.

H. G. Connor, Jr., of Wilson, for appellant.

W. O. Howard, of Tarboro, for appellee.

**BROWN, J.** This is an action for the construction of the words "her issue" in the devise to Maud S. Bullock in item 3 of the Arch Braswell will, the words of the devise being as follows:

"To have and to hold unto the said Maud S. during her natural life and after her death to her issue and their heirs."

The said Maud S. is about 65 years of age, and has two children, Ernest Bullock and Maud S. Bullock, who were born prior to death of testator, and the said Ernest Bullock has two children who are minors, Maud S. Bullock and her children, Ernest Bullock and wife, and Maud Bullock conveyed the land devised to plaintiff, who contracted to convey the same to defendant, and the question for determination is whether plaintiff can convey a good title provided the said Maud S. Bullock shall have no other child or children born unto her, and this depends upon the meaning of the words "her issue"; that is, whether it means her children or her lineal descendants.

[1, 2] Waiving the contingency of further children born to Maud S. Bullock, which is waived by the defendant, we are of opinion that a deed made by the said Maud S. Bullock and her children conveys a good title to

the defendant for the land purchased. There are authorities that the word "issue," when used in a will and unexplained by the context, may mean descendants, but in this, as in all other cases involving the construction of wills, the intention of the testator governs. Where it is held to mean descendants, it is held to mean children upon a slight indication in other parts of the will that such was the intention of the testator. *Ford v. McBrayer*, 171 N. C. 424, 88 S. E. 736; *Palmer v. Horn*, 84 N. Y. 516; 2 *Jarman*, Wills, 635.

In *Faison v. Odum*, 144 N. C. 108, 56 S. E. 793, as to a devise "for the use and benefit of my son Edward, during his life, \* \* \* and after the death of my said son Edward, to his issue forever; \* \* \* in case of his death without leaving issue, I give, devise and bequeath \* \* \* unto his surviving brothers and their heirs, and in case of their death before him and leaving children, to such issue and their heirs," it is held that the word "issue" here means children from the construction placed on the word by the testator himself; "such issue" being a correlative term for children.

In this case we think it is manifest that the testator in using the words "her issue" meant the children of Maud S. Bullock. He devised his lands to his children, W. T. Braswell, J. O. Braswell, Mary E. Braswell, and Arch Braswell in fee, to W. T. Braswell in trust for Jas. W. for his natural life, and then to his children, to be conveyed to them when the youngest becomes 21 years of age, and to Maud S., Helen Adrienna, and Alice Lee Joyner "during her natural life and then to her issue." In item 5 of the will the devise to Alice Lee Joyner was in same terms as the devise to Maud S. Bullock in item 3. Before the death of the testator, he sold the land devised to Mrs. Joyner and made a codicil, appointing a trustee to hold the money and directed that the income thereof be paid to her for life and then to be equally divided between her children.

It seems from an examination of the several items of the will, which it is unnecessary to set out, that the testator uses the words "issue" and "children" as synonymous terms. The word "issue" is construed to mean "children" in *Palmer v. Dunham*, 125 N. Y. 68, 25 N. E. 1081, and *Brislin v. Huntington*, 128 Iowa, 166, 103 N. W. 144, 5 Ann. Cas. 931. In that case it is held, where the issue is to take the share of a deceased parent, the word is construed to mean the children of such parent. See, also, *Cochrane v. Schell*, 140 N. Y. 516, 35 N. E. 971; *King v. Savage*, 121 Mass. 306; *Parkhurst v. Harrower*, 142 Pa. 432, 21 Atl. 826, 24 Am. St. Rep. 507.

Affirmed.

(179 N. C. 399)  
**CARDEN v. SONS AND DAUGHTERS OF  
 LIBERTY.** (No. 331.)

(Supreme Court of North Carolina. March 31,  
 1920.)

**1. INSURANCE**  $\S$ 817(2)—**NONPAYMENT OF  
 ASSESSMENTS IS MATTER OF DEFENSE AS TO  
 WHICH BURDEN IS ON INSURED.**

In an action on a benefit certificate, the member's claimed nonpayment of assessments was a matter of defense as to which the burden was on defendant.

**2. INSURANCE**  $\S$ 825(2)—**WHETHER MEMBER  
 RECEIVED NOTICE OF ASSESSMENT A QUESTION  
 FOR THE JURY.**

In an action on a benefit certificate, evidence held to make a question for the jury as to whether the member received a notice of an assessment in person or by an agent.

**3. APPEAL AND ERROR**  $\S$ 995—**EVIDENCE ON  
 QUESTION OF FACT NOT REVIEWABLE.**

The Supreme Court will not review the evidence.

**4. INSURANCE**  $\S$ 751(1)—**NONPAYMENT OF AS-  
 SESSMENTS DOES NOT DEPRIVE MEMBER OF  
 GOOD STANDING WHERE NOTICE WAS NOT  
 SENT AS REQUIRED BY BY-LAWS.**

Where the by-laws of a benefit society required notice of assessments to be sent members by lodge officers, the negligent failure of the local agent or financial secretary to send such notice was not chargeable to the member, and nonpayment of the assessment did not deprive her of good standing.

**5. EVIDENCE**  $\S$ 71—**DEPOSIT OF NOTICE IN  
 MAILS IS PRIMA FACIE EVIDENCE OF RECEIPT  
 THEREOF.**

The deposit in the mail of a notice to a member of a benefit society of an assessment was prima facie evidence of her receipt thereof.

Appeal from Superior Court, Durham County; Stacy, Judge.

Action by W. A. Carden against the Sons and Daughters of Liberty. From a judgment for plaintiff, defendant appeals. Affirmed.

The plaintiff's wife had been a member of the defendant, a fraternal organization, for more than eight years, paying her dues for said period. Upon her death the plaintiff brought this action for \$300 benefits under her contract with said organization. The defendant admits that the plaintiff's wife was a member of said organization at her death, but alleges that she was in arrears in the sum of \$2.50 for nonpayment of assessments, and therefore was not "in good standing," and not entitled to recover. The court submitted issues to the jury, who found that the plaintiff's intestate, Nettie Carden, was a member in good standing of Branson Council, No. 9, at the time of her death, and that defendant was indebted to the plaintiff in the sum of \$297.50. From judgment thereon, the defendant appealed.

D. W. Sorrell and Bryant & Brogden, all of Durham, for appellant.

J. W. Barbee and R. O. Everett, both of Durham, for appellee.

**CLARK, C. J.** The defendant admitted that, if Nettie Carden, the plaintiff's wife, was a member of the defendant organization in good standing at the time of her death, it would be liable in the sum of \$300, but contended that she was in bad standing at the date of her death because she owed \$2.50 dues at the date of her death. The plaintiff contended that, though she owed the defendant \$2.50 at her death, this would not work a forfeiture, for the reason that she had never been notified of her arrears by the defendant, as it was its duty to do.

[1] The refusal of the motion to nonsuit requires no discussion; for this was a matter of defense, and the burden was upon the defendant. *Spruill v. Ins. Co.*, 120 N. C. 141, 27 S. E. 39, and citations thereto in Anno. Ed.

[2-4] Whether Nettie Carden received the notice either in person or by an agent was entirely a question of fact for the jury, who found in favor of the plaintiff, and it is not for this court to review the evidence. The by-laws required the notice of assessments to be sent members by the lodge officers. It must be shown that this requirement was complied with, and the member did not lose her good standing unless this was done. If the failure to send such notice was the negligence of the local agent or financial secretary, such default did not fall upon the member, and while the amount which the jury found to be thus due (\$2.50) still remained a debt to be discharged by the member, which the jury has allowed as a credit on the \$300, it did not place her out of the position of being in good standing. *Doggett v. Golden Cross*, 126 N. C. 486, 36 S. E. 26; *Duffy v. Ins. Co.*, 142 N. C. 106, 55 S. E. 79, 7 L. R. A. (N. S.) 238; *Lyons v. Grand Lodge*, 172 N. C. 410, 90 S. E. 423.

The financial secretary, of the lodge, witness for the defendant, testified that it was his duty "to notify each member who was in arrears of the amount due." He testified that Mrs. Carden was paid in full up to July 1st, and that the only notice he sent her after that date in writing was sent by his little daughter on October 14th to be mailed at the mail box in East Durham, where she lived, but on cross-examination he said that he knew at the time that she and her husband were both ill with the "flu" and in the hospital at West Durham, three miles distant. He also says that he had a conversation with the husband on August 31st in regard to an arrearage. It is admitted that Mrs. Carden died on the 16th of October, two days after the alleged mailing of the notice, and the plaintiff testified that she did not receive that

notice. He further testified that the notice to him personally on August 31st was about another arrearage which he communicated to his wife, and that she paid it promptly on September 2d. It appeared that there were other arrearages at times previous to July 1st, but that all these had been paid. The judge charged the jury that, if the notice was mailed, there was a presumption of delivery, and that, if the wife received it, the plaintiff could not recover.

[5] The deposit of the notice in the mail, if made, is prima facie evidence of the receipt thereof by the sendee, but the jury upon the evidence evidently found that this was rebutted in this case. This action was brought by the plaintiff as beneficiary in the contract.

No error.

(179 N. C. 383)

ACME MFG. CO. v. McPHAIL. (No. 294.)

(Supreme Court of North Carolina. March 31, 1920.)

SALES  $\S$  364(2)—CHARGE IGNORING AN ISSUE HELD ERRONEOUS.

In seller's action for purchase price, where in addition to the issue of whether agreement that seller should pay freight charges had been made by salesman, there was an issue of whether buyer, upon seller's repudiation of salesman's agreement, agreed to pay freight charges himself, confining the charge to the issue of whether the salesman's agreement was made, and ignoring the issue of whether subsequent there-to buyer agreed to pay freight himself, was reversible error.

Appeal from Superior Court, New Hanover County; Allen, Judge.

Suit by the Acme Manufacturing Company against Jonah McPhail. Judgment for defendant, and plaintiff appeals. New trial.

This suit was brought originally to recover damages for the conversion of certain collateral securities placed with the defendant for collection and alleged to have been converted by him, but it was agreed that it should be tried as one for the recovery of the sum of \$145.47. This amount was composed of \$18.34, admitted to be due, and the balance of \$127.13, it being what the defendant alleged he had paid for freight charges of a logging road beyond Dunn, N. C., and which, as he contended, the plaintiff had promised to pay on the goods shipped by plaintiff to defendant. The parties had dealings, under a contract, and defendant purchased his fertilizer from the plaintiff, which, he alleged, had to be shipped to his home 17 miles from a railroad, but on a logging road. Plaintiff alleged that the fertilizer was to be shipped, under the contract, only to Dunn, and there delivered f. o. b. Defendant contended that after the contract was executed, J. F. Woodward, the plaintiff's salesman, called on him and inquired why he

had not sent in any orders for fertilizer under the contract, and he replied that he could not handle it, as the other dealers were paying the log road freight, and he could not come out even if he had to pay the log road freight charges; thereupon Woodward said, "We will pay the freight." There was evidence that Woodward had no authority to bind the plaintiff in this way. Relying on this promise, the defendant ordered the goods and paid the log road freight, as plaintiff would not pay it. There was evidence for the plaintiff that before McPhail had ordered out any goods he was notified by the plaintiff, through Mr. J. Gilchrist McCormick, that Woodward had no authority to promise him that the plaintiff would pay the log road freight charges on the goods shipped by the company to him, and that, after he received this notice, he ordered the company to ship the goods. There was further evidence that afterwards the defendant signed three or four notes for certain amounts, being the balance due by him to the company, which was for the full amount demanded by the plaintiff, there being no deduction on account of log road freight charges, but defendant claimed that by agreement they were to be deducted from the amount of the notes.

The judge charged the jury as follows:

If Mr. Woodward told the defendant, in a conversation about ordering out fertilizers during the year 1914 from the plaintiff, that the company had decided to allow the log road freight, and he did this to secure the order for the fertilizers, having been told that the defendant was not going to order out any unless that freight was paid, as other companies were paying the log road freight—I say, if that was done—then that statement by the agent Woodward was a representation that would be within the scope of his authority that would be binding whether he had the expressed authority to do it or not, if he did in fact do so. That would be so in the absence of any subsequent written agreement. Then the question would arise as to whether the company signed a written agreement which did not embody this agreement with the agent. If you find there was such an agreement, would plaintiff still be bound by the agent's representation? That raises a very interesting question, but upon consideration I will charge you that in any event, if you find from the evidence that the plaintiff's agent, Woodward, agreed with the defendant that the company would pay the log road freight, and at that time there had not been any fertilizers ordered out, then, I charge you that the sale was then executory, and if you further find, relying upon that agreement, the defendant McPhail, ordered out fertilizers, I charge you that would be an oral agreement binding on the parties. And the question about the subsequent signing of a written agreement which did not embody it would be a circumstance which you can consider in saying whether there was such an agreement or not, because it is contended by the defendant that there was such an agreement made with Mr. Gilchrist as well as with Mr. Woodward, and the contention of the plain-

tiff is that there was no such agreement made with Mr. Gilchrist, and that the fact that he signed a written agreement which did not embody any such agreement is a circumstance from which you can infer that there was such an agreement. In other words, the plaintiff contends that if he had any such agreement with Mr. Gilchrist, when he came to sign the contract he would have embodied it in the contract.

Mr. Wright: We do not claim there was a definite agreement with Mr. Gilchrist. He said there was a talk there, and he would let us know later.

Court: I say he contends what amounts to an agreement or conversation about it, from which the defendant insists that there was such an agreement with Mr. Woodward, and the plaintiff insists that according to the evidence there was no such agreement with Mr. Gilchrist, and there was no embodying of it in the contract, and therefore there must not have been any such agreement at all. I am stating that so you will get clearly in your mind that the controversy in this case hinges largely, if not entirely, upon the question as to whether there was any such agreement as to this log road freight, and what I am doing now is stating to you the arguments and contentions of the parties, and it is for you to consider these contentions and say whether the defendant is indebted in the sum of \$145 and some cents, or only in the sum of \$18 and some cents. You may take the case.

Judge Rountree: Your honor, call their attention to the fact that we contend the signing of the note was evidence of the fact that there was no such agreement.

Court: When I said note I meant signing of the contract and note also.

(Jury returns for further information.)

Court: I understand that you wish some information, and I want to make the inquiry; is it some one of the jury who wants it, or is it the whole jury?

Juror: The entire jury. We differ on your charge as to the authority of the statement that Mr. Woodward made to the defendant. Some claim you said, if he made that statement, that the company was liable for that statement, and some think you didn't make that statement.

Court: I charged you they would be liable if Mr. Woodward made the agreement with him.

Juror: Regardless of the written contract previously made?

Court: I said they could take the written contract and note in consideration in saying whether Woodward made the agreement or not; they claiming he didn't make any such agreement. The defendant says he did make such an agreement, and you will take all the circumstances in consideration in saying whether he did make such an agreement, and, if he did, then I charge you they would be bound by it.

Plaintiff duly excepted to the charge. Verdict for the defendant, and judgment thereon. Plaintiff appealed.

Rountree & Davis, and J. G. McCormick, all of Wilmington, for appellant.

Wright & Stevens, of Wilmington, for appellee.

WALKER, J. (after stating the facts as above). We will consider only one question. It appears that, after the agreement between Woodward and defendant was made, as alleged by the latter, and conceding, for the sake of argument, that it was made, the company notified defendant, through J. G. McCormick, that Woodward had no authority to make the agreement, and this was done before the defendant had ordered any of the goods. It was an important and material fact in the case if the jury found from the evidence that this notice was given. We said in *Wynn v. Grant*, 166 N. C. 47, 81 S. E. 953:

"The principal is held to be liable upon a contract duly made by his agent with a third person: (1) When the agent acts within the scope of his actual authority; (2) when the contract, although unauthorized, has been ratified; (3) when the agent acts within the scope of his apparent authority, unless the third person has notice that the agent is exceeding his authority; the term 'apparent authority' including the power to do whatever is usually done and necessary to be done in order to carry into effect the principal power conferred upon the agent and to transact the business or to execute the commission which has been intrusted to him." *Brimmer v. Brimmer*, 174 N. C. 435, 439, 93 S. E. 984.

Under this doctrine, even though Woodward did make the agreement with the defendant about the log road freight charges, it is contended that if, before the defendant acted thereon, he received notice of the agent's lack of authority, the agreement would have no effect upon the principal or make him liable for the unauthorized act of his agent, because up to the time of the notice that he had exceeded his authority, the defendant had done nothing, under the Woodward agreement, which would injure or prejudice him, if the authority of the agent is denied, or the agreement is held to be invalid, because of the want of authority in Woodward to make it. But we do not rest our decision on that ground, or decide that question. The judge's charge confined the jury to the single inquiry whether or not the agreement was made, and the finding upon that question was held to be determinative of the defendant's liability. In thus instructing the jury, we think the court narrowed the investigation too much.

There was another question involved, which should have been considered, and that is whether the defendant, after being notified by Mr. McCormick, if he was so notified, of Woodward's lack of authority to make the agreement and bind the company, consented that the Acme Company should forward the fertilizers under the written contract, and that the defendant would pay the log road freight. There was ample evidence of this understanding introduced by the plaintiff and supplemented by



the defendant's acts and conduct. Mr. McCormick testified that the notice of Woodward's assumption of authority, not conferred on him by the company, and of its unwillingness to pay the freight, was given to defendant, and after this was done, the defendant sent in orders for the fertilizers, and also signed the notes for the amount due for the same, without any allowance or credit for the freight charges paid by him. We do not mean that these are the admitted facts, because the evidence in regard to them was conflicting, the defendant denying the notice and explaining his signing of the notes by stating that they were to be credited with the amount of the freight charges. But this conflict of evidence required the matter to be submitted to the jury to find the facts in regard to it. If the jury should find that defendant had agreed to order under the old contract and not claim credit for the freight charges, the liability of defendant would not depend solely upon the making of the contract with Woodward. The charge therefore was erroneous in that respect, as it excluded from consideration the other important evidence in the case, bearing upon the essential inquiry whether defendant had waived, or surrendered, all rights under the Woodward agreement, if he had any, and agreed to go back to the original contract and pay the freight charges. The two propositions were so closely connected and related as to be inseparable. The fault in the instruction was in making the case turn upon one fact, and ignoring all other matter just as essential to a decision. The judge substantially charged the jury that, if the agreement with Woodward was made, the verdict should be for the defendant, and, if not made, then for the plaintiff, thereby eliminating other evidence having an important bearing upon the question of liability for the log road freight charges.

In *State v. Merrick*, 171 N. C. 795, 88 S. E. 505, Justice Hoke says:

"The authorities are at one in holding that, both in criminal and civil causes, a judge in his charge to the jury should present every substantial and essential feature of the case embraced within the issue and arising on the evidence, and this without any special prayer for instructions to that effect. Charged with the duty of seeing that impartial right is administered, it is a requirement naturally incident to the great office he holds and made imperative with us by statute law (Revisal, 535), 'He shall state in a plain and correct manner the evidence in the case and explain the law arising thereon,' and a failure to do so, when properly presented, shall be held for error. When a judge has done this, charged generally on the essential features of the case, if a litigant desires that some subordinate feature of the cause or some particular phase of the testimony shall be more fully explained, he should call the attention of the court to it by prayers for

instructions or other proper procedure; but, as stated, on the substantive features of the case arising on the evidence, the judge is required to give correct charge concerning it" (citing *Simmons v. Davenport*, 140 N. C. 407, 53 S. E. 225, *State v. Foster*, 130 N. C. 666, 41 S. E. 284, 89 Am. St. Rep. 376, and other authorities).

It was held in *Simmons v. Davenport*, supra:

"The rule which requires that the complaining party should ask for specific instructions if he desires a case to be presented to the jury by the court in any particular view does not, of course, dispense with the requirement of the statute that the judge shall state in a plain and correct manner the material portions of the evidence given in the case and explain the law arising thereon. Revisal, § 535."

To the same effect are *Carleton v. State*, 43 Neb. 373, 61 N. W. 699, and *State v. Barham*, 82 Mo. 67, cited and quoted from in the *Merrick Case*. It was therefore the duty of the court to have broadened the charge so as to embrace the material portions of the evidence, with proper explanation of the law arising thereon. This was not done, and constituted error which entitles the plaintiff to another jury.

New trial.

(179 N. C. 695)

# COWAN v. COWAN. (No. 307.)

(Supreme Court of North Carolina. March 31, 1920.)

## 1. PRINCIPAL AND AGENT ~~§~~189(4) — EVIDENCE OF FRAUDULENT ACTS BY DEFENDANT'S AGENT WERE ADMISSIBLE.

In an action to set aside deeds from plaintiff to defendant on the ground of fraud, evidence as to conduct of M. objected to on the ground that the defendant, and not M., was alleged to have committed the fraud, was competent since M. was acting for defendant.

## 2. PLEADING ~~§~~398 — DEFENDANT HELD NOT SURPRISED BY VARIANCE FROM COMPLAINT OF TESTIMONY OF HIS OWN WITNESS.

In an action to set aside deeds from plaintiff to defendant on the alleged ground of defendant's fraud, that defendant was not taken by surprise by evidence that his own agent committed the fraud is shown by the fact that he introduced the agent as his own witness.

## 3. TRIAL ~~§~~139(1) — NONSUIT PROPERLY OVERRULED WHERE COMPLAINT IS SUPPORTED BY EVIDENCE.

Where there was ample evidence to support the allegations of the complaint, a motion for judgment of nonsuit was properly denied.

Appeal from Superior Court, Bladen County; Calver, Judge.

Action by Jane Cowan against Georgina Cowan. Judgment for plaintiff, and defendant excepted and appeals. No error.

This is an action to set aside certain deeds executed by the plaintiff to the defendant, her daughter-in-law, on the ground of fraud. There was a verdict and judgment for the plaintiff, and the defendant excepted and appealed.

Lyon & Lyon, of Whiteville, for appellant.

J. Bayard Clark, of Elizabeth, for appellee.

**PER CURIAM.** We have carefully examined the record and find no error.

[1, 2] The evidence as to the conduct of Mathis which was objected to upon the ground that the complaint alleged that the defendant, and not Mathis, had committed the fraud, was competent, as Mathis was acting for the defendant, and that the defendant was not taken by surprise is shown by the fact that he was introduced as a witness for the defendant.

[3] There was ample evidence to support the allegations of the complaint, and the motion for judgment of nonsuit was properly denied.

No error.

(179 N. C. 380)

**CITY OF RALEIGH v. CAROLINA POWER & LIGHT CO.** (No. 258.)

(Supreme Court of North Carolina. March 31, 1920.)

**STREET RAILROADS** §57(4) — **CITY'S COMPLAINT FOR PROPORTIONATE SHARE OF COST OF BRIDGE HELD INSUFFICIENT.**

A complaint by a city against a street railroad company to recover a proportionate part of the cost of a bridge alleged to have been built by another railroad company without alleging that plaintiff city had paid anything for erection of said bridge *held* not to state a cause of action.

Appeal from Superior Court, Wake County; Guion, Judge.

Action by the City of Raleigh against the Carolina Power & Light Company. From a judgment dismissing the action upon the pleadings, plaintiff appeals. Affirmed.

The following is a copy of the complaint:

"The plaintiff, complaining of the defendant, alleges:

"(1) That the plaintiff is a duly incorporated municipal corporation of the state of North Carolina.

"(2) That the defendant is a corporation organized and existing and by virtue of the laws of the state of North Carolina with its principal place of business in the city of Raleigh, N. C.

"(3) That at the time hereinafter alleged the defendant was engaged in the operation of a street railway in the city of Raleigh under a charter granted by said city.

"(4) That at the time hereinafter alleged the Seaboard Air Line Railway was a corporation duly incorporated under the laws of Virginia, North Carolina, and other states, and was engaged in the operation of a line of railroad extending through the city of Raleigh.

"(5) That in the construction of the Raleigh & Gaston Railroad Company, predecessor of the Seaboard Air Line Railway, it became necessary to construct a bridge at the point where Hillsboro street in the city of Raleigh crossed the track of said Raleigh & Gaston Railroad Company, and said bridge was constructed of wood and was in existence at the time of the passage of the ordinance by the city of Raleigh hereinafter referred to.

"(6) That the board of aldermen of the city of Raleigh on the — day of July, 1912, enacted an ordinance requiring the Seaboard Air Line Railway to replace said wooden bridge with a steel or reinforced concrete bridge of design and plan to be approved by the board of aldermen of the city of Raleigh, and as a part of said ordinance the said board of aldermen enacted the following sections:

"Sec. 14. That where in the city of Raleigh any bridge or bridges crossing any street at, above or below street level, other than those bridges owned, built, and maintained wholly by the city of Raleigh, are built, replaced, repaired, remodeled or renewed, and any company operating street cars or other modes of transportation by which cars are operated on fixed or stationary track or tracks laid in the streets of the city of Raleigh, and such track or tracks shall cross such bridge or bridges, then the person, firm or corporation operating said street track shall join with the other parties building, replacing, repairing, remodeling, or maintaining such bridge or bridges, and shall pay its or their proportionate share of the cost of building, constructing, renewing, remodeling, repairing or maintaining such bridge or bridges.

"(a) That if any person, firm or corporation operating street cars or other mode of transportation over fixed or laid track or tracks on the streets of Raleigh, whose said tracks shall cross any such bridge or bridges, shall refuse or for fifteen days fail to join with the other parties in building, constructing, renewing, repairing, or maintaining any such bridge or bridges, or to pay their proportionate cost of the same after having been requested in writing to join therein, then the person, firm or corporation so failing or refusing to do shall be subject to a penalty of fifty dollars for every day or part thereof for which they refuse or fail to join in the building, constructing, repairing, renewing, remodeling, or maintaining such bridge or bridges, and every day's failure or refusal to so join in the building, repairing, remodeling, or maintaining such bridge or bridges, shall be and constitute a separate and distinct offense."

"(7) That, as required by said ordinance, the Seaboard Air Line Railway replaced the said wooden bridge with a bridge of reinforced concrete of a design and according to plans approved by the board of aldermen of the city of Raleigh, and the construction of said bridge was done in such manner and under the approval of the street commissioner of the city of Raleigh.

"(8) Prior to the commencement of the con-

struction of said bridge the Carolina Power & Light Company, a corporation engaged in operating street cars on a stationary track across and upon said bridge, was requested to join in building the reinforced concrete bridge by which the wooden bridge was to be replaced, as required by the said ordinance of the city of Raleigh, and the said Carolina Power & Light Company refused and for 15 days failed to join with the Seaboard Air Line Railway in constructing said reinforced concrete bridge, and the said company refused to pay its proportionate part of the cost of same after having been requested in writing to join therein.

"(9) That the construction of the reinforced concrete bridge to replace the wooden bridge was completed at a total cost of \$12,496.21.

"(10) That a bridge of the character required by the traffic on Hillsboro street, other than the cars of the Carolina Power & Light Company, could have been constructed for the sum of \$8,803.44.

"(11) That the Carolina Power & Light Company's proportionate part of the cost of said bridge is \$3,692.77, which is a sum equivalent to the difference in the cost of the bridge if it had been built of sufficient strength and size for ordinary traffic crossing said bridge and the cost of the bridge when constructed of sufficient size and strength for use by the Carolina Power & Light Company in operating its cars across the same in safety.

"(12) That prior to the commencement of this action the Carolina Power & Light Company was called upon to make payment of the said sum of \$3,692.77, and has failed and refused to do so.

"Wherefore plaintiff demands judgment that it recover of the defendant, Carolina Power & Light Company, the sum of \$3,692.77, with interest thereon from the 29th day of January, 1914, until paid, and the costs of this action to be taxed by the clerk.

"John W. Hinsdale, Jr.,

"Attorney for Plaintiff."

John W. Hinsdale, Jr., and Murray Allen, both of Raleigh, for appellant.

James H. Pou and W. L. Currie, both of Raleigh, for appellee.

**BROWN, J.** We agree with the counsel for the defendant that the complaint states no cause of action in behalf of the plaintiff against the defendant. The Seaboard Air Line Railway is no party to this action, and seeks no judgment against the defendant, and what rights it may have against the defendant is not for us to determine in this action.

It appears from the complaint that the Seaboard Air Line Railway replaced the wooden bridge over its tracks as they crossed Hillsboro street with a bridge of reinforced concrete, approved by the defendant's authorities. It further appears that the construction of the said bridge cost the Seaboard Air Line Railway \$12,496.21. The plaintiff demands judgment against the defendant for the sum of \$3,692.77, which it is alleged is the proportionate part of the cost of said

bridge which the defendant should pay. There is no allegation in the complaint that the plaintiff, the city of Raleigh, paid one penny for the erection of the said concrete bridge. Upon what theory the plaintiff can recover when it has paid out nothing we are unable to see. The entire complaint discloses clearly that the purpose of the action is to recover money of the defendant which was paid out by the Seaboard Air Line Railway Company.

We think the complaint fails to state a cause of action in behalf of the plaintiff, and that the action was properly dismissed.

Affirmed.

(179 N. C. 693)

CAROTHERS v. JAMES STEWART & CO.,  
Inc. (No. 305.)

(Supreme Court of North Carolina. March 31, 1920.)

1. EVIDENCE  $\S$  443(2)—RULE AGAINST CONTRADICTION WRITTEN CONTRACT INAPPLICABLE TO CONTRACTS BETWEEN DIFFERENT PARTIES.

Showing that, as an inducement and condition precedent to plaintiff contracting in writing with the government to work for it in France at 70 cents an hour, defendant, for whom plaintiff was working as foreman, and who was to be a contractor of the government for work in France, agreed that he should receive 87½ cents an hour, does not violate rule against contradiction of written contract by parol.

2. CONTRACTS  $\S$  245(2)—RULE OF MERGER NOT APPLICABLE TO CONTRACTS BETWEEN DIFFERENT PARTIES.

Rule of merger of parol contract in written contract is not applicable where as a condition to plaintiff's entering into written contract with the government to work for it at 70 cents an hour defendant orally contracted with plaintiff that he should receive 87½ cents an hour.

Appeal from Superior Court, Cumberland County; Calvert, Judge.

Action by W. A. Carothers against James Stewart & Co., Incorporated. Judgment for plaintiff, and defendant appeals. Affirmed.

Rose & Rose and Nimocks & Nimocks, all of Fayetteville, for appellant.

Sinclair & Dye, of Fayetteville, for appellee.

**PER CURIAM.** The plaintiff was an employé of defendant as a carpenter foreman receiving 87½ cents an hour. The defendant became a contractor of the United States government to do construction work in France. The government was to furnish all tools, equipment, etc. The necessary labor and superintendent was to be secured by the defendant. The defendant through its super-

intendent, E. N. Pratt, induced plaintiff to go to France. He signed the contract to work for the government at 70 cents per hour. This contract is also signed by defendant as agent of and on behalf of the government. Plaintiff alleges that, while in employment of defendant, and before signing the contract to work for the government at 70 cents, he had an agreement with Pratt for defendant that, if he would go to France and sign the contract with the government, he should receive at least 87½ cents an hour. Plaintiff sues to recover the difference between 70 cents per hour and 87½ cents per hour, admitted to be \$553.46. At conclusion of evidence the defendant moved to nonsuit the plaintiff.

We think there is abundant evidence to establish the agreement to pay 87½ cents an hour. The plaintiff testifies to it, and also that in his formal application for employment he inserted in it a condition that he was to receive 87½ cents an hour and gave it to Pratt for defendant.

There is evidence that defendant knew of Pratt's contract and never repudiated it. This is shown by Pratt's letter to defendant of June 22, 1918, in which Pratt informs them of his agreement with plaintiff. This letter is a strong testimonial to the efficiency of the plaintiff. We think there is abundant evidence of the agreement to pay the 87½ cents to plaintiff if he would sign up with the government at instance of defendant and go to France, and that defendant knew of the agreement and ratified it.

[1] It is contended that the agreement to pay 87½ cents is a violation of the rule which prohibits the contradiction of a written contract by parol evidence. We do not think the rule applies here.

The contract in writing was made with the government, and in it plaintiff agreed to accept 70 cents per hour from the government. The contract for the 87½ cents per hour was in parol and a separate and distinct contract entered into by plaintiff with defendant before the contract with the government was signed.

The consideration for the parol, the first contract, was that, if plaintiff would enlist with defendant for the government as a workman, the defendant would see to it he received at least 87½ cents per hour. This was a separate and distinct contract and preceded the one in writing with the government. It constituted a condition precedent to the plaintiff's entering into and executing the written contract with the government, and is separate and distinct from it. Under the authorities there is no contradiction, and parol evidence was competent to prove such condition precedent. Elliott on Contracts, §§ 1629-1650; Typewriter Co. v. Hardware Co., 143 N. C. 97, 55 S. E. 417; Taylor, Evi-

dence, § 1038; Basnight v. Jobbing Co., 143 N. C. 357, 62 S. E. 420.

[2] Nor do we think the parol contract to pay 87½ cents is merged into the written contract to pay only 70 cents, for the very good reason that the latter was made with the government. The parol contract was made with the defendant and guaranteed to plaintiff wages while in France of not less than 87½ cents per hour.

We think the rulings of the court upon the questions of evidence were correct, and that the charge presented the matter to the jury fairly and fully.

We find no error.

(179 N. C. 411)

SOUTHERN EXPRESS CO. et al. v.  
PRITCHETT. (No. 353.)

(Supreme Court of North Carolina. April 7, 1920.)

TRUSTS §101—LEASE OBTAINED BY AGENT OF PREMISES OCCUPIED BY PRINCIPAL HELD IN TRUST FOR PRINCIPAL.

It was a breach of good faith for an agent, while occupying premises of the principal, during its tenancy, without its knowledge, and without the knowledge of the owners, to secure a lease in his own name; the owners thinking that they were renewing the lease of the principal, and he is a mere trustee for the benefit of the principal.

Appeal from Superior Court, Forsyth County; McElroy, Judge.

Action by the Southern Express Company and others against J. B. Pritchett. Judgment for plaintiffs, and defendant appeals. No error.

J. E. Alexander and D. C. Kirby, both of Winston-Salem, for appellant.

Swink, Korner & Hutchins, and Manly, Hendren & Womble, all of Winston-Salem, for appellees.

CLARK, C. J. The Southern Express Co. was occupying an office in Winston under a lease for five years from April 1, 1911. Soon after the expiration of the five-year term, the defendant, who was managing agent of the express company at that point, had a conversation with one of the owners of the property about renewing the lease, who said it made no special difference, that the matter could run on, and whenever the express company wanted a lease it could get it. On February 28, 1917, the defendant was notified by the express company that it desired to renew the lease for another year, from April 1, 1917, and he was instructed to see the owners as to this. The defendant saw the owners, and reported to the express

company that the owners were willing that the express company should continue renting the premises as theretofore, but the rent would probably be increased to \$75 per month. On November 26, 1917, the defendant, while still managing agent of the express company at Winston, decided to leave their service, and on December 1st took a lease in his own name for one year from December 1, 1917, with the privilege of four years more at the same rental for the premises then occupied by the express company.

It appears from the testimony of Mr. C. E. Bennett, one of the owners, that he thought the defendant was acting for the express company, and that the lease he agreed to was in the name of the express company, and that he would not have leased it to the defendant if he had known that he was trying to lease the premises for himself. Two other witnesses testified that the defendant told them in conversation that Bennett, the owner, was not aware that the defendant was leasing the property for himself, and one of them said the defendant further stated:

"If Mr. Bennett had been aware that he [the defendant] was trying to lease it for himself, he would not have gotten it."

The defendant, being recalled, admitted the above conversation, except the last statement.

The court properly charged the jury on the first issue that, if they believed the evidence, the defendant on November 26, 1917, at the time he took a lease of the premises for himself, was managing agent of the express company at Winston, and as such agent acquired knowledge with respect to the occupancy of the premises by means of which he secured the lease to himself.

The court further correctly charged the jury, as to the second issue, that the Southern Express Company on November 26, 1917, was occupying the premises in question as a tenant by the year, beginning April 1, 1917 (*Murrill v. Palmer*, 164 N. C. 50, 80 S. E. 55), and directed the jury to answer that issue "Yes."

The court also correctly charged the jury upon the third issue that if they believed the evidence it was the purpose of the express company not to vacate the premises in question until they had completed arrangements to obtain other quarters, and they had not done so when the defendant leased these premises.

The fourth and last issue, and which is really the only controverted question, was:

"Does the defendant hold the said lease in trust for the plaintiff express company, as alleged in the complaint?"

The court upon this issue charged the jury:

"The court is of the opinion, gentlemen of the jury, and so charges you, that if the defendant,

while acting as agent of the plaintiff express company at this place, and while actually occupying this building, either for a term of one year, or from month to month, and with knowledge of these facts, went to the Messrs. Bennett (the owners) and secured a lease from them in his own name and for his own benefit, then under those circumstances and conditions he would, at the option of the plaintiff express company, hold the lease as trustee for its benefit."

The jury found this issue "Yes." There is ample evidence to justify this finding of fact, and the instruction as to the law was correct.

This case presents really only one issue of fact, and there is very little controversy as to that. As a matter of law, it is clear that the charge of the court upon the fourth issue was correct. It was a breach of good faith for the defendant, as the jury found, while occupying the premises as agent for the express company, and during their tenancy, without their knowledge, and without the knowledge of the owners, to secure a lease in his own name, the owners thinking that they were renewing the lease to the express company. Such conduct cannot be sustained in a court of law.

There were other exceptions, but none of them require any discussion.

No error.

(179 N. C. 389)

**FARRELL v. UNIVERSAL GARAGE CO.**  
(No. 297.)

(Supreme Court of North Carolina. March 31, 1920.)

**1. LIVERY STABLE AND GARAGE KEEPERS —7**  
**—GARAGE KEEPER'S NEGLIGENCE HELD FOR JURY.**

In automobile owner's action against garage proprietor for damage to automobile taken from garage during nighttime, question of whether garage proprietor had been negligent by leaving automobile unprotected with the doors open and no one in charge *held*, under the evidence, for the jury.

**2. LIVERY STABLE AND GARAGE KEEPERS —7**  
**—EVIDENCE OF ERECTION OF GATES IN GARAGE AFTER TAKING OF AUTOMOBILE REVERSIBLE ERROR.**

In automobile owner's action against garage keepers for damage to car taken from garage during the nighttime, involving question of whether garage keeper had been negligent in having no inner gate in the garage at the time the automobile was taken, the admission of evidence that garage keeper had erected inner gates subsequent to the taking of the automobile *held* reversible error.

**3. LIVERY STABLE AND GARAGE KEEPERS —7**  
**—DAMAGES FOR INJURY TO AUTOMOBILE IS DIFFERENCE BETWEEN VALUE BEFORE AND AFTER ITS INJURY.**

In automobile owner's action against garage keeper for injury to automobile taken from

garage without owner's consent, the measure of damages is the difference between the value of the automobile before and after its injury, and in estimating this difference it is proper for the jury to consider the cost and expenses of repairs.

Appeal from Superior Court, Cumberland County; Calvert, Judge.

Action by C. H. Farrell against the Universal Garage Company. Judgment for plaintiff, and defendant appeals. New trial.

This is an action to recover damages for injury to an automobile.

It was admitted that the plaintiff was the owner of the automobile, and that he had left it at the garage of the defendant to be taken care of for hire.

The plaintiff introduced evidence tending to prove that the automobile was taken from the garage at night without his consent by one Lee, who was in the employment of the defendant, and that it was damaged; that at the time it was taken from the garage there were automobiles in the garage, including his own, of the value of about \$50,000; that the doors of the garage were open; and that there was no one present to protect them.

The defendant introduced evidence tending to prove that while Lee was in the employment of the defendant his working hours were over at 6 o'clock, and that the automobile was taken from the garage between 11 and 12 o'clock; that David McLaurin was in charge of the garage on the night the automobile was taken; that about 11 o'clock Lee came to the garage and asked permission to use the automobile of the plaintiff, and that McLaurin told him he could not use it unless the plaintiff gave his permission to do so over the phone or by written order; that Lee then left, and about three-quarters of an hour thereafter McLaurin left the front of the garage temporarily for the purpose of going to the second story of the garage to close some windows, and that while thus temporarily absent he heard a noise indicating that some one was starting an automobile; that he ran down as quickly as he could and found Lee leaving with the automobile of the plaintiff; and that he remonstrated with him, but could not stop him.

On the cross-examination of this witness it was shown by the plaintiff that there was no inner gate at the garage at the time the automobile was taken therefrom. This witness was thereafter recalled by the plaintiff for further cross-examination as follows:

"Q. Have you got an inner gate there in that garage now? A. Yes, sir.

"Q. And it was put there since this happened? A. About four months after this happened.

"Q. But it was put there since this happened? A. Yes, sir.

"Q. And you keep it locked all the time after dark? A. No, sir.

"Q. Except when cars are out? A. No, sir.  
"Q. You lock it at night? A. Yes, sir; when I go home."

In apt time the defendant objected to each and every one of the questions asked this witness and the replies made by the witness thereto. Objection overruled, and defendant excepted.

At the conclusion of the evidence there was a motion for judgment of nonsuit, which was refused and the defendant excepted.

There was a verdict and judgment for the plaintiff, and the defendant appealed.

Sinclair & Dye, of Fayetteville, for appellant.

John H. Cook and Cook & Cook, all of Fayetteville, for appellee.

ALLEN, J. There would be much force in the defendant's motion for judgment of nonsuit if the plaintiff was seeking to recover damages on account of the negligence of Lee because he took the automobile after his working hours were over, and there is good reason for urging that at that time he was not in the employment of the defendant; but this is not the ground of the plaintiff's action.

[1] He is demanding damages, not for the negligence of Lee, but for the negligence of the defendant itself in leaving the automobile unprotected, with the doors open and no one in charge, so that any one passing could take it, and that his automobile was taken and damaged by reason of the failure of the defendant to exercise ordinary care, and on this phase of the case we are of opinion there is evidence for the consideration of the jury.

[2] There is, however, an exception which entitles the defendant to a new trial, and that is to the admission of evidence that since the injury complained of the defendant has made changes in the premises by erecting inner gates at the garage.

A leading case on this subject is *Railroad v. Hawthorne*, 144 U. S. 202, 12 Sup. Ct. 591, 36 L. Ed. 405, in which the court said:

"Upon this question there has been some difference of opinion in the courts of the several states. But it is now settled, upon much consideration, by the decisions of the highest courts of most of the states in which the question has arisen, that the evidence is incompetent, because the taking of such precautions against the future is not to be construed as an admission of responsibility for the past, has no legitimate tendency to prove that the defendant had been negligent before the accident happened, and is calculated to distract the minds of the jury from the real issue, and to create a prejudice against the defendant."

"The true rule and the reasons for it were well expressed in *Morse v. Railway Co.*, above cited, in which Mr. Justice Mitchell, delivering the unanimous opinion of the Supreme Court

(102 S.E.)

of Minnesota, after referring to earlier opinions of the same court the other way, said: 'But on mature reflection we have concluded that evidence of this kind ought not to be admitted under any circumstances, and that the rule heretofore adopted by this court is on principle wrong, not for the reason given by some courts, that the acts of the employés in making such repairs are not admissible against their principals, but upon the broader ground that such acts afford no legitimate basis for construing such an act as an admission of previous neglect of duty. A person may have exercised all the care which the law required, and yet, in the light of his new experience, after an unexpected accident has occurred, and as a measure of extreme caution, he may adopt additional safeguards. The more careful a person is, the more regard he has for the lives of others, the more likely he would be to do so, and it would be unjust that he could not do so without being liable to have such acts construed as an admission of prior negligence.' 30 Minn. 465, 468 [16 N. W. 358, 359].

"The same rule appears to be well settled in England. In a case in which it was affirmed by the court of exchequer Baron Bramwell said: 'People do not furnish evidence against themselves simply by adopting a new plan in order to prevent the recurrence of an accident. I think that a proposition to the contrary would be barbarous. It would be, as I have often had occasion to tell juries, to hold that, because the world gets wiser as it gets older, therefore it was foolish before.' *Hart v. Railway*, 21 Law T. (N. S.) 261, 263."

This authority is cited and the excerpts quoted approved in *McMillan v. Railroad*, 172 N. C. 855, 90 S. E. 683, and the same doctrine is declared in *Lowe v. Elliott*, 109 N. C. 582, 14 S. E. 51, *Myers v. Lumber Co.*, 129 N. C. 252, 39 S. E. 960, *Aiken v. Manufacturing Co.*, 146 N. C. 328, 59 S. E. 696, and in other cases.

It is true there are exceptions to the rule, illustrated by *Blevins v. Cotton Mills*, 150 N. C. 493, 64 S. E. 428, *Tise v. Thomasville*, 151 N. C. 281, 65 S. E. 1007, *Boggs v. Mining Co.*, 162 N. C. 394, 78 S. E. 274, and *Pearson v. Clay County*, 162 N. C. 224, 78 S. E. 73, where such evidence is admitted to show that the plaintiff's injury was brought about in the way claimed by him, or on the question as to whose duty it was to make repairs, when this was in controversy, or to show conditions existent at the time of the injury, or in contradiction of a witness, but the evidence admitted here is not within any of the exceptions.

The defendant introduced *McLaurin*, its manager, who testified on cross-examination that there was no inner gate when the automobile was taken from the garage, and he was afterwards recalled by the plaintiff for further cross-examination, and it was then

that he was permitted to testify over the objection of the defendant that inner gates were erected at the garage about four months after the injury complained of.

This latter evidence did not tend to show that the plaintiff was injured in the way he claimed or conditions existing at the time of the injury, because the witness had already testified that there were no inner gates at the garage at the time of the injury, nor was the question as to whose duty it was to make repairs raised, and it had no tendency to contradict any statement made by any witness for the plaintiff or the defendant.

The evidence was important because it enabled the plaintiff to urge before the jury that the defendant by erecting the inner gates had in effect admitted that the precautions of the defendant at the time the automobile was taken were insufficient, and that they had negligently failed to erect a barrier which would have prevented the taking of the automobile.

There is also an exception in the record to that part of the charge on the issue of damages in which his honor instructed the jury that the measure of damages was the expense necessary to put the automobile in the same condition as near as possible as it was before it was injured.

[3] The correct and safe rule is the difference between the value of the machine before and after its injury, and in estimating this difference it is proper for the jury to consider the cost and expenses of repairs, and in some instances this may be the damage which a party may be entitled to recover, but in this case the cost of repairs might be more or less, and it is better to adhere to the well-settled rule.

For the error pointed out there must be a new trial.

New trial.

(179 N. C. 349)

SNIPES v. WOOD. (No. 266.)

(Supreme Court of North Carolina. March 24, 1920.)

# 1. TRIAL §141—ON ADMITTED FACTS, LIABILITY IS QUESTION OF LAW.

In an action for the statutory penalty for unlawfully issuing a marriage license, where the plaintiff admitted the facts to be as testified by defendant and his witness, the question whether defendant made due inquiry before issuing the license is one of law.

## 2. MARRIAGE §25(4)—REGISTER MUST HAVE RELIABLE INFORMATION AS TO QUALIFICATIONS BEFORE ISSUING LICENSE.

Where the parties applying for a marriage license are not known to the register of deeds, he must make due inquiry as to their qualifications from some one known to him to be a credible person; it not being sufficient that he take

the sworn statement of the parties or their friends not known to him.

**8. MARRIAGE — 25(6)—EVIDENCE HELD NOT TO SHOW DUE INQUIRY BEFORE LICENSE ISSUED.**

In an action for the penalty for issuing a marriage license to plaintiff's 14 year old daughter, evidence that the register inquired as to the girl's age of the girl, the prospective bridegroom, and the taxi driver, all of whom were unknown to the register, held insufficient to show due inquiry, so that the register was liable.

Brown, J., dissenting.

Appeal from Superior Court, Wake County: Gulon, Judge.

Action by Nat G. Snipes against Arch J. Wood. Judgment for defendant, and plaintiff appeals. Reversed, with directions to enter judgment for plaintiff.

This case, as stated in the record, is as follows, it being necessary to set out the evidence, as there was a directed verdict:

The plaintiff brought this suit to recover the penalty of \$200 for the unlawful issuing of a marriage license, resulting in a marriage between plaintiff's 13 year old daughter and one Lewis Zapantas, a Greek. Plaintiff further contended that the said marriage license was issued without his written consent, and that the defendant did not make reasonable inquiry as to whether there was legal impediment to said marriage.

The defendant contended that he did make reasonable inquiry, and that he did all that the law contemplated.

Nat Snipes, witness for himself, testified:

I have lived in Durham, N. C., all my life. Leora Snipes is my daughter. She was 14 years old June 18, 1918, and was born in 1904, June 18th. She is now married to Lewis Zapantas, a Greek. She married against my consent. I saw Arch J. Wood soon after the marriage, and he said he issued the license on Zapantas' statement; that he did not know him at the time he issued the license. Leora Snipes' age was in the Bible. The Bible from which I took her age has been destroyed. She wore short dresses and did not weigh over 90 or 100 pounds.

Cross-examined:

My wife does not live with me. She left and went to Baltimore. I never gave my daughter a certificate to work in the factory. She worked in the factory, and I got \$10 of her wages on one occasion and give it to my wife. The factory would not pay her. I was in Virginia working at the camps and didn't know anything about my daughter working until I returned home.

Plaintiff offered record of judgment in case of State v. Zapantas as being some evidence tending to corroborate plaintiff. Defendant objects. Objection sustained, and plaintiff excepts. The record shows that Lewis Zapantas entered a plea of nolo contendere being

charged with marrying Leora Snipes, a female, under the age of 14; plea accepted by state.

Arch J. Wood, witness for himself, testified:

In May, 1918, I was register of deeds for Wake county. I served four years, and prior to that time had served as deputy under Mr. Charles Anderson. When I was register of deeds, Mr. W. H. Penny was my deputy, and he is now serving as register of deeds of Wake county. On May 23, 1918, I issued marriage license to Lewis Zapantas and Leora Snipes. On the morning of May 24, 1918, I remember it, one J. W. Hunter of Chapell Hill, a man who had previously been in the register of deeds office, came in with the young Greek and a young lady. The young lady seemed to be well developed and full grown and applied for marriage license, and Mr. Hunter stated that he knew both parties and that they were from Norfolk, and he simply brought them there for the purpose of introducing them. He ran an automobile for hire. He had previously been in my office, and I knew his face, and he told me he was there a week or two ago with other parties to get license, and I inquired of Mr. Hunter if he knew both parties, and he stated that he knew they were of legal age, and he said he believed them both to be more than 18 years of age. I questioned the Greek very closely and asked him how long he had been knowing the young lady, and if he knew her to be 18 years old, and he stated that from his best information he believed her to be 18 years old, and he also stated that the young lady's parents knew that both he and she were engaged to be married, and that it was agreeable to all. He stated that the young lady's parents both lived in Norfolk. I also questioned the young lady separately and apart from the other two parties. I did not try to keep the other parties from hearing me. She was sitting to one side, and I asked her the date of her birth, and she stated that she was 18 years old in June, 1917, and I made a record on the marriage license to that effect at that time. I also asked her if her parents knew that she was going to get married, and she said that they did, and that it was agreeable. She stated that her parents lived in Virginia. She then stated that the laws of Virginia required her to be 21 years of age, and the laws of North Carolina only required her to be 18, and that it was the reason that she was getting married here.

The Greek stated that the reason he was getting married here was because he was going to work in a restaurant in Raleigh. He also stated that it was perfectly agreeable to both parties. I made all the inquiries I knew how to make, both from the parties who introduced themselves, and also from J. W. Hunter, who witnessed the marriage. I married them and was at that time a justice of the peace. I had known Mr. Hunter something like three or four weeks. I had seen him on the streets several times, and he had been in my office once something like three or four weeks before that time. I thought Mr. Hunter was a reliable man. No statement he had ever made to me had proven to be untrue.

The paper which you hand me is the license



(102 S.E.)

I issued at that time, and is witnessed by W. J. Hunter, W. H. Penny, and C. T. Bailey, who were in the office at that time. I properly swore the Greek, and, as far as I knew, there was no legal impediment to the marriage at that time. Leora Snipes said that she was 18 years of age in June, 1917, and I made a record of that on the stub, and this is it.

#### Cross-examined:

I did not know either one of the parties that morning when they came to my office. I had no reason to doubt her age, as she seemed to be well grown and fully developed and weighed about 125 pounds. I do not know that the girl would not weigh over 90 pounds. I did not know the character of Mr. Hunter in the community in which he lives. I do not know whether Hunter has ever served time on the roads of Durham county under a sentence. I never saw any one around Raleigh or anywhere else who told me what kind of man Hunter was. The first time I ever saw him, according to my best recollection, was about three or four weeks previously to issuing the license. I know every one called him Tank. I relied upon the statement of all three, Hunter, Zapantas, and Leora Snipes. I had seen Hunter several times before he came to my office. He told me that he did not live in Raleigh, and I knew no one in Raleigh who did know him. I do not know anything about Mr. Hunter's character. I supposed he was running an automobile for hire. I had seen him with them when he was over here. I asked Hunter where he lived the day that I issued license, and he said that he lived in Chapel Hill, N. C. He also told me that he ran an automobile for hire when he was in my office before. Hunter told me that Zapantas and wife lived in Norfolk.

The marriage license was offered in evidence. At the foot of the license is the following:

Lewis Zapantas, being duly sworn, says: That the parties for license are of lawful age, i. e., both being over 18 years of age, and so far as he is informed and believes there is no lawful cause or impediment forbidding said marriage.

Lewis Zapantas.

Sworn and subscribed to before me, this May 23, 1918.

Arch J. Wood.

It is then stated that the parties were married by Mr. Wood, as justice of the peace, on May 23, 1918, at Raleigh.

W. H. Penny, witness for defendant, testified:

I am register of deeds of Wake county. I was chief deputy for Arch J. Wood, register of deeds in 1918, and had been in the office since January 1, 1902. I was present when Zapantas and Leora Snipes applied for marriage license. We question and take notice of these Virginia couples, because we have so many to come, and they cannot marry in Virginia until they are 21, and they come over here from every place in Virginia. Mr. Hunter said he knew the parties well; that he was a nice Greek and a gentleman. Mr. Wood made inquiry, and said to me, "What would you do in this case?" I said the girl looked to me to be 18 years old, and I went over and asked the young lady myself. I

said: "Miss Snipes, how old are you? Have you run away from Norfolk with this man?" She said her parents knew it and she could not marry in Virginia. I asked her when she was born, and she said in June, 1900. I said, "How old are you?" and she said 18 in June, 1917. Mr. Wood asked me what would I do, and I said: "I would write them, and would have done so some time ago." Mr. C. T. Bailey was in there in addition to six other clerks. Wood asked them their ages, and they said they lived in Norfolk and could not get married there and came down here. I saw Mr. Wood when he administered the oath. Cross-examined: Q. Why did you not swear the man who brought them down and recommended them? We swear the man who applies for license, regardless of what their ages are. We always question parties from Virginia, and we can catch them by asking them the year of birth.

#### Case for defendant.

O. L. Parham testifies as follows for plaintiff:

I know the general character of Nat Snipes, and it is good. I have not known him recently. All I have heard regarding his character is that it is good.

#### Cross-examined:

I have been deputy sheriff of Wake county for about 21 years. I knew Mr. Snipes when he lived in Wake county about 20 years ago. Since that time he has been living in Durham county.

W. H. Penny, recalled for further examination:

I made inquiry as to the girl's age, and she said she was born in June, 1900, and this would make her 18 years old. She married in May, 1918. I said 1900. She must have said 1898. We would not have written the license if she had said 1900.

At the conclusion of all the evidence, counsel for plaintiff moved the court for a verdict and judgment in favor of plaintiff, which was refused, and plaintiff excepted.

It was stated by the court that, if plaintiff would withdraw contradictory evidence as herewith set out in record, he would then direct a verdict, as a matter of law. At the close of the evidence in the cause, counsel for the plaintiff withdrew from the jury so much of the testimony of the plaintiff as relates to the statement made by the defendant as to the issuance of the license upon inquiry only of Lewis Zapantas, and further consent and agree that the testimony of the witness W. H. Penny, conflicting as to the dates between 1899 and 1900, may be corrected to the end that this testimony shall appear to be that the statement by Leora Snipes was that she was born in 1899, and that she was over the age of 18 in May, 1918, at the time of the issuance of the license, and with these corrections counsel for plaintiff submitted to the court by consent and agreement that, if upon all the testimony the court should be of the opinion, as a matter of law, the plaintiff

is entitled to recover, judgment shall be entered for the plaintiff, but that if, on the other hand, upon the whole evidence the court shall be of the opinion, as a matter of law, that the plaintiff is not entitled to recover, then judgment shall be entered in the action for the defendant.

Upon this agreement in open court, the court being of the opinion, as a matter of law, that the defendant did not issue said license knowingly and without reasonable inquiry as to the legal impediment of age to the marriage of said parties, it is adjudged that the plaintiff is not entitled to recover, to which plaintiff excepted and appealed.

J. W. Barbee, of Durham, and A. J. Templeton, of Raleigh, for appellant.

Herbert E. Norris and J. M. Broughton, both of Raleigh, for appellee.

WALKER, J. (after stating the facts as above). [1] The plaintiff admitted the facts to be as testified by the defendant and his witness W. H. Penny, and the question of due inquiry by the defendant before issuing the marriage license therefore became one of law.

[2] We are of the opinion that there was error, unless we are to overrule the many previous decisions of this court upon this subject. The cases, or a majority of them, will be found in *Gray v. Lentz*, 173 N. C. 346, 91 S. E. 1024, L. R. A. 1917E, 863, where the law is fully stated. The court said in *Williams v. Hodges*, 101 N. C. 303, 7 S. E. 788:

"The license shall not be issued as of course to any person who shall apply for it. The register is charged to be cautious and to scrutinize the application; it must appear probable to him, upon reasonable inquiry when he has not personal knowledge of the parties, that the license may and ought to be issued. The probability upon which the register should act is not such as arises from conjecture, \* \* \* but from \* \* \* inquiry of trustworthy persons known to the register who can and do give pertinent information."

And in *Trolinger v. Boroughs*, 133 N. C. 317, 45 S. E. 664:

"While we may not prescribe any rule for the guidance of the register, it would seem that 'reasonable inquiry' involves at least an inquiry made of, or information furnished by, some person known to the register to be reliable, or, if unknown, identified and approved by some reliable person known to the register. This is the rule upon which banks act in paying checks, and surely in the matter of such grave importance as issuing a marriage license the register should not be excused upon a less degree of care."

The case of *Cole v. Laws*, 104 N. C. 651, 10 S. E. 172, is equally emphatic in stating the correct principle in such instances. It is there held that—

"When a register of deeds issues a license for the marriage of a woman under 18 years of age, without the assent of her parents, upon

the application of one of whose general character for reliability he was ignorant, and who falsely stated the age of the woman, without making any further inquiry as to his sources of information, held, that he had not made such reasonable inquiry into the facts as the law required, and he incurred the penalty for the neglect of his duty in that respect."

In *Morrison v. Teague*, 143 N. C. 186, 55 S. E. 521, it was likewise held that—

"In an action against a register of deeds to recover the penalty under Revisal, § 2090, for issuing a marriage license contrary to its provisions, where the uncontradicted evidence showed that the register took the word of the prospective bridegroom and his friend, neither of whom he knew, as to the age of the young lady, and made no further inquiry of any one, the court should have given the plaintiff's prayer for instruction that as a matter of law defendant failed to make reasonable inquiry as to the age of the plaintiff's daughter."

The present Chief Justice said in *Laney v. Mackey*, 144 N. C. at page 634, 57 S. E. at page 387:

"The application was made by a man whose name was not known to the defendant, whom he does not show to have been trustworthy, and as to whom the only evidence is that his general character is bad. Such inquiry as the defendant made in this case was not reasonable. It was purely perfunctory and did not furnish the security against a violation of the law required by a proper observance of the requirements of the statute."

The court said in *Agent v. Willis*, 124 N. C. 29, 32 S. E. 822:

"The defendant seemed to think that an oath on the part of anybody was all that was necessary to authorize him to issue the license. But the character of the witness and accuracy of information are the things that the register of deeds should look to when he issues a license for marriage, in case where there is doubt about the age of the parties."

While the decisions cited so far are all clearly pertinent and furnish a strict analogy to this case the language of Justice Brown, in *Morrison v. Teague*, 143 N. C. 186, 55 S. E. 521, also clearly applies and is very persuasive and, as we deem, controlling:

"The learned counsel for the defendant, Mr. Gwaltney, most earnestly contended in his argument that, upon a fair interpretation of the words 'reasonable inquiry,' the charge of his honor should be sustained. Notwithstanding we find ourselves unable to reconcile this view with very recent decisions of this court, we agree with counsel that upon the evidence in the record the question was one of law, and that his honor was correct in so holding. The uncontradicted evidence shows that the register took the word of the prospective bridegroom and his friend as to the age of the young lady and made no further inquiry of any one; that the register did not know either Kennedy or his friend. The register's suspicion seems to have been aroused, for he inquired why they

(102 S.E.)

applied for license in Taylorsville, as the girl lived in Iredell; nevertheless, he made no further inquiry."

Justice Connor said in *Furr v. Johnson*, 140 N. C. 157, 52 S. E. 664:

"It would seem that 'reasonable inquiry' involves at least an inquiry made of, or information furnished by, some person known to the register to be reliable, or, if unknown, identified and approved by some reliable person known to the register."

The case of *Joyner v. Harris*, 157 N. C. 295, 72 S. E. 970, is in some respects much like our case. The prospective bridegroom and his friend, and brother, who gave information to the register of deeds, were both of good appearance. The register stated that he thought from their looks that they were trustworthy and would not get him in trouble. They certainly made a very good impression on him by their frankness and general demeanor. As to this case we said in *Gray v. Lentz*, supra:

"The case of *Joyner v. Harris*, 157 N. C. 295 [72 S. E. 970], while in some respects not like this one, is yet, in principle, not unlike it. It referred to the rule which, as we have said, had been settled for some time in several decisions of this court, that the register should have some reliable information before he issues the license, and not act blindly or too confidently upon the statements of mere strangers, and especially those who are directly interested and under a strong temptation to falsify, as here. We adopted and applied the familiar rule formulated in previous cases and held that sufficient inquiry had not been made. It is true that in *Joyner v. Harris*, we treated the information given as to her age as practically a statement of the girl herself; but the case is otherwise decisive of this one. It was there said: 'If we should hold that a register of deeds can satisfy himself as to the essential facts upon such an inadequate investigation as was made in this case, we would defeat the very object and purpose of the statute to throw safeguards about the young and inexperienced, who would by reason of their youthful impulses be liable to enter into so solemn and serious a relation lightly and unadvisedly and not soberly, discreetly, and reverently, as they should do and as the best interests of society require to be done.' The fact that the register administered an oath to the applicant and his friend does not, of itself, exonerate him. He is permitted by the statute to do so, that he may the better elicit the facts, and his doing so or failing to do so would be but a circumstance for the jury to consider."

[3] Now, applying these authorities, which seem to be uniform, to the facts of this case, the girl was under 14 years of age. She came to the register's office on May 24, 1918, accompanied by her lover, Lewis Zapantas, and J. W. Hunter, who was represented as their friend. Hunter had been in the office once before, about a week or two before that day, on a similar errand, to get a license for

another couple who were with him, and the register was told by him that he had been there on that occasion, and by this the register "knew his face." Hunter stated to the register that he knew both parties, Lewis Zapantas and his female companion, were of legal age, and "from his best information" he believed the girl to be 18 years old, that her parents knew of the engagement to be married and approved it, and that her parents lived in Norfolk, Va. The register also questioned the girl, and she stated in substance the same thing, and that she was 18 years old in June, 1917. Asked why she came here to be married, she replied that according to the laws of Virginia she had to be 21 years old. The Greek said he came here for the marriage because he expected to open a restaurant in Raleigh. The register testified that "he did not know either one of the parties that morning when they came to his office," but he had no reason to doubt the girl's age, as she seemed to be well grown and fully developed and weighed over 125 pounds. As to Hunter, the register said that "he did not know his character in the community in which he lived (Chapell Hill), and that no one had ever told him what kind of man Hunter was," and he further said:

"I did not know the character of Mr. Hunter in the community in which he lives. I do not know whether Hunter has ever served time on the roads of Durham county under a sentence. I never saw any one around Raleigh or anywhere else who told me what kind of man Hunter was. The first time I ever saw him, according to my best recollection, was about three or four weeks previously to issuing of license. I know every one called him Tank. I relied upon the statements of all three, Hunter, Zapantas and Leora Snipes. I had seen Hunter several times before he came to my office. He told me that he did not live in Raleigh, and I knew no one in Raleigh who did know him. I do not know anything about Mr. Hunter's character. I suppose he was running an automobile for hire."

Hunter stated that he knew the parties well and that Zapantas was a nice Greek and a gentleman. Defendant asked his deputy, W. H. Penny, what he would do, and the latter replied, "I would write them, and would have done so some time ago." The Greek was the only person who was sworn. This recital of the main facts in evidence does not present as strong a case for the defendant as some of those we have cited, where this court held that there was not due inquiry, and, if the facts herein are carefully compared with those set forth in the cases cited, this will more clearly appear. A register may expect that the evidence of the interested parties will not generally be reliable and that it is unsafe to confide in it, where the parties are unknown to him and their characters are not shown by some responsible person who does know them. How this wayward couple happened to fall in with Hunter, who lived in

Chapell Hill, many miles from Norfolk, Va., is not satisfactorily shown. They evidently had only a chance acquaintance, and we think the circumstances should have put a wary man on his guard. The character of Hunter was not known to the register. He had seen him once before in his office and casually on the streets of Raleigh three or four times; but it was only to see him. The circumstances were at least suspicious, and should have induced the defendant to have acted more guardedly. The defendant was himself doubtful, for he asked for the advice of another as to what should be done. He clearly has not brought his defense within the rule we have so often applied in such cases, and which, as stated above, is that he should not have relied upon what was said by a person whose character and responsibility was not known to him, or vouched for by some one who was known, or unless there are other circumstances from which he can form a reliable judgment as to the facts. Here, there was really nothing upon which to base a decision, except the statements of the interested parties, and that of Hunter, who manifestly got his information from them, if he had any at all, and that is really what he testified. He did not pretend to know the girl's parents, or to have ever even been with them, or where he could have acquired any knowledge of the facts, except from the parties themselves. He did not conceal his ignorance of the facts even adroitly, but very clumsily, and so acted as to arouse a keen suspicion as to the truth of his statements. It is to be noticed that Hunter never answered defendant's questions directly and fully, but evasively, and he never said where he got his information; nor did the Greek answer any more fully. We do not know where he got it unless from the girl. Will this do, under the statute? If so, it might as well be repealed, as being of no protection whatever to girls of tender years who are prone to act imprudently and unwisely in such important matters, and to decide impulsively, rather than deliberately, upon a question which so vitally concerns their future welfare and happiness, and we know what is generally the unfortunate result. It was partly to prevent this misfortune that the statute was passed. We should therefore be very careful to see that the intention of the Legislature is properly executed, and that no license is issued until after reasonable inquiry.

It appears in this record that the man was indicted for marrying this girl, who was five years under the required age, and that he pleaded *nolo contendere*, thereby virtually confessing his criminal wrong. We are not basing any part of our decision on this fact, as the evidence of it was ruled out, but merely refer to it incidentally, as showing how boldly and recklessly a man will commit two crimes to accomplish his purpose in such cases, and how essential it is that our officers, charged with the duty of issuing marriage licenses, should require some reliable evidence of the woman's age, and not trust to the statements of the parties, and some casual and accommodating outsider, whose character is not known, and who, in the generality of cases, as our records surely attest, proves to be utterly irresponsible and untrustworthy. That the defendant in this case acted honestly, and with the very best of intentions, we have not the least doubt, and, if he had followed his own first impression, he would have acted more wisely and considerately. The parties should have been required to furnish more reliable proof of the facts than they did, or go somewhere else where they were better known, as that which they did offer was, at least, suspicious, and the truth thinly veiled. We regret the result, but we are bound to enforce the law as construed by a long line of our decisions, extending back almost to the day when the statute was enacted.

This case is a striking illustration of the necessity for a strict compliance with the statute, as we have construed it. Practically everything these people told the register was false, and knowingly false, and the violation of the law by the parties resulted from not requiring at least some reliable or trustworthy information as to the facts, instead of confiding in Hunter, whose very admission and conduct showed that he was not speaking with any knowledge of them. This case is as clear as any we have cited, if not clearer than any.

We must reverse the decision of the judge if we follow our cases, and direct that judgment be entered in the court below for the plaintiff according to the agreement, and it will be so certified.

Reversed.

BROWN, J., dissenting.

(179 N. C. 330)

(102 S.E.)

SALISBURY &amp; S. RY. CO. et al. v. SOUTHERN POWER CO. (No. 386.)

(Supreme Court of North Carolina. March 17, 1920.)

**1. ELECTRICITY ⇐11—ONE PUBLIC SERVICE CORPORATION CANNOT BE MADE TO SUPPLY COMPETITOR.**

A public service corporation, as a hydroelectric company, as a general proposition, cannot be made to supply a competitor, another public service corporation of like character, with the material necessary to enable the latter to discharge its duty to the public.

**2. ELECTRICITY ⇐11—STREET RAILWAY AND RETAILER OF CURRENT HELD NOT COMPETITORS OF HYDROELECTRIC COMPANY TO DIS-ENTITLE THEM TO COMPEL SUPPLY.**

An electric street railway and a retailer of electricity engaged in supplying the citizens of municipalities with current to light their residences and for other private purposes were not competitors of a hydroelectric power company, engaged in wholesaling electricity, and so could compel the power company to supply them with current.

**3. ELECTRICITY ⇐11—HYDROELECTRIC COMPANY WHICH FURNISHED CURRENT FOR DISTRIBUTION UNDER DUTY NOT TO DISCRIMINATE.**

When a hydroelectric power company began to sell its current to smaller corporations for purposes of resale to and distribution among the public, every such retailing corporation secured equal right to be served by the company, and it must not discriminate, though it need not necessarily sell to all at the same price.

**4. ELECTRICITY ⇐11—JURISDICTION IN SUPERIOR COURT OF SUIT TO COMPEL HYDROELECTRIC COMPANY TO SUPPLY POWER RECONCILABLE WITH JURISDICTION OF COMMISSION TO FIX RATES.**

If, in mandamus proceedings, it shall be decided that corporations engaged in retailing electricity are entitled to decree compelling a hydroelectric power company to furnish current required by them, in case parties cannot agree on price, matter can be brought before Corporation Commission, and defendant power company required by superior court to furnish current at rate fixed by commission.

Walker and Allen, JJ., dissenting.

Appeal from Superior Court, Guilford County; Shaw, Judge.

On petition for rehearing. Former opinion confirmed, and petition dismissed.

For former opinion, see 101 S. E. 593.

Cansler & Cansler and W. S. O'B. Robinson, Jr., all of Charlotte, for appellant.

Linn & Linn, of Salisbury, Roberson & Dalton, and Brooks, Sapp & Kelly, of Greensboro, for appellees.

BROWN, J. This cause comes before the court again on petition to rehear, granted by

myself in order that I might have opportunity to make a more thorough examination of the questions presented on the record than I had last session.

Such examination has confirmed me in my former conclusion. The questions presented have been so fully and ably discussed by the CHIEF JUSTICE and Justice ALLEN, pro and con, that I will not undertake to add anything to the discussion. I will state my views briefly, but a little more fully than before.

The defendant filed an answer to the complaint, and afterwards, upon the hearing before Judge Shaw, moved to dismiss the action upon the ground that the complaint does not state a cause of action. The learned judge overruled this motion, and in so doing, I am still of opinion that he committed no error.

Assuming that all the facts stated in the complaint are true, in my judgment they make out a cause of action against the defendant which entitled plaintiffs to relief. These facts are well and correctly summarized in the opinion of the Chief Justice and need not be repeated. According to the allegations stated in the complaint, the defendant is a public service corporation engaged in business under the laws of this state in manufacturing electricity by water power and selling it over a large territory by wholesale. It has a monopoly of the hydroelectric power supply in a considerable portion of a populous section of this state.

[1] I candidly admit that as a general proposition one public service corporation cannot be made to supply a competitor, another public service corporation of like character, with the material necessary to enable the latter to discharge its duty to the public.

[2] But the facts alleged in the complaint, if established upon the final hearing, take this case out of that general rule. Neither the North Carolina Public Service Company, nor the Railway Company are competitors with the defendant according to my interpretation of the facts stated in the complaint. The railway company is in no sense a competitor with defendant, as it is not in the business of manufacturing electricity for sale, but uses the current it buys from the defendant solely to operate its street car service between Salisbury and Spencer. Not being a dealer in, or manufacturer of, electricity, in my opinion it cannot be considered a competitor in any sense, but so far as the defendant is concerned is a part of the general public which defendant has elected to serve, and has the right to compel defendant to furnish it with electricity as far as defendant is able to do so.

I fail to find any reason or authority to support the position that a corporation manufacturing electricity for wholesale to the public cannot be made to supply a street

car company if it is able to do so. A corporation under certain circumstances may be as much a part of the general consuming public as an individual.

According to the facts alleged, I do not think the other plaintiff, the North Carolina Public Service Corporation, is a competitor with defendant. The plaintiff is a retailer of electricity, and engaged in supplying the citizens of Salisbury and Spencer with electricity to light their residences and for other private purposes. It cannot compete with defendant, for the latter does not undertake to supply residences, and is in every sense a wholesaler of the electric current. The plaintiff supplies no territory supplied by defendant, but buys its current from the latter, and distributes it among the inhabitants of a limited territory. While this plaintiff has power under its charter to manufacture, at instance of defendant it ceased to do so 10 years ago, and the defendant has supplied the current by contract ever since. It has for all these years elected to treat plaintiff and other similar corporations as a part of the general consuming public, and to furnish them with electricity as a means of supplying the citizens of the territory that the defendant occupies. Defendant is willing to continue doing so, provided these retail companies will pay the price demanded.

[3] In my opinion the defendant had the right originally to confine its sales and contracts to those desiring electricity for direct personal consumption and thereby retain control of the number of its customers, limiting them to that number it could adequately serve. But when defendant voluntarily entered the field of supplying current to a person or corporation which does not desire it for consumption, but to sell and distribute to others for their consumption, the case is changed. It becomes subject to the provision of law that it must extend the same treatment to all persons and corporations who stand in like case. It cannot sell to one and arbitrarily refuse to sell to another. One corporation, desiring current from it for distribution purposes, *prima facie* has precisely the same right to obtain it as another. A public service corporation cannot arbitrarily refuse to supply one of a class which it has undertaken to serve. It must justify its refusal by good reasons.

If the defendant in the beginning had elected to supply only the individual consumer, I am satisfied it could not have been compelled to supply smaller corporations engaged in retailing the electric current. But when defendant commenced and continued to sell its current to such smaller corporations for purposes of resale and distribution, every such corporation has an equal right, and it must not discriminate. That does not mean it must sell them all at the same price. The circumstances surrounding each distributing

corporation, cost, etc., must be taken into consideration.

Having undertaken this public service, the defendant is bound to serve impartially all who have the right to demand its service. As it does not undertake to furnish the individual consumer, and having elected to furnish corporations that do supply the individual, it must continue to furnish such corporations so far as its business and the capacity of its plants will permit.

This is the principle recognized by this court in *Telephone Co. v. Telephone Co.*, 159 N. C. 15, 74 S. E. 638, wherein, quoting from the Indiana Supreme Court it is said:

"Such physical connection cannot be required as of right, but if such connection is voluntarily made by contract, as is here alleged to be the case, so that the public acquires an interest in its continuance, the act of the parties in making such connection is equivalent to a declaration of a purpose to waive the primary right of independence, and it imposes upon the property such a public status that it may not be disregarded."

The citizens of Salisbury, Spencer, and adjacent territory have a very vital interest in this controversy.

The defendant does not undertake to furnish them electricity except through the medium of a distributing company. If defendant cannot be compelled to so continue to furnish it then these citizens have no other resource except to pay the higher cost of coal-made current, and the defendant is practically free from state control. Therefore they have a direct public interest in imposing upon defendant the duty it voluntarily assumed 10 years ago and has been discharging ever since. Something has been said in the argument about the plaintiff charging these citizens 800 per cent. profit. Nothing of that sort appears in the complaint. They have their remedy before the Corporation Commission, and if they are foolish enough to submit to such plunder it is their own folly.

These views, I think, are supported by the authorities cited in the opinion of the Chief Justice as well as by the following cases: *Trans. Co. v. R. R. Com.*, 176 Cal. 499, 169 Pac. 59; *Morganton v. Hope Gas Co.*, March, 1919, *Public Utilities Report Ann.* 1919D. 270; *N. Y. v. McCall*, 245 U. S. 345, 38 Sup. Ct. 122, 62 L. Ed. 337; *Attica Water, Gas & Electric Co. v. Alden-Batavia Natural Gas Co.*, 3 P. S. C. (2 Dist. N. Y.) 207—almost on all fours; *Missouri v. Bell Tel. Co.* (C. C.) 23 Fed. 540, opinion by Justice Brewer; *Acker M. & Co. v. N. Y. Edison Co.*, *Pub. Utilities Rep. Ann.* 1919B, 287. This latter case is very much in point. *Perceval v. Public Service Com'n*, 163 App. Div. 705, 148 N. Y. Supp. 583; *State v. Tel. & Tel. Co.*, 85 Wash. 29, 147 Pac. 885, 151 Pac. 1122.

[4] It is earnestly contended by the learn-

ed counsel for defendant that the superior court has no jurisdiction of this action because before any judgment can be rendered herein requiring the defendant to sell power to the plaintiffs, the court would necessarily have to fix the rates and the terms and conditions of the sale, and it has no jurisdiction to do either, the Legislature having given the Corporation Commission full and exclusive jurisdiction over this subject.

If upon the final hearing, when all the issues are passed upon and the true facts found, it shall be decided that the plaintiffs are entitled to a decree compelling defendant to furnish the current required, in case the parties cannot agree upon the price, I see no reason why the matter cannot be brought before the Corporation Commission and the defendant required by the court to furnish the current at the rate fixed by the commission.

PER CURIAM. The petition to rehear is dismissed.

WALKER and ALLEN, JJ., dissenting, without further opinion than the one filed.

(179 N. C. 396)

MOORE et al. v. MILLER. (No. 302.)

(Supreme Court of North Carolina. March 31, 1920.)

1. EJECTMENT  $\S$  86(3), 108—WHERE SHOWING OF TITLE IS INSUFFICIENT, NONSUIT PROPER IN VIEW OF PRESUMPTION.

Plaintiff by showing merely a line of deeds covering a tract of 185 acres, and that defendant is in present possession of a portion of tract, asserting ownership, could not maintain ejectment, and judgment of nonsuit under Hinsdale Act was properly rendered; Revisal 1905,  $\S$  386, establishing certain presumptions as to possession and occupation in favor of direct owner, being inapplicable, and Laws 1917, c. 195, as to title being conclusively deemed to be out of the state where it is not a party, not relieving plaintiff of burden of showing title.

2. EJECTMENT  $\S$  116—ADJUDGING TITLE IN DEFENDANT PERMISSIBLE ONLY ON SUFFICIENT AFFIRMATIVE FINDINGS.

Where plaintiff showed merely a line of deeds covering tract of 185 acres and that defendant was in possession of a portion of the tract asserting title, although judgment of nonsuit under Revisal 1905,  $\S$  539, was properly granted, in so much of decree as adjudges title in defendant there is error, since that is only permissible on affirmative findings sufficient to justify it.

Appeal from Superior Court, Cumberland County; Calvert, Judge.

Action by J. W. Moore and another against William Miller. From the judgment ren-

dered, plaintiffs appeal. Modified and affirmed.

The action is to recover a tract of land, claimed by plaintiff on allegations that defendant is in the wrongful possession of a portion of said land.

Defendant alleged that he owned and was in possession of 22.6 acres of land in said county, setting forth boundaries, and denied that his occupation and possession of said lands is wrongful.

On the hearing plaintiff introduced a connected line of deeds, the first bearing date in 1895, for 185 acres of land in said county, describing same by metes and bounds, and the last, bearing date in October, 1918, purporting to convey said tract of land to plaintiffs. Plaintiff's evidence, in connection with the admissions in the pleadings, further tended to show that defendant is in possession of 22.6 acres of land, with defined boundaries, the land claimed by him in his answer, and the same lying and being with the larger boundary set forth in plaintiff's deeds.

Plaintiff having rested, defendant demurred to the evidence and moved for judgment of nonsuit under the Hinsdale Act (Revisal,  $\S$  539). The court sustained the demurrer, and entered judgment that plaintiffs are not the owners of the land described in defendant's answer, but that defendant is the owner of said land and entitled to retain possession thereof. Plaintiff excepted and appealed.

Nimocks & Nimocks, of Fayetteville, for appellants.

John H. Cook and Cook & Cook, all of Fayetteville, for appellee.

HOKE, J. [1] The authoritative cases have not infrequently expressed approval of the position that in actions of ejectment plaintiff must recover on the strength of his own title. The various methods by which this requirement can be met are specifically set forth in *Prevatt v. Harrelson*, 132 N. C. 250, 251, 43 S. E. 800, *Mobley v. Griffin*, 104 N. C. 112-115, 10 S. E. 142, and other decisions on the subject as follows:

"1. He may offer a connected chain of title, or a grant direct from the state to himself.

"2. Without exhibiting any grant from the state, he may show open, notorious, continuous, adverse, and unequivocal possession of the land in controversy, under color of title in himself and those under whom he claims, for 21 years before the action was brought. *Graham v. Houston*, 15 N. C. 232; *Christenbury v. King*, 85 N. C. 229; *Osborne v. Johnston*, 65 N. C. 22.

"3. He may show title out of the state by offering a grant to a stranger, without connecting himself with it, and then offer proof of open, notorious, continuous, adverse possession, under color of title in himself and those under whom he claims, for 7 years before the action was brought. *Blair v. Miller*, 13 N. C. 407;

*Christenbury v. King*, *supra*; *Isler v. Dewey*, 84 N. C. 345.

"4. He may show, as against the state, possession, under known and visible boundaries, for 30 years, or, as against individuals, for 20 years, before the action was brought. Sections 139 and 144, Code of North Carolina.

"5. He can prove title by estoppel, as by showing that the defendant was his tenant, or derived his title through his tenant, when the action was brought. Code, § 147; *Conwell v. Mann*, *supra* [100 N. C. 234, 6 S. E. 782]; *Melvin v. Waddell*, 75 N. C. 361.

"6. He may connect the defendant with a common source of title, and show in himself a better title from that source."

From a perusal of this statement it will appear, as held in *Graybeal v. Davis*, 95 N. C. 508, that, in order for plaintiff to establish his title, he must show a grant from the state directly to himself or connect himself with one by proper deeds, or he must show possession in the assertion of ownership, with or without color, for the requisite period, or that defendant is estopped to deny his title.

Recurring to the testimony, the plaintiff has failed to show title in any of the ways indicated in these decisions. He has not shown any grant from the state. Nor has he offered any evidence of possession in himself or those under whom he claims, nor presented any facts creating an estoppel in his favor. He has shown merely a line of deeds, beginning in 1895, covering a tract of land of 185 acres, and that defendant is in present possession of a portion of said land asserting ownership, and on authority this will not suffice. *Huneycutt v. Brooks*, 116 N. C. 788, 21 S. E. 558; *Brown v. Morisey*, 128 N. C. 139, 38 S. E. 471; *Worth v. Simmons*, 121 N. C. 357, 28 S. E. 528. We were referred by counsel to *Revisal*, § 386, establishing certain presumptions as to possession and occupation of land in favor of the true owner; but these presumptions, from the express language of the provision, will arise and exist only in favor of a claimant who has shown "a legal title." Unless and until this is made to appear the presumption is primarily in favor of the occupant, to wit, that he is in possession asserting ownership, a distinction pointed out in *Land Co. v. Floyd*, 167 N. C. 686, 687, 83 S. E. 687. Nor does the recent act of the Legislature as to "the presumption as to title being out of the state in actions affecting the title to real property" in any way affect the question presented. The statute referred to, *Laws 1917, c. 195*, provides "that in all actions involving the title to real property title shall be conclusively deemed to be out of the state

of North Carolina unless the state be a party to such action" or the trial is one of a protested entry laid for the purpose of obtaining a grant, etc.

It is well recognized that, in actions of this character, a litigant on whom rested the burden of the issue, suing for a small piece of land, with a view only of showing title out of the state, was called on to establish the location of some old grant, often of much larger boundary. Ancient of date, with the witnesses who could speak directly to the facts dead, many of the marks and monuments of boundary destroyed or obliterated, it was an effort entailing much cost and expense, and not infrequently threatening a miscarriage of justice, and this when it was fully understood that, if a *prima facie* case was established and the adversary required to offer proof, he, too, would insist on the position that title was out of the state. To remove this burdensome and untoward condition, the Legislature has enacted this most desirable statute providing that, in actions between individual litigants, title should be conclusively presumed to be out of the state. But that is the extent and limit of it. There is no presumption in favor of one party or the other, nor is a litigant seeking to recover land otherwise relieved of the burden of showing title in himself.

[2] While we approve of his honor's ruling on the principal question, there is error in so much of the decree as adjudges that the title is in the defendant. Under our decisions, that is only permissible on affirmative findings sufficient to justify it. *Cavanaugh v. Jarman*, 164 N. C. 372, 79 S. E. 673; *Wickler v. Jones*, 159 N. C. 103-116, 74 S. E. 801, 40 L. R. A. (N. S.) 69, *Ann. Cas.* 1914B, 1083.

On the facts presented, the case having been determined on motion of defendant and for entire lack of proof on the part of plaintiff, the case seems to come directly under the *Hinsdale Act* (*Revisal*, § 539), calling for "judgment, as \* \* \* of nonsuit," usually taking the form that the action be dismissed. In the heading the section referred to embodying the *Hinsdale Act* purports to regulate procedure. On a "demurrer to evidence" and in the absence of a jury verdict or a specific and formal admission of the relevant facts, authority is in support of a judgment "as \* \* \* of nonsuit." *Tussey v. Owen*, 147 N. C. 335, 61 S. E. 180; *Purnell v. Railroad*, 122 N. C. 832-836, 29 S. E. 953.

There is no error in the ruling of the lower court, and, modified as suggested, the judgment is affirmed.

Modified and affirmed.



(179 N. C. 409)

PLANTERS' BANK & TRUST CO et al. v.  
TOWN OF LUMBERTON.  
(No. 310.)

(Supreme Court of North Carolina. April 7,  
1920.)

1. CONSTITUTIONAL LAW §70(3)—EXPEDIENCY OF DETERMINATION OF SITUS OF PERSONAL PROPERTY FOR GENERAL ASSEMBLY, AND NOT FOR COURTS.

The determination of the situs of personal property for purposes of taxation is addressed to the General Assembly, which may provide different rules for different kinds of property and change them from time to time, and, when it has acted, no consideration of expediency will authorize the courts to disregard the legislative will.

2. MUNICIPAL CORPORATIONS §86(6) — BANKING STOCK TO BE TAXED IN CITY WHERE BANK IS LOCATED.

Under Laws 1919, c. 92, § 42, shares of stock in a banking corporation located in a city held by persons residing in the state, but outside of the corporate limits of the town, are subject to taxation as other personal property in the town.

Appeal from Superior Court, Robeson County; Allen, Judge.

Action by the Planters' Bank & Trust Company and others against the Town of Lumberton. Judgment for defendant, and plaintiffs appeal. Affirmed.

This action was instituted upon an agreed statement of facts to determine the right of the defendant, town of Lumberton, to levy and collect, for municipal purposes, a tax upon the shares of stock of the plaintiff banks owned by nonresidents of the town of Lumberton, but residents of the state of North Carolina. All of the plaintiff banks have paid, under protest, to the defendant, town of Lumberton, the taxes assessed by said defendant against the shares of their capital stock owned by nonresidents of the town of Lumberton, but residents of the state of North Carolina, and this action is brought on the part of the plaintiff banks and their stockholders who are nonresidents of the town of Lumberton, but residents of the state of North Carolina, to recover the tax so paid under protest. Judgment was rendered denying the right of the plaintiffs to recover, and they excepted and appealed.

Johnson & Johnson, L. R. Varner, and H. E. Stacy, all of Lumberton, for appellants.

McIntyre, Lawrence & Proctor, of Lumberton, for appellee.

ALLEN, J. [1] The determination of the situs of personal property for purposes of taxation is addressed to the General Assembly, which may provide different rules for

different kinds of property and change them from time to time, and when it has acted no consideration of expediency will authorize the courts to disregard the legislative will. *Winston v. Salem*, 181 N. C. 405, 42 S. E. 889.

"The capital stock of a corporation is assessable to the corporation itself at its principal place of business. But shares of such stock, considered as the property of their individual holders, are taxable to such holders at their respective places of residence, in the absence of a statute to the contrary; but the situs of shares of corporate stock for purposes of taxation may properly be fixed by statute at the place where the corporation is domiciled." 37 Cyc. 961.

[2] The question then presented by the appeal is whether the Legislature has said that shares of stock in banking corporations located in Lumberton held by persons residing in North Carolina, but outside of the corporate limits of Lumberton, shall be subject to taxation as other personal property in that town.

Prior to Machinery Act of 1919, c. 92, the policy of the state as declared in chapter 234, § 42, Laws 1917, required the banking institution to pay the state tax upon the shares of stock, and owners of the shares to pay the county and municipal taxes thereon, the provision as to the latter being:

"The residents of this state who are shareholders in any bank, banking association, or savings institution (whether state or national) shall list the number of their respective shares in the county, city, or town, precinct, or village where they reside, for the purposes of county, school, and municipal taxation"

—thus fixing the situs of the shares for the purpose of county, school, and municipal taxation at the residence of the owner.

The act of 1917 was, however, changed in important particulars by chapter 92, § 42, Laws of 1919, the material parts of which are as follows:

"The taxes imposed for state purposes upon the shares of stock in any bank, banking association, or savings institution (whether state or national) in this state shall be paid by the cashier of such bank, banking association, or savings institution, directly to the state treasurer. \* \* \* Every such bank, banking association, or savings institution shall, during the month of May, list annually with the state tax commission, in the name of and for its shareholders, all the shares of its capital stock, whether held by residents or nonresidents, at its market value on the first day of May. \* \* \* The taxes so assessed upon the shares of any such bank, company or association shall be paid by the cashier, secretary, treasurer or proper accounting officer thereof, and in the same manner and at the same time as other taxes are required to be paid in such county, special school district or city; in default of such

payment such cashier, secretary, treasurer or other accounting officer as well as such bank, company or association shall be liable for such taxes, and in addition, for a sum equal to ten per centum thereof. Any taxes so paid upon any such shares may, with the interest thereon, be recovered from the owners thereof by the bank, company, association or officer paying them, or may be deducted from the dividends accruing on such shares. The taxation of shares of any such bank, banking association, or savings institution shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of this state, whether such taxation is for state, county, school, or municipal purposes."

This last statute of 1919 is controlling in the present controversy, and, while it does not in express language change the situs of the shares of stock from the residence of the owner to the home of the bank, this is the only reasonable inference from its provisions.

It omits entirely the requirement in the act of 1917 that the owner of the shares shall list them at the place of his residence, or at any other place, and imposes this duty on the cashier of the bank, who is required to pay the taxes, state, county, special, and municipal.

The purpose of the act is clear to require the bank to pay all taxes on the shares of stock where it is located, and to relieve the owner from listing or paying taxes thereon, except as he may be required to reimburse the bank.

Affirmed.

(179 N. C. 335)

**BUCKHORNE LAND & TIMBER CO. v. YARBROUGH. (No. 103.)**

(Supreme Court of North Carolina. March 24, 1920.)

**1. DEEDS §38(8)—DESCRIPTION SUFFICIENT TO LET IN PAROL EVIDENCE FOR IDENTIFICATION.**

Deed of "All that tract of land situated, lying, and being in the counties of Harnett and Moore, lying on both sides old road between Summerville and M.'s land in Moore county, bounded by the lands of M., lands belonging to the estate of M., deceased, H. [and others], and the lands of the estate of B. and others, including a part of a 5,000-acre survey and a 3,000-acre survey patented by B. and conveyed by R. and others to M. and M.," etc., sufficiently described the land to let in parol evidence to identify it, under Revisal, §§ 948, 1605.

**2. DEEDS §38(1)—FRAUDS, STATUTE OF §100, 110(1)—DEED MUST CONTAIN DESCRIPTION CERTAIN IN ITSELF OR CAPABLE OF BEING MADE CERTAIN BY REFERENCE.**

A deed conveying realty or a contract concerning it, within the meaning of the statute of frauds, must contain a description of the land, either certain in itself or capable of being re-

duced to certainty by reference to something extrinsic to which the contract refers.

**3. EVIDENCE §274(7)—DECLARATIONS BY A DECEDENT COMPETENT ON QUESTIONS OF BOUNDARY.**

On questions of boundary, hearsay is competent as evidence, but must come from a disinterested source; the declaration (1) having come from a disinterested person; (2) having been made ante litem motam; (3) the person who made it being deceased.

**4. EVIDENCE §317(5)—NOTES OF SURVEYOR INCORPORATING MATTERS AS TO BOUNDARIES TOLD HIM BY INTERESTED OWNER INADMISSIBLE.**

In an action to recover the possession of land under a deed the description of which had to be made certain by parol evidence, notes of a surveyor incorporating matters that the interested owner of the land had told him about the boundaries held inadmissible as hearsay upon hearsay, and without the guaranty of lack of interest in the declarant.

**5. LANDLORD AND TENANT §63(3)—TENANT AND SUBTENANT ESTOPPED TO DENY LANDLORD'S TITLE.**

Neither a tenant nor his subtenant can controvert the landlord's title, being estopped from asserting their own title, even a homestead right, until possession has been restored to the landlord; a rule not precluding the tenant from showing an equitable title in himself, or circumstances calling for the interposition of equity for his relief.

Appeal from Superior Court, Chatham County; Connor, Judge.

Action by the Buckhorne Land & Timber Company against J. A. Yarbrough. From judgment for plaintiff, defendant appeals. New trial.

This action was brought to recover the possession of land. The plaintiff, in its complaint, alleged title in itself to a large tract of land, which the plaintiff estimated to contain something like 10,000 acres. The defendant disclaimed any interest in the land except two tracts one containing 110 acres and one 7½ acres, in which he asserts ownership in himself, and denied the plaintiff's title. Upon coming to trial the plaintiff, with leave of the court, amended its complaint limiting the controversy to the two tracts of 110 acres and 7½ acres to which the defendant had asserted claim of title, and upon the amended pleadings as set forth in the record the case was tried. The defendant assigned three errors (among others not deemed necessary to be now considered), as follows:

The admission, over his objection of a deed from Neill McKay and John W. McKay to the Deep River Manufacturing Company, and other deeds connecting him therewith; the ground of objection being that the description of the land in the deeds was too vague and uncertain for it to be identified. It will

be necessary to give only the description in the first-named deed, as the others refer to it, which is as follows:

"All that tract of land situated, lying, and being in the counties of Harnett and Moore, lying on both sides old road between Summer-ville and Neill McNeill's land in Moore county, bounded by the lands of Neill McNeill, Esq., lands belonging to the estate of Murdock McLeod, deceased, Jas. S. Harrington, Neil McLean, Jr., the Bethea lands, Jas. M. Turner, and the lands of the estate of Noah Buchanan and others, including a part of a 5,000-acre survey and a 3,000-acre survey patented by John Gray Blount and conveyed by Wm. B. Rodman and others to Neill McKay and John W. McKay; also 640 acres patented by the said John W. McKay; also a piece patented by Jas. S. Harrington and John Harrington and Neill McNeill and Hector McNeill and others, and by them conveyed to the said Neill McKay and John W. McKay, containing by estimation 10,000 acres."

The second error assigned is the admission in evidence of a written lease of the lands, for the purpose of working the trees thereon for turpentine, and for this purpose only, introduced for the purpose of estopping the defendant, who claimed under said lease, to deny the plaintiff's title.

The third error assigned is to the admission of a paper writing, signed by D. G. McDuffie, civil engineer, dated September 24, 1888, for the purpose of locating the land described in the McKay deed aforesaid; the said paper writing being in the following words and figures:

This is to certify that November 14, 1868, Rev. Neill McKay and Dr. J. W. McKay and wife sold to the Deep River Manufacturing Company 10,000 acres of land in Harnett county and Moore county, as follows: 5,000 acres and 3,000 acres known as the Blount speculation land, and 2,000 acres composed of 640 acres granted to Dr. J. W. McKay and the pieces which the McKays had bought from Neill McNeill, Hector McNeill, Jas. S. Harrington, and John Harrington, joining Neill McNeill, McLeod, Neill McLean, Jr., Bethea, J. M. Turner, and Noah Buchanan.

I further certify that I was selected by both parties to make an actual survey of said lands, and that the Rev. Neill McKay went with me and showed me where the boundaries were, and that after making the survey I handed the plat and courses and distances to Col. J. M. Heck, and I certify that the following are the courses and distances (then follows description by metes and bounds).

There are other exceptions and assignments of error, but, in the view taken of the case by the court, they need not be set out here. Defendant moved for a nonsuit, which was denied, and he excepted.

The jury returned the following verdict:

(1) Was E. J. Yarbrough, at the time she executed the deed to J. A. Yarbrough for the 110-acre tract described in the amended com-

plaint, the tenant of the plaintiff's predecessor in title? Answer: Yes.

(2) Is the plaintiff the owner and entitled to the possession of the lands described in the amended complaint? Answer: Yes.

(3) What is the annual rental value of plaintiff's lands in the possession of the defendant? Answer: \$80.

Judgment on the verdict, and defendant appealed.

Baggett & Baggett, of Lillington, H. E. Norris, of Raleigh, A. C. Ray and W. P. Horton, both of Pittsboro, and Chas. Ross, of Lillington, for appellant.

Seawell & Milliken and Hoyle & Hoyle, all of Sanford, for appellee.

WALKER, J. (after stating the facts as above). [1] The description in the deed of Neill McKay and John W. McKay to the Deep River Manufacturing Company is sufficiently certain to let in parol evidence for the purpose of identifying the land. Since the decision of this court in Patton v. Sluder, 167 N. C. 500, 83 S. E. 818, there can be no doubt of the correctness of the proposition just stated that the description of the land is not too vague to be aided by parol proof so as to fit it to the land intended to be conveyed. The descriptive words in the Patton Case were: "On the headwaters of Swannanoa river, adjoining Hemphill and Gilliam heirs and others." Prior to the decisions in Blow v. Vaughan, 105 N. C. 198, 10 S. E. 891, and Wilson v. Johnson, 105 N. C. 211, 10 S. E. 895, such descriptions as that appearing in the McKay deed were held not to be too vague and indefinite to be aided by parol proof. Those two cases varied the rule somewhat, but were disapproved in Perry v. Scott, 109 N. C. 374, 14 S. E. 294. The following was the description construed in the last case:

"Lying and being in the county of Jones and bounded as follows, to wit: On the south side of Trent river, adjoining the lands of Colgrove, McDaniel, and others, containing 360 acres, more or less."

This was held to be sufficiently certain to be located by parol proof.

[2] It is true we have held that a deed conveying real estate or a contract concerning it, within the meaning of the statute of frauds, must contain a description of the land, the subject-matter of the contract, "either certain in itself, or capable of being reduced to certainty by a reference to something extrinsic to which the deed refers" (Massey v. Bellisle, 24 N. C. 170); but the principle is satisfied by the descriptive words of this deed. The evidence proposed to be offered to identify the land must, of course, have that tendency, but we are not discussing the question whether the description is sufficient in any given case, but the general one,

what description is, in itself, sufficiently certain to be perfected by parol testimony.

In our case, we think the description is sufficient to let in parol evidence. The Revised of 1905, §§ 948 and 1605, declares in explicit language that this shall be the law. The matter is so fully discussed in *Perry v. Scott*, supra, and in *Patton v. Sluder*, 187 N. C. 500, 83 S. E. 818, that further comment would be useless. While we hold that the deed is valid, there was some evidence admitted to identify the land, which we deem to be incompetent. We refer to the notes of the surveyor, D. G. McDuffie, made in September, 1888, and which are fully set forth in our statement of the case. The paper is in the handwriting of McDuffie, who is dead, and it was written by him before this controversy arose and this action was brought, and at the time of writing these notes McDuffie had no interest in the land or the subject-matter of the notes, except that he had been employed by the McKays and the Deep River Manufacturing Company to make the survey for them, but the fact remains that the surveyor, McDuffie, derived his knowledge of the lines and corners upon which he based his survey from Parson Neill McKay, and this fact appears in the notes offered in evidence by the plaintiff, for he says in the notes:

"I further certify that I was selected by both parties to make an actual survey of said lands, and that the Rev. Neill McKay went with me and showed me where the boundaries were, and that after making the survey I handed the plat and courses and distances to Col. J. M. Heck, and I certify that the following are the courses and distances."

[3] It is true that in questions of boundary hearsay is competent as evidence. But it must come from a disinterested source. The conditions under which it is received are: (1) The declaration must come from a disinterested person; (2) it must have been made ante litem motam; and (3) the person who made it must be deceased, so that he cannot be produced and heard in person as a witness. *Smith v. Headrick*, 93 N. C. 210; *Yow v. Hamilton*, 136 N. C. 357, 48 S. E. 782, and cases cited. It was said by *Smith, C. J.*, in *Whitehurst v. Pettipher*, 87 N. C. 179, 42 Am. Rep. 520:

"The declaration is received under the conditions mentioned as evidence, instead of the sworn statement for which it is substituted, when the party making it is dead and the evidence would otherwise be lost. It is manifest that if the declarant were alive, and would be allowed to prove the fact to which the declaration relates, the declaration itself may be proved after his death."

[4] In this case, if McDuffie were living, he would not be permitted, as a witness, to testify as to what Dr. McKay told him about the boundaries, because it would, of course, be hearsay, and Dr. McKay was, at the time

he showed him the boundaries of the land, an interested person, being the owner of the land or one of its owners. The primary declaration would not have come from a disinterested source. The notes of McDuffie were written 20 years after the actual survey was made by him, and were based, it appears, entirely upon the declaration of an interested person. They constituted the declaration, not the sworn testimony, of McDuffie, as to what another man had declared, and the latter interested in the land the boundaries of which are in question. It is the declaration of the person who knows the boundaries that is required to satisfy the rule of admission, and that is, in this case, the declaration of Dr. McKay. It is excluded because of his interest in the land and his making a declaration favorable to himself. The declarant must be dead, because if alive he must be produced as a witness, and he must be disinterested, and the declaration must be made ante litem motam, to avoid bias or to free it from suspicion, and to remove all temptation to falsify. *Dobson v. Finley*, 53 N. C. 495; *Shaffer v. Gaynor*, 117 N. C. 15, 23 S. E. 154; *Westfelt v. Adams*, 131 N. C. 379, 42 S. E. 823. It is admitted from necessity, because it is the best and only evidence of the fact obtainable. Mr. McDuffie was only writing into his notes substantially something that Parson McKay had told him, which is hearsay upon hearsay. The cases we have generally had are those where a living witness testified to what a deceased person had declared as to boundaries. The judge erred in admitting these notes. They were material and their admission prejudicial, because they were used for the purpose of locating the boundaries, and were allowed, by the court, to have the effect of proof as to them, and if competent they would be strong proof of the lines and corners.

[5] The third question, as to the estoppel of the defendant to deny the plaintiff's title because of the tenancy of his predecessor, *E. J. Yarbrough*, requires little discussion as to the facts. They must be settled by the jury. We need only to state the general principles of law governing such cases, and the applicability of the estoppel to a subtenant. It is well-settled doctrine, says the court, in *Davis v. Davis*, 83 N. C. 71, that one who, as tenant, gains possession of the land of another cannot resist an action for its recovery, brought after the termination of the lease, by showing a superior title in another or in himself, acquired before or after the contract. The obligation to surrender becomes absolute and indispensable. Honesty forbids, says *Ruffin, J.*, that he should obtain possession with that view, or, after getting it, thus use it. *Smart v. Smith*, 13 N. C. 258. Neither the tenant nor any one claiming under him, remarks *Daniel, J.*, can controvert

(102 S.E.)

the landlord's title. He cannot put another person in possession, but must deliver up the premises to his own landlord. *Callender v. Sherman*, 27 N. C. 711. If he entered as tenant, or after entry had become such, is the language of Rodman, J., he was estopped from asserting his title until he had restored the possession to the plaintiff. *Heyer v. Beatty*, 76 N. C. 28. Even a homestead right cannot be asserted in opposition to the recovery. *Abbott v. Cromartie*, 72 N. C. 292, 21 Am. Rep. 457. The rule does not preclude the tenant from showing an equitable title in himself, or such circumstances as under our former system would call for the interposition of a court of equity for his relief, and which relief may not be obtained in the action, as is held in *Turner v. Lowe*, 66 N. C. 413. Yet the force of the general proposition remains unimpaired, that where the simple relation of lessor and lessee exists without other complications, the latter cannot contest the title of the former. *Forsythe v. Bullock*, 74 N. C. 135. The obligation to restore a possession thus obtained before an inquiry, into the title is permitted, although springing from the contract, rests upon the foundation of good faith and honest dealings among men. *Lawrence v. Eller*, 169 N. C. 211, 85 S. E. 291, L. R. A. 1916E, 696, Ann. Cas. 1917D, 546; *Le Roy v. Steamboat Co.*, 165 N. C. 109, 80 S. E. 984. This principle of estoppel is fully considered in these two cases, and in *Lawrence v. Eller*, supra, this court said that the general rule, however, as stated, while it varies at times in its application, has been everywhere recognized as sound, and has always been very rigidly enforced in this jurisdiction, citing in support of it the following authorities: *Campbell v. Everhart*, 139 N. C. 502-514, 52 S. E. 201; *Pool v. Lamb*, 128 N. C. 1, 37 S. E. 953; *Springs v. Schenck*, 99 N. C. 552, 6 S. E. 405, 6 Am. St. Rep. 552; *Davis v. Davis*, 83 N. C. 71; *Farmer v. Pickens*, 83 N. C. 550; *Wilson v. James*, 79 N. C. 349; *Abbott & Foster v. Cromartie*, 72 N. C. 292, 21 Am. Rep. 457; *Callender v. Sherman*, 27 N. C. 711; *Towne v. Butterfield*, 97 Mass. 105; *Brown v. Keller*, 32 Ill. 157, 83 Am. Dec. 258; *Davis v. Williams*, 130 Ala. 530, 30 South. 488, 54 L. R. A. 749, 89 Am. St. Rep. 55; *Rogers v. Boynton*, 57 Ala. 501; *Ward v. Ryan* (1876-77) 10 L. R. C. L. 17; *Peyton v. Stith*, 5 Pet. 485, 8 L. Ed. 200; 2 McAdam, Landlord and Tenant, § 421; 18 A. & E. (2d Ed.) 414; 24 Cyc. 946.

The court held in *Springs v. Schenck*, supra:

"A tenant cannot be heard to deny the title of his landlord, nor can he rid himself of this relation, without a complete surrender of the possession of the land."

It was held in *Towne's Case*, supra:

"A tenant at will is estopped from denying his landlord's title without surrender of the leased premises or eviction by title paramount or its equivalent."

The court said in *Brown v. Keller*:

"That a tenant must surrender the premises before asserting rights adverse to his landlord which he acquired after renting the premises."

And in *Davis v. Williams*, supra, it was held as follows:

"(1) A tenant is estopped to dispute the title of his landlord, unless his landlord's title has expired or been extinguished, either by operation of law or his own act, after the creation of the tenancy." Page 58.

"(2) It is only where there is a change in the condition of the landlord's title for the worse, after a tenant enters into his contract, in the absence of fraud or mistake of fact, that he is permitted to show the change in the condition of the title." Page 58.

"(3) A tenant must first surrender the premises to his landlord before assuming an attitude of hostility to the title or claim of title of the latter." Page 58.

"(4) An estoppel will be enforced in a court of equity as well as in a court of law." Page 59.

We see from this review of the subject, and the long line of cases sustaining our conception of the law, that there can no longer be any dispute as to the nature of this kind of estoppel, or as to its effect. It may also be considered as settled that any one to whom the tenant has assigned, and who has entered under him, becomes subject to the estoppel as much so as the tenant himself, and the authorities already cited are equally clear and explicit as to this proposition. Whether the case is brought under the influence of this principle depends, of course, upon the facts as found from the evidence. We will not refer to the facts, or comment upon them, as we cannot well anticipate what they will be at the next trial when ascertained by the jury. The question of adverse possession is also postponed until the other matters are decided, as it depends upon them.

We order a new trial because of the error in regard to the notes of the surveyor, and we exercise our discretion by extending it to both tracts of land.

New trial.

(179 N. C. 345)

GREEN et al. v. RUFFIN et al. (No. 261.)

(Supreme Court of North Carolina. March 24, 1920.)

**1. SUBROGATION §40 — INDORSEER OF NOTE RECEIVING BENEFIT FROM PROCEEDS OF RENEWAL NOTE CANNOT RECOVER ON ORIGINAL NOTE.**

Where an indorser of corporate note paid the note, and as part of the collateral pledged received a note executed by plaintiff, the indorser is not entitled to enforce such note where he knew plaintiff had executed renewal, the proceeds of which had been used in reducing the corporate obligation, but the original note which had been pledged was not discharged, and came into the indorser's hands.

**2. EVIDENCE §591—PLAINTIFF'S INTRODUCTION OF DEFENDANT'S ANSWER HELD NOT CONCLUSIVE NOR GROUND FOR NONSUIT.**

Where plaintiff, who sought to enjoin sale of land under mortgage given to secure a note, introduced evidence tending to show that defendant was not entitled to enforce the note plaintiff's introduction of a part of defendant's answer which tended to rebut his evidence is no ground for nonsuit, but the conflict should be submitted to the jury.

**3. SUBROGATION §40 — WHERE CREDITOR COULD NOT ENFORCE COLLATERAL NOTE, ONE SUBROGATED TO HIS RIGHTS CANNOT.**

The equitable doctrine of subrogation will not be permitted where it will work injustice to the rights of those having superior equities, or where it will operate to defeat a legal title; hence defendant, who paid off a corporate note which he had indorsed and received collateral pledged, cannot enforce collection of collateral note where it was an original note, and the maker had executed a renewal note, the proceeds of which had been paid over to the holder of the corporate obligation; for the original holder might not enforce collection.

Appeal from Superior Court, Franklin County; Gulon, Judge.

Action by Bryant Green and another against W. H. Ruffin and another. From a judgment of nonsuit, plaintiffs appeal. Reversed.

This is an action to restrain a sale of the land in controversy under a mortgage. The facts are as follows:

R. H. Strickland, the defendant in interest, while a stockholder and vice president of the Hill Live Stock Company, indorsed a note of his company made payable to the American Agricultural & Chemical Company in the sum of \$10,000. After this note matured and while collection was being pressed thereon, said live stock company, as an inducement for extension of the payment, deposited as collateral security certain notes and securities of its concern amounting to a large sum. Among the collateral so deposited was a note and deed of trust for \$1,000 given by Bryant

Green, one of the plaintiffs. When the Green note matured he was induced by the live stock company to execute a renewal note in payment of the original, which was likewise secured by deed of trust, conveying the identical lands that were conveyed as security to the first note. At the time of the execution of said renewal note and deed of trust Green was assured by Hill, president of the live stock company, that his first note would be marked paid, and the deed of trust secured by same would be duly canceled of record. After obtaining the renewal note and deed of trust of the live stock company, Hill represented to the First National Bank of Lenoir, N. C., that the first or original note had been deposited as collateral to a note given to the chemical company, that said original note was then past due, and the chemical company was demanding its payment in cash, that the proceeds of the renewal note, which said live stock company desired to sell said bank, would be used to pay the original note, and said bank bought the renewal note and paid cash therefor. The money so received from the sale of said renewal note was paid to the chemical company, who held the original note and credited thereon. The live stock company from time to time made payments on its note due the chemical company, aggregating about \$8,000, and judgment was obtained for the balance due thereon of about \$2,000 against the live stock company, R. E. Strickland, and others. Strickland paid the judgment and took over the collateral, which amounted to several thousand dollars. The lands conveyed in the two deeds of trust by Green were sold under the terms of the second deed of trust, and the Franklin Land Company became the purchaser. Said land company subsequently conveyed said lands to Green, the original owner. Six months after the foreclosure sale made under the second deed of trust the defendant Strickland attempted to foreclose under the first deed of trust, and this action is to restrain the sale.

K. P. Hill testified:

"I was president of the Hill Live Stock Company, and Mr. R. H. Strickland was vice president of said company. In the spring of 1914 the Hill Live Stock Company executed its note to the American Agricultural & Chemical Company in the sum of about \$10,000 for certain fertilizers purchased, and Mr. Strickland, J. P. Hill, and myself indorsed said note, which was delivered to the said chemical company. In the latter part of 1915 the note so executed by the Hill Live Stock Company and indorsed by Mr. Strickland and myself was turned over to Mr. Jim Pou, of Raleigh, for collection. We went to see Mr. Pou and carried a large batch of papers, including the Green note, and delivered them as collateral security to the company's note. In January, 1916, we induced Bryant Green to give us a second note and mortgage in renewal of the first note executed in

(103 S.E.)

April, 1915, and deposited with Mr. Pou, under the agreement that his first note should be obtained and delivered up to him for cancellation. I discounted this second note at the First National Bank with the understanding that I would send the proceeds thereof to Mr. Pou to be applied on the note to which Green's first note was deposited as collateral and obtain said first note and have the deed of trust securing same canceled of record. In accordance with this agreement I sent the money obtained from the bank on the second note to Mr. Pou to be applied on the chemical company's note. From time to time we paid about \$8,000 on the chemical company's note, which left about \$2,000 due thereon. I neglected to get the first Green note and deed of trust. Mr. Strickland knew about these transactions and kept up with the payments that were made upon the chemical company's note."

The plaintiffs also introduced a part of the answer of the defendant Strickland which is as follows:

"That he ceased to be a stockholder in the Hill Live Stock Company on the 27th day of August, 1914; that he indorsed the note to the Agricultural & Chemical Company for a large amount, and judgment was rendered against him, and, being solvent, he paid said judgment to the amount of \$2,500, and said judgment and securities were transferred to this defendant for value and without notice."

At the conclusion of the evidence his honor entered judgment of nonsuit, and the plaintiffs excepted and appealed.

The defendant Ruffin has no interest in this controversy except to perform his duties of trustee in the deed of trust, under the directions of the court.

W. H. Yarborough, Jr., and Ben T. Holden, both of Louisburg, for appellants.

W. M. Person, of Louisburg, and N. Y. Gulley, of Wake Forest, for appellees.

ALLEN, J. [1] The witness Hill testified that the second note and mortgage were executed as a renewal of the first note and mortgage, which had been deposited with the chemical company as collateral, and under an agreement that the first note and mortgage under which the defendant Strickland is asking that the land be sold would be delivered up and canceled, and that the proceeds derived from discounting the second note and mortgage were actually paid to the chemical company in reduction of the liability of the defendant Strickland thereon as indorser. He also testified:

"Mr. Strickland knew about these transactions and kept up with payments that were made upon the chemical company's note."

It therefore appears from this evidence that Strickland knew of the agreement to

cancel the first note and mortgage, and that he received the benefit of the contract by the application of the proceeds of the second note and mortgage to the note of the chemical company, and he will not now be permitted to receive the benefits and repudiate the obligations of the transaction. See *Wilkins-Ricks Co. v. Welch*, 102 S. E. 316, at this term.

[2] It is true that the plaintiff weakened the force of this evidence by introducing a part of the answer of the defendant in which he alleged that the collateral securities held by the chemical company were transferred to him "for value and without notice," but this merely presented the case of contradictory evidence, and did not justify entering a judgment of nonsuit.

This precise question was presented in *Trust Co. v. Bank*, 166 N. O. 112, 81 S. E. 1074, in which the plaintiff introduced evidence that a check was duly mailed, and relied upon the presumption that it was received on a certain date, and after doing so introduced a part of the answer of the defendant which tended to rebut this presumption.

A judgment of nonsuit was entered, the court being of opinion that the presumption was rebutted by the introduction of the answer by the defendant, but this court set aside the judgment of nonsuit, the court saying:

"The fact that plaintiff introduced the rebutting evidence does not alter the case. He is not concluded thereby, but may show that the fact is otherwise, as a party is not always bound by the statement of his own witness. \* \* \* The prima facie presumption as to the time when the check was received was not rebutted by the introduction of the answer, and the question should have gone to the jury."

[3] Again, the defendant Strickland, in order to assert his rights under the first note and mortgage, must invoke the equitable doctrine of subrogation which "will not be permitted where it will work injustice to the rights of those having superior equities or where it will operate to defeat a legal right." 25 R. C. L. 1821. His right to subrogation, if any, is the right to be subrogated to the rights of the chemical company in the collateral security, and, as it appears from this evidence the plaintiff Green, who was the debtor in the collateral security, furnished the money, and it was actually paid to the chemical company, that company could not hold the securities as against the plaintiff Green, and, if so, Strickland could not do so by subrogation.

In our opinion, the case is one which ought to be submitted to a jury.

Reversed.

(179 N. C. 403)

**OCEAN ACCIDENT & GUARANTEE CORPORATION, Limited, v. PIEDMONT RY. & ELECTRIC CO. (No. 333.)**

(Supreme Court of North Carolina. March 31, 1920.)

**1. INSURANCE ⇨183—LIABILITY POLICY CONSTRUED AS ENTITLING INSURER TO HAVE PAY ROLL OF POWER PLANT INCLUDED IN COMPUTING PREMIUMS.**

A liability insurance policy issued to a railway and electric light company held to cover everything except the operation of a street railway and the railway power lines, and hence to entitle the insurer to have the pay roll of insured's power plant included in computing the premium, which was based on the pay roll.

**2. INSURANCE ⇨168—DESCRIPTION OF WORK COVERED BY LIABILITY INSURANCE CONSTRUED.**

In a provision of a liability insurance policy describing the work covered by the insurance as the operation, maintenance, and extension of lines and the making of service connections, the word "operation" was not used as a mere caption or heading, but was itself one of the things intended to be insured.

**3. EVIDENCE ⇨441(13)—INSURANCE POLICY CONCLUSIVELY PRESUMED TO CONTAIN TERMS BY WHICH PARTIES INTENDED TO BE BOUND.**

Under the general rule that all prior regulations or agreements are merged in a subsequent written contract touching the same subject-matter, a policy of insurance, properly executed when offered by the insurer and accepted by insured, must be conclusively presumed to contain all the terms of the agreement for insurance by which the parties intend to be bound.

**4. INSURANCE ⇨146(3)—POLICY CONSTRUED IN FAVOR OF INSURED.**

Insured is entitled to a favorable interpretation of the policy, when there is any ambiguity in its language.

Appeal from Superior Court, Alamance County; Calvert, Judge.

Action by the Ocean Accident & Guarantee Corporation, Limited, against the Piedmont Railway & Electric Company. From a judgment for defendant, plaintiff appeals. New trial granted.

Plaintiff, on or about June 29, 1915, issued and delivered to the defendant, Piedmont Railway & Electric Company, a public liability insurance policy, set out in the record. The premium to be paid for this liability insurance was \$9 per each \$100 of compensation of said defendant to its employes working at and in the places covered by said insurance, as per its three monthly pay rolls. Plaintiff sues for a balance alleged to be due on the premium, and alleges that these three monthly pay rolls amounted to \$5,042.45, exclusive of the pay roll of the employes of said street railway company, which was spe-

cifically excluded because injuries to persons occurring by reason of the operation of the street railway were not covered by the policy.

Defendant does not in terms deny the plaintiff's allegation as to the amount of the pay roll, but does deny that the pay roll of defendant's power plant and light plant, which is run in connection with the power plant, should be included in the pay roll on which the premium is based. It was agreed that, if the pay roll of the power plant is included, defendant would owe plaintiff \$222.90, and that if said part of defendant's pay roll is not included defendant would owe plaintiff nothing. The parts of the policy itself material to the controversy are as follows:

"The premium is based upon the entire compensation earned, during the policy period, by all employes of the assured not herein elsewhere specifically excluded, engaged in connection with the work described in and covered by this policy."

"4. A full description of the work covered by this policy, the locations of all places where such work is to be done, the estimated compensation of employes engaged therein for the term of this policy, the premium rate or rates, and the deposit premium are given hereunder:

"Description of work covered by this policy: Electric light and power companies, operation, maintenance and extension of lines, and making service connections.

"Locations of all places where such work is to be done: Alamance and Orange counties, North Carolina.

"Estimated compensation for policy period: See three monthly premium adjustment indorsement.

"Premium rate per \$100 of commission: \$9.00.

"Deposit premium: \_\_\_\_\_

"It is understood and agreed this policy shall not apply to bodily injuries or death caused directly or indirectly by reason of the operation or maintenance of the street railway, or its power lines or any other work in connection with the street railway or railway power lines. [Then follows statement of special work done at all locations mentioned in policy, which are not covered by it, unless a specific amount of compensation, premium rate, and deposit are stipulated for.]

"8. No work of any nature not herein disclosed is done by the assured at the places covered hereby, except as follows: Operation of street railway not covered hereunder."

The plaintiff contended that it was entitled to a premium which should be arrived at by taking a percentage of the entire pay roll of the defendant. The defendant contended that the premium was to be a percentage of only a part of its pay roll, and was not to include the pay roll of its employes engaged where the public was forbidden to go, and where there would be no danger of injury to the public, to wit, the pay roll of its employes actually engaged in and about its power house. If the contention of the plaintiff is correct, then the defendant would be due the balance sued for. If the contention of the



defendant is correct, then it has paid plaintiff all sums due.

The trial judge, upon the admitted facts and other evidence which was not disputed, found for the defendant, and found that the defendant had paid all premiums it had contracted to pay, and there was a verdict and judgment for the defendant. Plaintiff excepted and appealed.

W. S. Coulter and A. H. King, both of Burlington, for appellant.

John J. Henderson and Parker & Long, all of Graham, for appellee.

WALKER, J. (after stating the facts as above). [1] We are required, in construing this policy, to examine the entire writing, and to base our conclusion as to its meaning upon the contract as a whole. The language of the instrument is very comprehensive and when properly construed, it embraces all kinds of work and operation and all risks arising therefrom, except those in connection with the defendant's street railway, or its power lines. If the exception was intended to cover other operations or other risks, why was it not expressed in the writing. The language of the exception is very clear and explicit, for it provides that—

"No work of any nature, not herein disclosed, is done by the assured at the places covered hereby, except the operation of street railway which is not covered hereunder."

That states, without the shadow of a doubt, that the policy of insurance includes everything except the operation of the street railway; otherwise it would have been added in unmistakable language that there was a further exception in regard to the operation of the light and power plant. How this construction can be avoided, under the rule of law prescribed for ascertaining the meaning of a written contract, we are at a loss to know. The language of the exception is an unerring index to the meaning of the instrument, as it eliminates the only thing not insured and leaves all that is left to be covered by the policy.

[2] Again: Section 4 of the "statement" shows what was intended with respect to the risk assumed by the plaintiff, and for which the defendant promised to pay the premium as fixed by the contract by the formula set forth therein. It describes the "work" covered by the insurance as "Operation, maintenance and extension of lines and making of service connections." The word "operation," in that paragraph, was not used as a mere caption or heading, that included only "maintenance" and extension of lines and making service connections, but is itself one of the things intended to be insured, as if it had been expressed:

"The operation of the lines, as well as the maintenance and extension, including the making of service connections."

It was something separate and apart from the other things specified, and not a general or descriptive title in relation to them. This expression, "Operation, maintenance and extension," etc., immediately follows these words in the policy:

"A full description of the work covered herein and the location of all places where such work is to be done," etc., "are given hereunder."

So that everything is included except "operation or maintenance of the street railway or the power lines or any other work in connection therewith."

[3] There are other reasons which lead us to the same conclusion, that the defendant is liable for the remainder of the premium, claimed by the plaintiff. There is a general rule as to contracts that all prior regulations or agreements are merged in a subsequent written contract touching the same subject-matter, which is now too well established to need the support of cited authority. Therefore, when a policy of insurance, properly executed, is offered by the insurer and accepted by the insured as the evidence of their contract, it must be conclusively presumed to contain all the terms of the agreement for insurance by which the parties intend to be bound. If any previous agreement of the parties shall be omitted from the policy, or any terms not theretofore considered added to it, the parties are necessarily presumed to have adopted the contract as written as the final form of their binding agreement. This was said in *Clements v. Insurance Co.*, 155 N. C. 57, 70 S. E. 1076, and is well supported by *Vance on Insurance*, p. 348, cited and approved by us in that case. What, therefore, passed between the parties prior to the delivery of the policy, must be taken by us as abandoned at that time, and the policy substituted for it, as the later and final expression of their agreement. It is to be presumed that the defendant read the policy before accepting it, and that the terms stated therein were satisfactory. It was said in *Insurance Co. v. Mowry*, 96 U. S. 547, 24 L. Ed. 674, by Justice Field:

"The entire engagement of the parties, with all the conditions upon which its fulfillment could be claimed, must be conclusively presumed to be there stated. If, by inadvertence or mistake, . . . provisions were omitted, the parties could have had recourse for a correction of the agreement to a court of equity, which is competent to give all needful relief in such cases. But, until thus corrected, the policy must be taken as expressing the final understanding of the assured and of the insurance company."

This was approved in *Floars v. Insurance Co.*, 144 N. C. 232, 56 S. E. 915; *Wilson v. Insurance Co.*, 155 N. C. 173, 71 S. E. 79; *Clements v. Insurance Co.*, supra. The doctrine is well stated, as to all contracts, and especially with reference to policies of insurance, in 9 Cyc. 391, as follows:

"Where one accepts a paper which he knows contains the terms of an offer, he will be bound by it, and cannot be heard to say that he did not read it, or did not know what it contained. This principle finds frequent application in bills of lading, express receipts, and the like. So, where a person receives an insurance policy pursuant to an application, it is his duty to examine it and see those things in respect thereto which are open to ordinary observation by a person of ordinary intelligence, and if he neglects to do so, taking it for granted that what he has received is what he applied for, or intended to apply for, such conduct on his part amounts to an acceptance of the policy received, regardless of whether it corresponds to the policy applied for, or intended to have been applied for, or not, and if it does not so correspond he cannot be heard to complain."

If the defendant desired the policy to be drawn differently, it should have made this known before it was accepted, and rejected the policy unless its wish was complied with. Besides, defendant was retaining a policy, which offered larger protection to it than was claimed, and if any accident had occurred in the operation of the light or power lines, for which it was liable in damages by reason of

its negligence, or for other cause, it could have claimed indemnity, and, this being so, why should it not pay the corresponding premium. It would seem to be equitably estopped by this fact, though this is immaterial and is not decided.

[4] Defendant could have asked for a liberal construction of this policy in its favor, and the solution of any doubt, as to the meaning of these clauses, against the insurance company. We have held that the insured is entitled to a favorable interpretation, when there is any ambiguity in the language of a policy. *Bray v. Insurance Co.*, 139 N. O. 390, 51 S. E. 922; *Power Co. v. Casualty Co.*, 153 N. O. 275, 69 S. E. 234; *Vance on Insurance*, 429. Such a claim for construction surely would have been sustained by us, and the present defendant would have secured a benefit thereby for which it would owe the plaintiff the premium now claimed by it. So that defendant had a policy for full insurance, excepting the railway operation, and it must therefore pay the premium thereon as fixed by the rules of the company. It follows that, in any view, the court erred in its decision.

New trial.

(113 S. C. 339)

**McDOWELL v. SOUTHERN RY. CO.**  
(No. 10877.)

(Supreme Court of South Carolina. Feb. 23, 1920.)

**1. MASTER AND SERVANT ⇨288(12)—ASSUMPTION OF RISK OF INJURY FROM CONTACT WITH HIDDEN BARBED WIRE HELD FOR JURY.**

Where the testimony tended to show that it was necessary for railroad bridge hands engaged in tearing down a bridge to run to the place where plaintiff was injured in order to prevent the cap of a bent from falling on them, and that danger arising from a barbed wire was hidden, it was a question for the jury whether plaintiff assumed the risk.

**2. MASTER AND SERVANT ⇨265(2)—MASTER'S LACK OF KNOWLEDGE OF HIDDEN DANGER A MATTER OF DEFENSE.**

The fact that employer may not have had notice of the hidden danger arising from a concealed barbed wire is a matter of defense, and no part of injured employe's cause of action.

**3. MASTER AND SERVANT ⇨180(1)—FELLOW-SERVANT DOCTRINE INAPPLICABLE IN CASE UNDER FEDERAL ACT.**

The fellow-servant doctrine has no application to a case arising under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8666).

**4. NEGLIGENCE ⇨101—CONTRIBUTORY NEGLIGENCE AVAILABLE ONLY IN MITIGATION OF DAMAGES UNDER FEDERAL ACT.**

In a case arising under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8666), the defense of contributory negligence is not available, except in mitigation of damages.

**5. RELEASE ⇨24(2)—PLAINTIFF MAY AVOID RELEASE, WITHOUT REPLY SHOWING RETURN OF CONSIDERATION, WHERE REPLY NOT DEMANDED.**

A defendant in a personal injury suit, who pleads a release as a defense, has right to make motion requiring plaintiff to file a reply stating whether consideration was returned; but, where defendant does not make such motion, plaintiff has the right to offer evidence in avoidance of release, and cannot be nonsuited for failure to return the consideration.

Appeal from Common Pleas Circuit Court of Cherokee County; R. W. Memminger, Judge.

Action by Gilmore McDowell against the Southern Railway Company. Order of nonsuit, and plaintiff appeals. Reversed.

N. W. Hardin, of Blacksburg, for appellant.

Harry E. De Pass, of Spartanburg, for respondent.

**GARY, C. J.** This is an action for damages under the interstate commerce law, and the appeal is from order of nonsuit. The complaint alleges:

"(1) That at the times hereinafter mentioned the defendant was and now is a railroad cor-

poration owning property within the state and now operating freight and passenger trains as a common carrier for hire in Cherokee county, S. C., and other parts of the state, and into and from other states; has a freight and passenger office at Blacksburg, with agents therein. That plaintiff is a resident and citizen of the state.

"(2) That at the times herein mentioned the plaintiff was an employe of the defendant, doing work at all times under the direction of the boss or superior officer of the defendant at various places on its line of road as bridge and trestle hand, and such other work as he was directed to do.

"(3) That while engaged in tearing down some bents of a bridge of the defendant, near Sumter, S. C., on or about March 1, 1916, with rope attached to the cap of said bents, under the direction of the boss in charge, which was very dangerous on account of unusual rough, boggy ground, underbrush, high weeds and grass, an uncovered drain and stream, and rotten timbers in bridge falling around—was being done in a very dangerous place and unsafe place to work. As the cap was being pulled off the bent, plaintiff was instantly forced upon some barbed wire, concealed upon the right of way of the defendant, that plaintiff did not know of, but which the defendant did know of, or by the exercise of due diligence could have known, and plaintiff became entangled in said barbed wire, and his legs and body badly cut, lacerated, and injured, from which he suffered much pain and distress in mind and body, and has ever since so suffered, and was disabled from work in consequence from the 27th of May to the 9th of August, 1916, due to the negligent, reckless, wanton, and willful conduct of the defendant, its servants, and agents as above set forth. \* \* \*

The defendant denied all the allegations of the complaint, except those in the first paragraph, and set up the defenses of contributory negligence, assumption of risk, and that prior to the commencement of the action the plaintiff, in writing, released the defendant from all liability.

At the close of the testimony for the plaintiff, the defendant's attorneys made a motion for a nonsuit; one of the grounds being that there was no negligence, but, if so, it was the negligence of a fellow servant. In disposing of this ground his honor the presiding judge thus ruled:

"This place is where they were repairing a trestle, and taking out old work and putting in new; so there can be no claim about its being unsafe and rotten timber, because that is the work they were engaged in—taking out old timber and putting in new timber. Now, it appears to this court, under the evidence taken in connection with the complaint, that the plaintiff has no cause whatsoever."

The plaintiff testified as follows:

"Q. You say you were hurt where? A. At Sumter, Green Swamp trestle, South Carolina. Q. And you say Mr. Pope, I believe, was foreman there? A. Yes, sir. Q. Tell the jury

how you happened to get hurt; what was the cause of it? A. We set off some bents in the creek parallel with the water, and tied a rope to the cap, and me and several other men were pulling it, and we had to run to keep the cap from falling on us, and we ran into the barbed wire fence, and we ran into the wire fence, and it cut one of them veins in two in my leg, and a place about two inches long. Q. What sort of a place were you working in? A. Right on the side of a swamp—weeds and boggy—about waist high. Didn't any one know the wire was there at all. It was about 50 feet from the trestle, and the cap come over whirling, and we had to get out of the way. Q. Were the timbers you were handling sound? A. Rotting."

Lonnie Moore, a witness for the plaintiff, thus testified:

"Q. What was the cause of his getting hurt, do you know, Will? (Mr. De Pass objects, unless the witness saw the occurrence.) A. I was on top of the trestle, and I had a bar, and Gilmore and them had a rope tied to the cap, and they had a strain on the cap with a rope to keep it from rocking and knocking down another bent. I shoved out, and they had to keep pulling to keep it from falling on another bent, and by them pulling it they had to run away to keep it from falling on them. Q. Had he not run, what would likely to be the result? (Mr. De Pass objects, on the ground that the question is leading.) Q. What kind of a place was it there, Will? A. It was swampy and grown up around there. \* \* \* Q. Why did you have to run? A. To save ourselves, to keep the cap from falling on us. Sometimes, on a high trestle, they fall more than 50 feet from the trestle." (Italics added.)

[1] The testimony tended to show that it was necessary for the plaintiff and the other servants to run to the place where he was injured, in order to prevent the cap from falling on them, and that the danger arising from the wire was not obvious, but hidden. Therefore it was a question for the jury whether the plaintiff assumed the risk of his employment. *Lester v. Railway*, 93 S. C. 395, 76 S. E. 976; *Anderson v. Lumber Co.*, 99 S. C. 100, 82 S. E. 984; *Nelson v. A. G. & P. Co.*, 107 S. C. 1, 92 S. E. 194.

[2] The fact that the defendant may not have had notice of the hidden danger, arising from the wire which was concealed, is a matter of defense, and is no part of plaintiff's cause of action. *Branch v. Railway*, 85 S. C. 405, 14 S. E. 808; *Hicks v. Railway*, 63 S. C. 559, 41 S. E. 753; *Richey v. Railway*, 69 S. C. 387, 48 S. E. 285; *Willis v. Manufacturing Co.*, 72 S. C. 126, 51 S. E. 538; *Grainger v. Railway*, 101 S. C. 73, 85 S. E. 231; *Prince v. Massasoit Co.*, 107 S. C. 387, 93 S. E. 2; *Rikard v. Middleburg Mills*, 101 S. E. 643. None of the cases cited by the respondent's attorney are applicable, as the testimony is to the effect that the place where the plaintiff was at work, was made dangerous by a concealed instrumentality, of which the plaintiff had no notice.

[3, 4] The fellow-servant doctrine has no application to a case arising under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665). Nor is the defense of contributory negligence available, except in mitigation of damages. *Mondon v. Railway*, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44.

The respondent's attorney served the following notice:

"The defendant, upon the appeal of the above-entitled case, will ask the Supreme Court (if they find that they cannot sustain the nonsuit on the ground stated by the circuit judge) to sustain the order of nonsuit upon the following grounds, to wit:

"(1) Because the circuit judge erred at the trial in allowing the plaintiff to amend his complaint in such a way as to bring his causes of action within the terms of the Employers' Liability Act, and thereby allowing him to change the nature of his action in such a way as to defeat the defendant of its defenses of contributory negligence, negligence of a fellow servant, and assumption of risk, as had been set up in its answer.

"(2) Because the circuit judge erred in not sustaining the release interposed by the defendant as to first two causes of action, and in not granting a nonsuit thereon as to them, when the testimony showed that the plaintiff had failed to return the consideration paid for said release before suit was brought.

"(3) Because the circuit judge erred in not granting the nonsuit upon the ground that, if there was any evidence of negligence, such negligence was committed and was the result of the act of a fellow servant, for which the defendant is in no way liable.

"(4) Because the circuit judge erred in not sustaining the motion for a nonsuit upon the ground that whatever injuries plaintiff sustained were the result of risks, which were plain, open, and obvious, and which he assumed when he entered the employment of the master.

"(5) Because the circuit judge erred in not granting the nonsuit upon the ground that the plaintiff was guilty of contributory negligence; the error being that, even if the defendant was negligent, yet the plaintiff himself was guilty of such negligence as contributed as a direct and proximate cause of his injuries."

What we have already said disposes of all these grounds except that numbered (2), which will be considered. When the plaintiff's attorney offered testimony to prove that the release was not valid, the record shows that the following took place:

"The Court: That goes along the time of an effort to compromise or settle this matter. (Argument.)

"Mr. Hardin: I am offering this, showing that this man, when he executed the paper, was deceived. Anything up to the beginning of the action.

"Mr. De Pass: We move to strike all that testimony out, on the ground that it is an effort to show a compromise.

"The Court: Nevertheless, if it tends in any way to show deception, that he was led into this thing, and made to settle the claim for a

grossly inadequate consideration, the jury ought to have that before them, whether this release is a valid one or not. That is one of the defenses of the answer—that he has released his claim."

In ruling upon the grounds of the motion for a nonsuit, his honor thus stated his reasons for refusing the one numbered (2):

"The Court: There is some evidence that this party sent a check to the superintendent and offered to return the money to him.

"Mr. De Pass: After the suit was filed.

"The Court: Yes, sir. Sometimes they don't know, until the answer is out, that the release is going to be put in. I wouldn't consider throwing the case out of court on any such state of facts as that. \* \* \* Now, it appears to this court, under the evidence taken in connection with the complaint, that the plaintiff has no case whatsoever. Of course, I reject the defense absolutely about the release for \$1. I don't think any responsible court or a jury, with a man out of the woods could be held to have signed a release for \$1 for damages. That would not get by in my court."

[5] When the defendant answered the complaint setting up the release as a defense, it had the right to make a motion requiring the plaintiff to file a reply, stating whether the consideration for the release had been returned; and, if it had appeared that the plaintiff had not offered to return the money received by him, then the defendant could have demurred to the reply. But the defendant did not make such a motion, and the plaintiff had the right to offer evidence in denial or avoidance of the release. *Levister v. Railway*, 58 S. C. 508, 35 S. E. 207.

Reversed.

HYDRICK, WATTS, FRASER, and GAGE, JJ., concur.

(112 S. C. 440)

CLINE v. SOUTHERN RY. CO. et al.  
(No. 10392.)

(Supreme Court of South Carolina. March 30, 1920.)

**1. ABATEMENT AND REVIVAL §75(2)—QUESTION OF SURVIVAL ARISES ON MOTION OF ADMINISTRATRIX FOR SUBSTITUTION ON APPEAL.**

The question whether a cause of action survived plaintiff's death, pending an appeal by him from a judgment for defendants, properly arises, and may be determined on the motion of his administratrix for an order of substitution resisted by defendants, who ask leave to file a supplemental answer alleging plaintiff's death, or a remand to permit filing of such answer.

**2. ABATEMENT AND REVIVAL §55(3) — ACTION FOR FRAUD IN PROCURING RELEASE OF CLAIM DOES NOT SURVIVE.**

A cause of action by an injured employe for damages for fraud and deceit by which he

was induced to release his claim for injuries, and accept a contract for permanent employment, which was later broken by the employer, was a cause of action for tort, and did not survive his death pending an appeal by him from a judgment for defendants.

**3. MASTER AND SERVANT §3(1)—CONTRACT OF EMPLOYMENT VOID IF RELEASE FOR WHICH IT WAS PRINCIPAL CONSIDERATION WAS VOID FOR FRAUD.**

Where a contract for permanent employment was the chief consideration for a release of the employe's claim for injuries, the validity of the contract depended on the validity of the release, and, if the release was void for fraud, the contract fell with it.

**4. ELECTION OF REMEDIES §15 — EMPLOYE SUIING FOR INJURIES BARRED FROM SUIING FOR BREACH OF CONTRACT OF EMPLOYMENT CONSTITUTING CONSIDERATION FOR RELEASE.**

Where an injured employe was induced by fraud to release his claim for personal injuries and accept a contract for permanent employment, which the employer later failed to perform, he could either sue for breach of the contract of employment or treat the release and contract as void, and sue for the injury, and was bound to elect, and, having elected to sue for the injuries, was estopped by an adverse judgment in such action from suing for breach of the contract.

Appeal from Common Pleas Circuit Court of York County; Ernest Moore, Judge.

Action by D. J. Cline against the Southern Railway Company and another. From a judgment for defendants, plaintiff appeals. Affirmed.

See, also, 110 S. C. 534, 96 S. E. 532.

J. Harry Foster, of Rock Hill, for appellant.

McDonald & McDonald, of Wyncboro, for respondents.

HYDRICK, J. On September 30, 1913, Cline was seriously and permanently injured while in the service of defendant as a bridge foreman. He was repairing a coal chute, and one of the bents, which he was trying to get into its place, fell on him and crushed or fractured, and possibly dislocated, some of the vertebrae of his spine. For several months he was under treatment of defendant's surgeons. On the last of December the surgeon who last treated him told him that he had no permanent disability; that he would be well in four or five months, and there was no reason why he should not return to his work.

Accordingly he reported to his superior for duty. In compliance with a rule of the company, he was required to release the company from all liability for damages on account of his injury, as a condition of being accepted back into the service; and on January 5, 1914, on payment to him of \$175, he executed

such a release, and was given his former position. He remained in the service until the last of April, 1914, when he was displaced by another employé, who claimed his position under a rule of seniority. He was offered a subforeman's place, but declined it.

In May, 1914, ignoring the release, he sued the company for damages for his injury. Besides other defenses, the company pleaded the release in bar of the action. Cline replied to that plea, and alleged that the release was obtained by fraud, to wit, that the company's surgeon misrepresented to him the nature and extent of his injury, and also that the other agents of the company, who induced him to execute the release, did so by falsely and fraudulently promising to give him permanent employment as a bridge foreman so long as his work was satisfactory; that they made said contract, not intending at the time to perform it, but merely for the deceitful purpose of inducing him to execute the release, and thereby of defrauding him of his right of action; that they also falsely, and for like fraudulent purpose, represented to him that his rank in seniority amongst his fellow employés was such as would entitle him to his position as bridge foreman under the rules of the company; that the contract for permanent employment was the chief consideration which induced him to execute the release. The contract for employment, however, was not mentioned in the release, and the only consideration therein expressed was the payment to Cline of the sum of \$175.

That case was tried and resulted in a judgment of nonsuit, which was affirmed by this court, on the ground that Cline's own testimony affirmatively showed that his injury was caused by his own fault, and therefore the company was not liable. 101 S. C. 493, 86 S. E. 17.

Cline then brought this action, setting out in his complaint two causes of action—the first for damages for fraudulent breach of the alleged contract of permanent employment; and the second for damages for the fraud and deceit by which he was induced to make the contract and execute the release. Defendant's demurrer to his complaint and to each of the causes of action therein stated was overruled by this court. 110 S. C. 534, 96 S. E. 532. Defendant then answered, and denied the charges of fraud and the making of the alleged contract for permanent employment, and again pleaded the release in bar of the action, and Cline again replied to that plea, as he did in the first action. Defendant also pleaded the first action as an adjudication of its nonliability for Cline's personal injury, and as an election by Cline, after full knowledge of all the facts, to repudiate the release and alleged contract for permanent employment, and rely upon his right of action for his personal injury.

After all the evidence had been taken, in-

cluding the record and judgment in the first action, defendant moved the court to require Cline to elect upon which cause of action he would ask for judgment, and he elected the second cause of action. Defendant then moved for a directed verdict on that cause of action, and the motion was granted, on the ground that, as it appeared from the testimony in this case and also from the judgment in the first case that Cline had no cause of action against defendant for his personal injury, the fraud and deceit, if any, in procuring the release of defendant from liability therefor, caused him no damage. Judgment went accordingly, and Cline appealed.

[1] Pending the appeal Cline died intestate, and his widow was appointed administratrix of his estate. On the call of the case in this court, his administratrix moved for an order of substitution and that she be allowed to prosecute the action. Defendant resisted the motion on the ground that the cause of action did not survive; and defendant also moved for an order remanding the case to the circuit court for the purpose of allowing it to apply to that court for leave to file a supplemental answer, alleging Cline's death and the nonsurvival of the cause of action, or else that this court allow the filing of such an answer. The issue properly arises and may be determined on the motion of the administratrix for an order of substitution; defendant's affidavit and proposed supplemental answer being considered as reasons for the refusal of her motion.

[2] The motion should be refused on the ground that the cause of action does not survive. It belongs to that class of actions for damages for tort which under the rules of the common law does not survive. *Huff v. Watkins*, 20 S. C. 477; *Jenkins v. Bennett*, 40 S. C. 393, 18 S. E. 929. The fact that there are allegations in the second cause of action about the release and the contract for permanent employment and the breach thereof does not give that cause of action even the semblance of one on contract. The thing complained of and for which damages were sought was the practicing of fraud and deceit upon plaintiff, whereby he was induced to make the contract and execute the release of a supposed right. Plaintiff was not suing to set aside the release so that he might pursue the right released, nor was he complaining of any breach of contract—that was the gravamen of the first cause of action—but his complaint in the second cause of action was solely about the wrong done him, and for that alone he sought damages. Such an action falls within the principle of the cases above cited, and does not come within the exception there stated, to wit, that the action does not abate when the wrong complained of has resulted in some gain or advantage to the estate of the wrongdoer.

As the exceptions challenge the ruling of the court as to the fact and effect of Cline's election at the trial in this case to ask for judgment only on the second cause of action, it becomes necessary to decide the issues so made; for, although the second cause of action died with Cline, the first did not, as that was an action for damages for the breach of the alleged contract for permanent employment.

[3, 4] According to Cline's testimony, the contract for employment was the chief consideration for the release. Therefore the validity of that contract depended upon the validity of the release. If the release was void for fraud, the contract fell with it. Now, when the company breached the alleged contract for employment, Cline had one of two remedies; he had the right to sue for damages for the breach of the contract for employment, or to treat the release and contract as void, and sue for damages for his injury. But clearly he did not have the right to pursue both remedies, for they are inconsistent, since the first affirms the validity of the release and contract, and the second asserts their invalidity.

The law is well settled that in such circumstances a party must elect which remedy he will pursue; and it is equally well settled that, once he has made his election with full knowledge of the facts, he is bound by it, no matter what the result may be, and he cannot afterwards have recourse to the other remedy, if the one chosen proves to be fruitless. Now, with full knowledge of the facts, as appears from the pleadings in the first action, Cline elected to treat the contract and release as void, and rely on his right of action for damages for his personal injury. By that action he impliedly and expressly repudiated the release and contract. Having thereby asserted their invalidity, he could not afterwards be allowed to maintain an action for damages for the breach of the contract, which is necessarily based upon its validity. *Harrison v. Lynes*, 36 S. C. 596, 15 S. E. 335.<sup>1</sup>

The case of *Hughes v. Railway*, 92 S. C. 1, 75 S. E. 214, is directly in point, and really conclusive of the question. In that case plaintiff first sued for damages for the breach of a contract of employment alleged to have been made at the time of his execution of a release of defendant from liability for damages for a personal injury very much like the contract in this case is alleged to have been made. After judgment of nonsuit on that cause of action, he brought a second action for damages for his injury, and the defendant pleaded the first action in bar of the second, and the plea was sustained, on the ground

that the bringing of the first action based on the validity of the release was an election, and therefore a bar to the second, which was based on its invalidity.

Having voluntarily made his election, after full knowledge of the facts, by bringing his action for damages for his personal injury, Cline was estopped by the judgment in that action from suing for damages for breach of the contract which he had repudiated as invalid in his first action. Hence it makes no difference whether he should have been or was required to elect between the first and second causes of action set out in the complaint in this action, as he had already made an election which barred his first cause of action.

The first cause of action having been barred, and the second having abated by the death of Cline, it follows that the motion of his administratrix should be refused, and the appeal herein should be dismissed, and it is so ordered, and the judgment below is affirmed.

GARY, C. J., and WATTS, FRASER, and GAGE, JJ., concur.

(113 S. C. 378)

HOME BANK OF LEXINGTON v. FOX  
(FOX et al., Interveners). (No. 10389.)

(Supreme Court of South Carolina. March 29, 1920.)

1. EXECUTION  $\S$  41—NO LEVY ON CONTINGENT INTEREST UNDER TRUST.

Execution cannot be levied on a contingent interest of the debtor under a testamentary trust.

2. DEEDS  $\S$  105—WHERE GIFT IS TO CLASS ONLY THOSE WITHIN IT CAN TAKE.

Where a gift is to a class, only those falling within the class can take.

3. DEEDS  $\S$  133(2)—CHILDREN OF BENEFICIARY OF TRUST HELD NOT TO HAVE VESTED INTEREST.

Where land was conveyed in trust for the grantor's son and his wife with directions that at the death of both, the property should be conveyed to the lawful children of the son freed from all trust, but in event any children should die leaving issue such issue should take, with further provisions that on the death of the son his wife should take, a child did not acquire a vested interest on the death of his father.

Appeal from Common Pleas Circuit Court of Lexington County; T. J. Mauldin, Judge.

Action by the Home Bank of Lexington against Alfred J. Fox, in which Ella V. Fox and others intervened. From a judgment for plaintiff, interveners appeal. Reversed.

<sup>1</sup> Reported in full in the Southeastern Reporter; reported as a memorandum decision without opinion in 36 S. C. 596.

J. W. Thurmond, of Edgefield, and Efrd & Carroll, of Lexington, for appellants.

Timmerman, Graham & Callison, of Lexington, for respondent.

FRASER, J. John Fox conveyed certain property to A. J. Norris, upon the following trusts:

"In trust, nevertheless, for the use, benefit, and behoof of my son, John Jesse Fox, and his wife and children, the estate conveyed and the rents, issues, and profits and interest thereon not to be in any manner subject to the debts or liabilities of the said John J. Fox. The cash amount herein conveyed is to be invested by the said trustee in good, safe securities and reinvested from time to time as occasion may require. The said John J. Fox and his wife, Ella V., are to be permitted to use and occupy said lands and to receive and appropriate the rents, issues, and profits arising therefrom and from the cash amount of seven hundred and sixty-seven dollars herein conveyed to the support of themselves and children and to the education of their children during the term of their joint lives and during the life of the survivor of them. After the death of the said John J. Fox and his wife, Ella V., the trust estate herein mentioned is to be conveyed and paid over by the trustee to the lawful children of the said John J. Fox, freed from all trust; if any of their children die before that time leaving child or children then living, such child or children to take the parent's share. If the said Ella V. should survive the said John J. Fox and marry again, then upon her second marriage the trust estate herein is to be conveyed by the said trustee to the lawful children of the said John J. Fox freed from all trust. If any of his children die before that time leaving a child or children then living, such a child or children to take the parent's share.

"The said trustee is hereby authorized and empowered, with the consent in writing of the said John J. Fox and his wife, Ella V., or the survivor of them, if he is satisfied that the same will be to the advantage, to sell any or all of the real estate herein conveyed to him and reinvest the proceeds arising from such sale in other real estate more suitable for the needs of the said John J. Fox and his wife and children, such substituted real estate to be held by the said trustee upon the same conditions as the lands herein conveyed. The said trustee is hereby authorized, with the consent of the said John J. Fox and his wife, Ella V., or the survivor of them in writing, to invest the cash amount herein conveyed to him in some suitable real estate and hold the same for them subject to the same trust conditions and limitations as are stipulated herein conveyed to him."

John J. Fox died, leaving his widow, Mrs. Ella V. Fox, his children, Alfred J. Fox, Mrs. Emily Fox Wingard, James H. Fox, John S. Fox, and Miss Beulah Fox. Miss Beulah Fox has died since her father, without issue and unmarried. Mrs. Ella V. Fox is still living.

[1] Alfred J. Fox became indebted to the plaintiff bank and went away from the state. The bank obtained a judgment against him and undertook to attach the interest of Alfred

J. Fox in the trust property and sell it to satisfy the judgment. Mrs. Ella V. Fox and her other living children intervened and set up that the interest of Alfred J. Fox was a contingent interest, and not subject to attachment, levy, and sale. On the trial of the case in the court of common-pleas, it was correctly held that, if the interest of Alfred J. Fox was a contingent interest, then it was not subject to attachment, levy, and sale, but that, if said interest was vested, then it was. The court held that Alfred J. Fox took a vested, and not a contingent, interest, and it was subject to attachment, levy, and sale. From this latter holding this appeal is taken.

The cases upon this subject are too numerous to be the subject of review, even if it would be profitable, but it would not.

[2, 3] The case of Faber v. Police, 10 S. C. 387, is relied upon to sustain the holding that Alfred J. Fox took a vested remainder, and the citation there is as follows:

"According to the elementary writers a vested remainder is one which is limited to an ascertained person in being, whose right to the estate is fixed and certain, and does not depend upon the happenings of any future event, but whose enjoyment in possession is postponed to some future time. A contingent remainder, on the other hand, is one which is limited to a person not being or not ascertained, or, if limited to an ascertained person, it is so limited that his right to the estate depends upon some contingency in the future. So that the most marked distinction between the two kinds of remainders is that in one case the right to the estate is fixed and certain, though the right to the possession is deferred to some future period; while in the other the right to the estate as well as the right to the possession of such estate is not only deferred to a future period, but is dependent upon the happenings of some future contingency."

A careful comparison between the provisions of this deed and the citations from Faber v. Police will show that the citation does not sustain the holding.

If Alfred J. Fox shall marry and die without issue, then at his mother's death, in the first instance, the property is to be divided among the children of John J. Fox. The wife of Alfred J. Fox would take nothing. If the remainder were a vested remainder, then his widow would have taken. Except for a subsequent provision, his issue could take nothing. The subsequent provision is there and substituted, not the "heirs", but "issue" of Alfred J. Fox. The rule is that, where the gift is to a class, then only those who come within the class can take. This rule is too well known to demand the citation of authority. The language here is plain:

"After the death of John J. Fox and his wife, Ella V., the trust estate herein mentioned is to be conveyed and paid over by the trustee to the lawful children of the said John J. Fox, freed from all trusts." (Italics ours.)



—only substituting issue for a deceased child. It is said that there was a present enjoyment by the children. The income was to be paid to John J. Fox and Ella V. Fox or the survivor, and not to the children. The enjoyment of the children was indirect only. The object of the trust was his son and his family, and, after that object had been accomplished, then the estate was turned loose to the children, with a substitution of the child or children of a deceased child for its parent at the time of distribution. The interest of Alfred J. Fox is clearly contingent upon his survival of both John J. and Ella V. Fox, and Ella V. is still alive. The interest is contingent and not the subject of levy and sale.

The judgment is reversed.

HYDRICK and WATTS, JJ., concur.

GAGE, J. I concur in the leading opinion; but I am not to be understood as holding that the contingent estate of Alfred is out of the reach of his creditors in a proper forum. *Rice v. Burnett*, Speers Eq. 587, 42 Am. Dec. 336; *Pomeroy's Eq.* § 1285 et seq.

GARY, C. J. (concurring). Alfred J. Fox took a vested remainder, with the right of possession postponed, until the death of the surviving life tenant. His vested remainder was subject to be defeated by his death, prior to that of the surviving life tenant leaving child or children who would take his share by substitution. *Gourdin v. Deas*, 27 S. C. 479, 4 S. E. 64; *Woodley v. Calhoun*, 69 S. C. 285, 48 S. E. 272; *Pearson v. Easterling*, 107 S. C. 265, 92 S. E. 619, Ann. Cas. 1918D, 980. The interest of Alfred J. Fox was not subject to execution. *White v. Kavanagh*, 8 Rich. 377; *Bristow v. McCall*, 16 S. C. 545.

(25 Ga. App. 62)

TRUITT v. RUST & SHELburne SALES CO. (No. 10883.)

(Court of Appeals of Georgia, Division No. 2, March 11, 1920.)

(Syllabus by the Court.)

1. SALES §418(2, 12)—DAMAGES FOR SELLER'S FAILURE TO DELIVER; PROFITS ON BUYER'S RE-SALE NOT RECOVERABLE UNLESS SELLER KNEW OF CONTRACT TO RESELL.

In a purchaser's suit for damages because of failure of the seller to deliver the goods contracted for in accordance with the terms of the contract of sale, generally the measure of damages is the difference between the contract price and the market price at the time and place of delivery. *Sizer v. Melton*, 129 Ga. 143, 58 S. E. 1055 (7); *Hardwood Lumber Co. v. Adam*, 134 Ga. 821, 68 S. E. 725, 82 L. R. A. (N. S.) 192 (1); Civ. Code 1910, § 4131. "The purchaser of goods cannot recover of the seller

damages for nondelivery, measured by his profits on a particular contract of resale and by his losses on account of inability to perform that contract, unless the seller at the time of making the contract of sale had notice of such contract of resale." *Wappoo Mills v. Guano Co.*, 91 Ga. 396, 18 S. E. 308; *Hardwood Lumber Co. v. Adam*, 134 Ga. 821, 68 S. E. 725, 82 L. R. A. (N. S.) 192.

2. PLEADING §193(8)—WHERE SPECIAL DAMAGES SUED FOR ARE NOT RECOVERABLE, SUIT IS NOT MAINTAINABLE.

Where the petition cannot be construed as asking for general or nominal damages, but is expressly limited to a prayer for special damages only, and these are not recoverable, the suit is not maintainable, and is subject to be dismissed on demurrer. *Sparks Milling Co. v. Western Union Tel. Co.*, 9 Ga. App. 728, 72 S. E. 179; *Hadden v. Southern Messenger Service*, 135 Ga. 372, 69 S. E. 480.

Error from City Court of La Grange; E. T. Moon, Judge.

Action by Alf Truitt against the Rust & Shelburne Sales Company. Petition dismissed on demurrer, and plaintiff brings error. Affirmed.

M. U. Mooty, of La Grange, for plaintiff in error.

Hatton Lovejoy, of La Grange, and Little, Powell, Smith & Goldstein, of Atlanta, for defendant in error.

JENKINS, P. J. Judgment affirmed.

STEPHENS and SMITH, JJ., concur.

(25 Ga. App. 74)

GODWIN v. ALLMAN. (No. 11016.)

(Court of Appeals of Georgia, Division No. 2, March 11, 1920.)

(Syllabus by the Court.)

1. LANDLORD AND TENANT §326(2)—CROPPER CANNOT DISPOSE OF CROP BEFORE LANDLORD RECEIVES HIS PART.

Where the relation of landlord and cropper exists, the title to the crop raised upon the premises is in the landlord, and under the law the cropper cannot, without the consent of the landlord, sell or otherwise dispose of any part of the crop grown by him before the landlord has received his part of the entire crop.

2. AMENDMENTS TO PETITION; STRIKING SECTIONS OF ANSWER.

The court did not err in allowing the two amendments to the plaintiff's petition, nor in striking subsections (a), (d), (f), and (g) of paragraph 5 of the defendant's answer, as these sections were subject to the demurrer interposed by the plaintiff.

3. CHARGE OF COURT.

The excerpts from the charge of the court complained of in the second and third grounds

of the amendment to the motion for a new trial do not contain reversible error.

#### 4. REFUSAL OF CHARGE.

The court did not err in refusing to give in charge the request in writing by the defendant set out in the fourth ground of the amendment to the motion for a new trial.

#### 5. APPEAL AND ERROR §1140(5)—WHERE INTEREST WAS ERRONEOUSLY AWARDED, AN AFFIRMANCE, WITH DIRECTION TO WRITE OFF INTEREST, ORDERED.

There was evidence to support the verdict; but the judgment entered up by the plaintiff's attorney was not in accordance with the verdict, as it included "legal interest accrued" in addition to the sum found by the jury. It is therefore ordered that the judgment be affirmed, with direction that it be amended by writing off the "legal interest accrued."

Error from Superior Court, Chattooga County; Moses Wright, Judge.

Action by W. O. Allman against W. C. Godwin. Judgment for plaintiff, motion for new trial denied, and defendant brings error. Affirmed, with direction.

Wesley Shropshire, of Summerville, for plaintiff in error.

Lee J. Langley, of Rome, for defendant in error.

SMITH, J. Judgment affirmed, with direction.

JENKINS, P. J., and STEPHENS, J., concur.

(25 Ga. App. 63)

HINES, Director General of Railroads, v. WILSON. (No. 10889.)

(Court of Appeals of Georgia, Division No. 2. March 11, 1920.)

#### (Syllabus by the Court.)

##### 1. SUFFICIENCY OF PETITION.

The petition as amended was good as against both the general and special demurrers, and the court did not err in overruling the same.

##### 2. HIGHWAYS §1—THOROUGHFARE WHICH PUBLIC HAS RIGHT TO USE IS A "HIGHWAY."

"Every thoroughfare which is used by the public and in common to all the public, and which the public has the right to use, is a highway." *Southern Ry. Co. v. Combs*, 124 Ga. 1004, 53 S. E. 508 (1).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Highway.]

##### 3. HIGHWAYS §1, 18—METHODS OF ESTABLISHMENT.

"A highway may have its origin in a legislative act, or in the order of a court of com-

petent jurisdiction, or may come into existence by dedication or by prescription." *Southern Ry. Co. v. Combs*, 124 Ga. 1004, 53 S. E. 508 (2).

##### 4. TRIAL §295(1)—CHARGES NEED NOT BE UNDULY ELABORATE.

"While in some particulars certain excerpts from the charge of the court which were assigned as error in some of the grounds of the motion for a new trial are subject to criticism, yet, when the charges to which exceptions were taken are read in connection with the evidence and the entire charge, none of them contain errors requiring a reversal; nor are they of a character which renders their separate discussion necessary or beneficial. Mere space-consuming elaboration is not always necessary or desirable." *Ferguson v. Wescott*, 145 Ga. 276, 83 S. E. 932 (1).

##### 5. TRIAL §260(1)—CHARGE COVERED BY THAT GIVEN PROPERLY REFUSED.

In view of the charge given by the court and in the light of the evidence, the court did not err in refusing to give the several instructions requested by the defendant.

##### 6. RAILROADS §324(3)—PASSENGER IN UNLICENSED AUTOMOBILE MAY RECOVER FOR INJURIES ON DEFECTIVE CROSSING.

Where a passenger in an automobile is injured by reason of the negligence of a railway company in failing to keep its crossing in repair, the mere fact that the vehicle has not been registered in the office of the secretary of state, and a license obtained, and a license fee paid as required by law (*Georgia Laws Ex. Sess. 1915, p. 107*), will not render the person so injured a trespasser, and bar her right of recovery against the railway company for negligence. See *Central of Georgia Ry. Co. v. Moore*, 149 Ga. —, 102 S. E. 168.

##### 7. NEW TRIAL §70—PROPERLY REFUSED WHERE EVIDENCE SUPPORTED VERDICT.

The evidence was sufficient to support the verdict, and there was no error in refusing to grant the motion for a new trial.

Error from Superior Court, Henry County; W. E. H. Searcy, Jr., Judge.

Action by Shirley Wilson, by next friend, against W. D. Hines, Director General of Railroads. Judgment for plaintiff, motion for new trial denied, and defendant brings error. Affirmed.

E. M. Smith and Paul Turner, both of McDonough, and Harris, Harris & Witman, of Macon, for plaintiff in error.

Reagan & Reagan, of McDonough, for defendant in error.

SMITH, J. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(25 Ga. App. 64)

**HINES, Director General of Railroads, v. SWINT.** (No. 10888.)(Court of Appeals of Georgia, Division No. 2.  
March 11, 1920.)*(Syllabus by the Court.)*

FOLLOWED CASE.

The ruling in the case of Hines, Director General, v. Wilson, 102 S. E. 646, this day decided, is controlling in this case.

Error from Superior Court, Henry County; W. E. H. Searcy, Jr., Judge.

Action by Lucile Swint, by next friend, against W. D. Hines, Director General of Railroads. Judgment for plaintiff, and defendant brings error. Affirmed.

E. M. Smith and Paul Turner, both of McDonough, and Harris, Harris &amp; Witman, of Macon, for plaintiff in error.

Reagan &amp; Reagan, of McDonough, for defendant in error.

SMITH, J. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(25 Ga. App. 90)

**METROPOLITAN LIFE INS. CO. v. HAND et al.** (No. 10900.)(Court of Appeals of Georgia, Division No. 2.  
March 18, 1920.)*(Syllabus by the Court.)*

APPEAL AND ERROR ⇐1001(1)—EVIDENCE ⇐340(1)—INSURANCE ⇐659(1)—JUDGMENT ⇐648—TRIAL ⇐66—VERDICT MAY BE RENDERED ON SWORN TESTIMONY OF PLAINTIFF; CONVICTION OF VOLUNTARY MANSLAUGHTER OF INSURED WOULD NOT EXCLUDE BENEFICIARY'S TESTIMONY THAT KILLING WAS ACCIDENTAL; ADMISSIBILITY OF EVIDENCE OF PLAINTIFF'S CONVICTION AND SENTENCE FOR KILLING INSURED; REOPENING CASE IN DISCRETION OF COURT.

This court cannot say, as a matter of law, that the jury was not authorized to find the verdict rendered, since it is supported by the sworn testimony of the plaintiff, which they had a right to accept and believe. The fact that in a criminal proceeding the beneficiary named in the policy sued on had been convicted of voluntary manslaughter for the felonious killing of his wife, who was the assured named in the policy, would not prevent the jury in this proceeding from accepting his sworn testimony to the effect that such killing by him was accidental and unintentional. The refusal of the trial court to admit in evidence a certified copy of the indictment, verdict, and sentence in the criminal case, in support of the coroner's verdict (which latter was admitted in evidence under the terms of the policy), was not erroneous. *Cottingham v. Weeks*, 54 Ga. 275; *Tumlin v. Parrott*, 82 Ga. 732, 9 S. E. 718(2); *Seaboard Air Line Railway v. O'Quin*, 124 Ga. 357, 52 S. E. 427(3), 2 L. R. A. (N. S.) 472; *Powell v. Wiley*, 125 Ga. 823, 54 S. E. 732 (1). Nor was error committed in allowing testimony tending to show the general good character of the plaintiff, although unimpeached; since the nature of the action, and the affirmative defense set up thereto by the defendant, necessarily involved the same. Civ. Code 1910, § 5745; *German-Amer. Mutual Life Association v. Farley*, 102 Ga. 720, 29 S. E. 615 (5). The court did not abuse his discretion in reopening the case in order to permit the plaintiff to introduce an additional witness to testify concerning one of the issues in the case.

board Air Line Railway v. O'Quin, 124 Ga. 357, 52 S. E. 427(3), 2 L. R. A. (N. S.) 472; Powell v. Wiley, 125 Ga. 823, 54 S. E. 732 (1). Nor was error committed in allowing testimony tending to show the general good character of the plaintiff, although unimpeached; since the nature of the action, and the affirmative defense set up thereto by the defendant, necessarily involved the same. Civ. Code 1910, § 5745; German-Amer. Mutual Life Association v. Farley, 102 Ga. 720, 29 S. E. 615 (5). The court did not abuse his discretion in reopening the case in order to permit the plaintiff to introduce an additional witness to testify concerning one of the issues in the case.

Error from City Court of La Grange; E. T. Moon, Judge.

Action by William Hand and others against the Metropolitan Life Insurance Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

Battle &amp; Hollis, of Columbus, for plaintiff in error.

M. U. Mooty, of La Grange, for defendants in error.

JENKINS, P. J. Judgment affirmed.

STEPHENS and SMITH, JJ., concur.

(25 Ga. App. 81)

**WOOTEN v. DOSS et al.** (No. 10903.)(Court of Appeals of Georgia, Division No. 2.  
March 18, 1920.)*(Syllabus by the Court.)*

ACTION ⇐65—SUBROGATION ⇐14(3)—SUBSEQUENT PURCHASER, PAYING UNAUTHORIZED MORTGAGE, HELD NOT ENTITLED TO SUBROGATION, NOR TO RIGHTS ARISING AFTER SUIT.

Wooten sued J. L., N. C., J. C., and F. C. Doss, alleging that he had bought certain land from J. L. and N. C. Doss, through their attorneys in fact, J. C. and F. C. Doss, under representations to the effect that the property was free of liens, whereas in fact there existed at the time of the purchase a mortgage lien upon the purchased property, which the plaintiff found necessary to pay, and had actually paid, in order to protect his title. Plaintiff says that he is entitled to be subrogated to all the rights of the mortgagee under the mortgage, and asks judgment against each of the defendants. The record as amended shows that the mortgage referred to was executed by the said attorneys in fact under an ordinary power of attorney specifically authorizing them, as such attorneys in fact, to execute a bond for title or deed of conveyance to the land mentioned, and to sign receipts for the purchase money paid therefor. No authority to create a lien on the said property is made to appear. Defendants demurred to the suit on various grounds, and, upon the demurrer being sustained, the action was dismissed. Held, it appearing that the mortgage was executed without legal authority, under

the allegations of the petition it did not constitute a valid lien on the property as against the plaintiff, and therefore it was not incumbent upon the plaintiff to discharge the same, as he alleges in his petition it was necessary for him to do. The fact that, subsequent to the filing of this suit, one of the defendants, who had owned an interest in the land, signed a cancellation of the power of attorney referred to, in which cancellation he referred to the previous grant of authority as including the right to create mortgages, would not affect the rights of the plaintiff in this suit, or operate to thus subsequently endow the suit with a valid cause of action which did not exist at the time it was instituted.

Error from Superior Court, Floyd County; W. J. Nunnally, Judge.

Action by T. K. Wooten against N. C. Doss and others. Demurrer to petition sustained, and action dismissed, and plaintiff brings error. Affirmed.

F. W. Copeland and Maddox & Doyal, all of Rome, for plaintiff in error.

W. B. Mebane, Barry Wright, and Harris & Harris, all of Rome, for defendants in error.

JENKINS, P. J. Judgment affirmed.

STEPHENS and SMITH, JJ., concur.

(25 Ga. App. 101)

PIERCE et al. v. SMITH. (No. 11153.)

(Court of Appeals of Georgia, Division No. 2  
March 18, 1920.)

(Syllabus by the Court.)

EXECUTORS AND ADMINISTRATORS §17(7)—CHILDREN OF INTESTATE'S DECEASED BROTHER HAVE ONLY ONE VOTE IN SELECTION OF ADMINISTRATOR.

In a contest as to the selection of an administrator, where the deceased person left no children, but left several sisters and the children of two deceased brothers as his heirs at law, the children of a deceased brother would together have one vote, but only one, in the selection of the administrator. See Civ. Code 1910, § 3931, and section 3943, subsecs. 2 and 3; *Mattox v. Embry*, 131 Ga. 283, 287, 62 S. E. 202.

Error from Superior Court, Pulaski County; E. D. Graham, Judge.

Contest as to the selection of an administrator between Mrs. Chester Pierce and others and Elizabeth Smith. Judgment for the latter, and the former bring error. Affirmed.

H. F. Lawson, of Hawkinsville, for plaintiffs in error.

H. E. Coates, of Hawkinsville, for defendant in error.

SMITH, J. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(25 Ga. App. 79)

CARTER v. NORTON. (No. 11036.)

(Court of Appeals of Georgia, Division No. 2  
March 11, 1920.)

(Syllabus by the Court.)

1. LIBEL AND SLANDER §123(7)—EVIDENCE WARRANTING SUBMISSION OF ISSUE OF JUSTIFICATION.

Where a defendant in a suit for slander pleads justification, admitting that he used substantially the language set out in the plaintiff's petition, and there is evidence to sustain such plea, the court did not err in submitting that issue to the jury.

2. LIBEL AND SLANDER §101(1), 112(1, 3)—DEGREE OF PROOF REQUIRED TO ESTABLISH PLEA OF JUSTIFICATION STATED.

"In all civil cases the preponderance of testimony is considered sufficient to produce mental conviction." Civil Code (1910) § 5730.

(a) "In an action for slander, where the language alleged to have been used imputes to the plaintiff guilt of an indictable offense, he establishes a prima facie case upon proof that the slanderous language, substantially as alleged in the petition, was used by the defendant; and, without more, the plaintiff is presumed to be innocent of the crime charged." *Redfearn v. Thompson*, 10 Ga. App. 550, 73 S. E. 949 (1).

(b) Therefore, in order to sustain his plea of justification, it was not incumbent upon the defendant to prove beyond a reasonable doubt the truth of the language set out in the petition; but it was sufficient to authorize a verdict in his favor if he substantially proved by a preponderance of the testimony the truth of the language alleged as slanderous, and it was not error for the court so to charge the jury.

3. APPEAL AND ERROR §1005(2)—VERDICT AFFIRMED BY TRIAL COURT CONCLUSIVE.

The preceding rulings having decided adversely to the plaintiff in error all the points made and insisted upon in special grounds of his motion for a new trial, and there being some evidence to sustain the verdict, the action of the trial judge in refusing a new trial must be affirmed.

Error from City Court of Valdosta; J. G. Cranford, Judge.

Action between R. E. Carter and C. S. Norton. Judgment for the latter, motion for new trial denied, and the former brings error. Affirmed.

Dan R. Bruce, of Valdosta, for plaintiff in error.

E. K. Wilcox, of Valdosta, for defendant in error.

SMITH, J. Affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(127 Va. 47)

FOURTH NAT. BANK OF MONTGOMERY,  
ALA., v. BRAGG.(Supreme Court of Appeals of Virginia. March  
18, 1920.)1. CARRIERS ⇐59—TRANSFER OF BILL OF  
LADING VESTS TITLE IN TRANSFEREE.

A bona fide assignment or transfer of a bill of lading vests in the assignee or transferee the title of the shipper to the goods covered by the bill.

2. CARRIERS ⇐59—BANK TAKING ASSIGN-  
MENT OF BILL OF LADING AND PAYING DRAFT  
ACQUIRES TITLE.

Where a bank takes an assignment of a bill of lading and pays the accompanying draft of the shipper for the value of the goods, the bank thereby becomes a bona fide holder, and no attachable interest in the goods or the proceeds remains in the shipper.

3. BANKS AND BANKING ⇐127—DRAFT AC-  
COMPANIED BY BILL OF LADING DEPOSITED  
AS CASH WITHOUT AGREEMENT PASSES TITLE.

Where a draft accompanied by a bill of lading is deposited as cash and placed to the depositor's credit without any agreement to the contrary, the bank acquires title both under the law of Virginia and under that of Alabama.

4. BANKS AND BANKING ⇐127—TITLE TO  
DRAFT DEPOSITED IN STATE IN WHICH DRAWN  
GOVERNED BY LAW OF THAT STATE.

Where a draft drawn in Alabama on a party in Virginia was deposited by the drawer in an Alabama bank, the bank's title to the draft and its proceeds were governed by the law of Alabama.

5. TRIAL ⇐136(4)—FOREIGN LAWS A QUES-  
TION OF FACT, BUT INTERPRETATION A QUES-  
TION OF LAW.

The question of what is the law of another state is one of fact, but the interpretation of a foreign statute or judicial decision is a question of law.

6. COURTS ⇐108—DECISIONS OF ANOTHER  
STATE MAY BE LOOKED TO IN INTERPRET-  
ING DECISIONS IN EVIDENCE.

While a foreign judicial decision, not introduced in evidence, may not be resorted to as evidence, it may be looked to as an authoritative statement of legal principles for the guidance of the court in the interpretation of the decisions which were introduced in evidence.

7. BANKS AND BANKING ⇐127—TITLE TO  
DRAFT DEPOSITED NOT AFFECTED BY RECOURSE  
ON DEPOSITOR.

A bank's title to a draft deposited as cash and placed to the credit of the depositor is not affected by the bank's right of recourse on the depositor, if the drawee fails to pay the draft.

8. BANKS AND BANKING ⇐127—TITLE TO  
DRAFT DEPOSITED NOT AFFECTED BY RESTRICT-  
TIVE FORM OF BANK'S INDORSEMENT.

A bank's title to a draft deposited as cash and placed to the credit of the depositor was not affected by the form of its indorsement, which stated that it indorsed solely for collec-

tion, and that it did not guarantee the title, possession, delivery, quantity, quality, or condition of the goods covered by an attached bill of lading.

9. APPEAL AND ERROR ⇐1175(5)—ON REVER-  
SAL COURT WILL RENDER JUDGMENT WHERE  
FACTS ARE DULY DEVELOPED.

Under Code 1919, § 6365, requiring the appellate court to enter such judgment as to it seems right and proper, and providing that civil cases shall not be remanded for new trial, except where the ends of justice require it, the court, on reversing a judgment, will enter judgment for appellant, where the facts are fully before the court, and there is no reason to suppose that any new or different evidence might be introduced affecting the result.

Error to Circuit Court of City of Rich-  
mond.

Action by W. G. Bragg against W. F. Covington, in which the Fourth National Bank of Montgomery, Ala., intervened. Judgment for plaintiff, and intervener brings error. Reversed, and judgment entered for the intervener.

George Bryan, of Richmond, for plaintiff in error.

A. H. Sands, of Richmond, for defendant in error.

KELLY, P. On December 7, 1917, W. F. Covington, trading as Covington Manufacturing Company, at Montgomery, Ala., drew a sight draft for \$1,740.21 on Manchester Mills, Richmond, Va., and attached thereto a bill of lading for a shipment of corn. This draft, with the bill of lading attached, was deposited by Covington in the Fourth National Bank of Montgomery, where he had a regular account. The item was not entered for collection, but was treated as cash, and along with other cash items deposited at the same time (the total deposit being \$1,875.23) was placed immediately to Covington's credit and subject to his check. His account at the bank continued thereafter in the usual course of such accounts until some time in April, 1918, when it became overdrawn and was discontinued. In the meantime, however, although the account had been active and Covington's balance at times substantial, the balance had fluctuated, and shortly after the deposit of the draft above mentioned, to wit, on December 11, 1917, the balance was reduced to about \$600, on December 15 to about \$300, and on January 14, 1918, to less than \$25. It thus appears that to all substantial intents and purposes the full amount placed to his credit on account of the draft was paid out upon his checks.

It was the custom and usage of the banks in Montgomery to take out-of-town drafts as cash, giving the depositor credit therefor and allowing him to check upon the amount at once; but in such cases the deposit had first

to be approved by some officer of the bank authorized for that purpose. In this case the deposit appears to have been approved by the cashier of the bank, an officer having such authority. It was always understood that, if such drafts were not paid by the drawee, they would be charged back, or the depositor otherwise held ultimately liable therefor.

The draft was forwarded by the bank to its correspondent, the American National Bank, in Richmond, by which it was presented, and, after the deduction of a small amount, which was authorized by the bank, with the approval of Covington, the same was paid on February 2, 1918, there having been some delay and negotiations with reference thereto between its presentation and payment.

The day the draft was paid to the American National Bank, the proceeds were attached by W. G. Bragg for the satisfaction of an unliquidated demand against Covington which he was then asserting in a foreign attachment proceeding in the circuit court of the city of Richmond. The Fourth National Bank intervened by petition, claiming to have been the holder in due course of the draft, and as such the owner of the proceeds of the bill of lading. The case was tried by the court and a jury. There was a verdict and judgment in favor of Bragg, and the case is here upon a writ of error.

[1, 2] It is a platitude of the law merchant that a bona fide assignment or transfer of a bill of lading vests in the assignee or transferee the title of the shipper to the goods covered by the bill. *Smith's Mercantile Law*, p. 378; 4 R. C. L. p. 32, and cases cited in note 19. Equally familiar and well settled is the proposition that, where a bank takes an assignment of a bill of lading and pays the accompanying draft of the shipper for the value of the goods, the bank thereby becomes a bona fide holder, and no attachable interest in the goods or proceeds thereof remains in the shipper. *Buckeye National Bank v. Huff*, 114 Va. 1, 7, 75 S. E. 769; *Walsh Boyle & Co. v. National Bank*, 228 Ill. 448, 81 N. E. 1067.

[3] The important question in this and all similar cases is whether it can be said that the draft with the bill of lading attached has been taken by the bank in such way as to constitute an assignment of and payment for the bill. The answer here depends upon the manner in which the draft, as the medium both of the assignment of and the payment for the bill, was deposited in and handled by the bank; and the case thus presents the very common, but very important, and not altogether simple, question as to the circumstances under which a bank, in taking from a customer a check or draft in the usual course of the banking business, will become the owner of such check or draft, as

distinguished from a mere collecting agent for the customer. The authorities upon the question are multitudinous and not altogether harmonious, but they may be safely said to clearly preponderate in favor of the view that under the facts of this case the bank became the owner of the draft by purchase, and accordingly the owner of the bill of lading and its proceeds.

Some general discussion of the authorities seems desirable, since the question, precisely as it arises here, can hardly be said to have been definitely settled either in this state or in the state of Alabama, where the draft was drawn and deposited.

In 3 *Ruling Case Law*, p. 524, § 152, it is said:

"When a check or other commercial paper is deposited in bank indorsed for collection, or where there is a definite understanding that such is the purpose of the parties at the time of deposit, there is no question that the title to the paper remains in the depositor. So checks deposited as checks do not give rise to the relation of debtor and creditor, and the title to them remains in the depositor; the bank merely acting as an agent of the depositor for the purpose of collection. If, on the other hand, there is a definite understanding at the time of the deposit that such paper is deposited as cash, it is clear that the title passes to the bank. But where a check indorsed in blank is deposited, without any definite understanding as to the way it is to be treated, but is credited by the bank to the depositor as cash, and is so entered upon the depositor's passbook, the question frequently arises whether the title to the check passes immediately to the bank or remains in the depositor: *Prima facie*, according to the weight of authority, the passing to the credit of the depositor of a check bearing an indorsement not indicating that it was deposited for collection merely, passes the title to the bank"—citing numerous cases.

In *Burton v. United States*, 196 U. S. 283, 25 Sup. Ct. 243, 49 L. Ed. 482, the following observations, pertinent here, were made by Mr. Justice Peckham, who delivered the opinion of the court, concurred in by all of the Justices except Mr. Justice Harlan:

"There was no oral or special agreement made between the defendant and the bank at the time when any one of the checks was deposited and credit given for the amount thereof. The defendant had an account with the bank, took each check when it arrived, went to the bank, indorsed the check, which was payable to his order, and the bank took the check, placed the amount thereof to the credit of the defendant's account, and nothing further was said in regard to the matter. In other words, it was the ordinary case of the transfer or sale of the check by the defendant and the purchase of it by the bank, and upon its delivery to the bank under the circumstances stated the title to the check passed to the bank and it became the owner thereof. It was in no sense the agent of the defendant for the purpose of collecting the amount of the check from the trust company upon which it was drawn. From the time of

the delivery of the check by the defendant to the bank it became the owner of the check; it could have torn it up, or thrown it in the fire, or made any other use or disposition of it which it chose, and no right of the defendant would have been infringed. The testimony of Mr. Brice, the cashier of the Riggs National Bank, as to the custom of a bank, when a check was not paid, of charging it up against the depositor's account, did not in the least vary the legal effect of the transaction; it was simply a method pursued by the bank of exacting payment from the indorser of the check, and nothing more. There was nothing whatever in the evidence showing any agreement or understanding as to the effect of the transaction between the parties—the defendant and the bank—making it other than such as the law would imply from the facts already stated. The forwarding of the check 'for collection,' as stated by Mr. Brice, was not a collection for defendant by the bank as his agent. It was sent forward to be paid, and the Riggs Bank was its owner when sent."

The case of *Ditch v. Western National Bank*, 79 Md. 192, 29 Atl. 72, 138, 23 L. R. A. 164, 47 Am. St. Rep. 375, is instructive and much in point. Shyrock & Co. drew their check on the Third National Bank of Baltimore, payable to the order of one Reese, who indorsed it to the order of Ditch & Bro., and the latter in turn indorsed it "for deposit to the credit of" themselves. There was no special arrangement made between the depositor and the bank with reference to checking on the deposit, but the evidence shows that the effect of the transaction was to give to Ditch & Bro. a credit with the bank and the unconditional right to check upon it. The court said in the course of the opinion:

"If Nicholson & Sons [the bankers] had paid to Ditch & Bro. the full amount of the check in coin or currency when it was delivered to them, it is supposed that there would have been no question about the nature and effect of the transaction. But they gave Ditch & Bro. what was preferred to the coin or currency; they gave them the unconditional right to get the coin or currency at any time they might see fit to call for it, thus relieving them from the trouble and risk attending the care and custody of it. Now, it is extremely difficult to see on what principle or by what process Ditch & Bro. could retain any interest in this check after they had delivered it to a blank indorsee and had received full and valuable consideration for it. It will not be alleged by any one that the banker did not give a consideration, valuable in the eye of the law, and sufficient to maintain the transfer of the check, when he made an absolute and unconditional contract with the depositor to pay his checks to the amount of the deposit."

In Freeman's note to *Ditch v. Bank*, supra, 47 Am. St. Rep. 389, it is said:

"The law, therefore, is that checks, drafts, or other evidences of debt received by a bank in good faith as deposits, and credited as so much money, become the property of the bank, and it becomes legally liable to the depositor as for

so much money deposited as of the date of the credit [citing a multitude of cases]. And our understanding is that this rule is not confined to cases where checks are drawn upon the same bank which credits them as cash, but that a bank which receives and credits as cash checks drawn upon some other bank is entitled to the same rights and incurs the same liability as if the checks were drawn upon itself and so credited [citing cases]. The transaction is, in legal effect, a transfer to the bank upon an implied contract on the part of the latter to repay the amount of the deposit upon the checks of the depositor."

Again, in a note in 86 Am. St. Rep. 781, the same learned author says:

"We have already seen that a general deposit of money with a banker transfers the title to such money to the bank and creates the relation of debtor and creditor between the banker and the depositor. The same rule applies with equal force to checks or drafts deposited by a customer, and it is established beyond doubt that whenever paper is deposited, and is regarded by both parties as amounting to so much cash, the title to such paper passes immediately, and the relation of debtor and creditor arises. The transaction is equivalent to a purchase of the check or draft by the banker, and he becomes responsible to the depositor for the amount thereof" [citing many cases].

In a note to the Virginia case of *Fayette National Bank v. Summers*, 105 Va. 689, 54 S. E. 862, 7 L. R. A. (N. S.) 694, it is shown that, by the clear weight of authority, where a check or draft is taken for deposit and treated as cash, as distinguished from a deposit for collection, the relation of debtor and creditor is established at once between the depositor and the bank; the bank becoming the owner of the check or draft and the depositor the owner of the proceeds placed to his credit. To be sure, the general rule is that this result is *prima facie* only, and may be rebutted by proof showing that the parties contemplated a different relationship at the time of the deposit. But when nothing else appears than the mere fact of the deposit and the credit thereof as cash, which the depositor may withdraw at will, the law implies and establishes between the bank and the depositor the relationship of vendor and purchaser as to the paper, and of creditor and debtor as to the proceeds thereof.

In 2 Michie on Banks and Banking, p. 914, it is said:

"A deposit in a bank of a bill, check, or other evidence of debt in the ordinary course of business, whereby the depositor receives a credit against which he may draw, operates to transfer the title to the bank, in the absence of usage, custom, or any oral or other agreement that the effect of the transaction shall be otherwise," etc.

And the same author says, at page 917, that—

"This is the rule, although the bank has the right to charge dishonored paper to the depositor, instead of proceeding against the maker."

See, also, to same effect, 2 Morse on Banks and Banking (5th Ed.) § 577, and cases cited.

The Virginia cases, so far as they have gone, appear to be substantially in accord with the result of the authorities as indicated above.

In *Fayette National Bank v. Summers*, the court approved the following instruction:

"The court instructs the jury that, if they shall believe from the evidence that the plaintiff bank received the check which is the subject of this suit as a deposit to be treated as cash, and that such was the intention of the parties at the time the check was received and deposited, then title to said check passed to the bank at that time. But if the jury shall believe from the evidence that the parties intended that the bank should not receive said check as cash, but only as an agent for collection, then title to said check did not vest in the bank at the time of the deposit.

"The court further tells the jury the question as to whether the parties intended the check when deposited to be treated as cash or merely for collection is one of fact for the jury, under all the facts and circumstances proven in the case relating thereto and throwing light thereon."

It is true the court in that case thought there was enough evidence to carry to the jury the question of the intention of the parties, or, to express it differently, enough evidence to justify the jury in finding that the prima facie presumption, to which we have referred, was rebutted; but the importance of the case in its application to the one in hand is that it distinctly recognizes the practically universal doctrine that a deposit of a check or draft which the parties intend to be treated as cash, passes the title of the check or draft to the bank.

It is interesting and pertinent to note that, in this case of *Bank v. Summers*, Judge Keith cited and quoted with approval the Alabama case of *National Bank v. Miller*, 77 Ala. 173, 54 Am. St. Rep. 50, which likewise expressly recognized the same doctrine.

The result of the decision of this court in *Bank v. Summers*, and of the Alabama case of *Bank v. Miller*, undoubtedly is that the question is one of intention of the parties, and both of these cases, as well as the other cases in Virginia and Alabama to which our attention has been directed, show a strong tendency to leave the question to the jury wherever there is any evidence to rebut the prima facie presumption that a cash deposit is intended to vest in the bank the title to the instrument pursuant to which the cash deposit is made. None of the cases in either state, however, go far enough, as we construe them, to conflict with the general doctrine, overwhelmingly established by authority elsewhere, that the deposit of a check or

draft as cash, in the absence of other evidence, passes title in the check or draft to the bank as a matter of law.

In *Greensburg National Bank v. Syer*, 113 Va. 53, 73 S. E. 438, the same general rule is recognized. It was held there that—

"if, when a draft is deposited in bank, it is the intention of both the depositor and the bank that it shall be treated as cash, the title thereto passes to the bank; but that if it was the intention of the parties that it should not be received as cash, but only for collection, \* \* \* then the title does not pass to the bank."

The case of *Lynchburg Milling Co. v. National Exchange Bank*, 109 Va. 639, 64 S. E. 980, was a case in which there was a contest between the payee of a bill of exchange and the drawer thereof, or a creditor of the drawer, over the proceeds of the draft. The exact question involved in the case in hand did not arise in that case, but a judgment in favor of the bank was sustained, and Judge Whittle in the course of his opinion said:

"The Negotiable Instruments Act, Va. Code 1904, § 2341a (24), declares that 'every negotiable instrument is deemed prima facie to have been issued for a valuable consideration, and every person whose signature appears thereon to have become a party thereto for value.'"

In *Miller v. Norton*, 114 Va. 609, 77 S. E. 452, the substance of the opinion, in so far as directly applicable to this case, is accurately stated by the reporter as follows:

"Where there is a general deposit of money in a bank, the title to and beneficial ownership of the money is vested in the bank, and the relation between it and the depositor is that of debtor and creditor. So, likewise, where a check drawn on a particular bank is presented to that bank for general deposit and the bank gives the depositor credit therefor, the relation between the bank and the depositor is that of debtor and creditor, since the giving of credit under such circumstances is practically and legally the same as if the bank had paid the money to the depositor and has received it again on deposit.

"Where a check on one bank is deposited in another for collection, the ownership of the check is not transferred to the receiving bank, but it is the agent of the depositor until collection is made, and not until then does it become the debtor of the depositor. But if the check is deposited in exchange for credit given the depositor, then the transaction is in effect a sale of the check to the bank, and it becomes the beneficial owner of the check and the debtor of the depositor."

In the course of the opinion in this case of *Miller v. Norton* it is said:

"In this country, though the rule seems to be different in England, it is settled that the mere giving of credit to a depositor's account of a check does not constitute the bank a holder for value, but in order to have that effect the credit must be drawn upon."



If this expression had to be taken at its face value, without the qualification appearing in other parts of the opinion, the facts of the instant case would fully measure up to it, because the deposit was not only checked upon, but practically exhausted by the checks of the depositor. It is manifest, however, from the opinion as a whole, that the court intended to decide that, wherever the credit given for the deposit carried with it the right of the depositor to draw checks thereon and the obligation of the bank to pay them, the title to the paper in exchange for which the credit was given passed to the bank. The last sentence quoted above from the syllabus is taken literally from the body of the opinion, is supported by the authorities cited therein, as well as by the great weight of authority generally, and is a correct statement of the law as we understand it to be declared in that opinion, and as we intend to declare it here.

In *Buckeye National Bank v. Huff*, supra, a case involving a draft with bill of lading attached, the effect of the decision pertinent here is correctly stated by the syllabus as follows:

"Where a bank takes, by indorsement, a bill of lading, and pays the draft of the shipper for the value of the goods, the bank becomes the owner of the goods covered by the bill of lading until the draft is paid; and this is true, although the transfer be not to give the permanent ownership, but to furnish security for the advance of money or discount of commercial paper. After such transfer, no attachable interest in the goods remains in the shipper.

"The law presumes that the transfer of a bill of lading, with a draft attached, is for a valuable consideration, and the burden of proving the contrary is upon him who denies it. \* \* \*

"The assignment of a bill of lading for goods operates to transfer to the holder the legal title to the goods and the possession thereof as effectually as if there were a physical delivery of the goods to a purchaser. After such assignment, the levy of an attachment on the goods for a debt due by the shipper is a conversion of the goods, for which the holder of the bill of lading may bring either an action for damages resulting from the wrongful seizure, or an action of trover, and in either case the measure of damages is practically the same. The holder of the bill of lading is not limited to a recovery of the value of the goods sold in the attachment proceedings and the costs incident to the sale. The conversion is complete, and in such case the injury suffered is, as a rule, the value of the property converted, and the holder of the bill of lading, with a draft attached for the price of the goods, is entitled to recover at least the amount of the draft."

[4] It is contended, however, by the defendant in error, and so held by the lower court, that the contract between Covington and the bank must be interpreted, and the title of the bank to the proceeds accordingly determined, by the law of the state of Alabama. This proposition appears to be entire-

ly sound and well settled. No question as to the right or liability of the drawee is involved. As between the drawer and the holder of the draft, the law of the place in which it was made determines the question of title to the proceeds, unless it appears that the parties had in contemplation the law of some other place as the proper law. As stated in *Bigelow on Bills and Notes* (2d Ed.) p. 281:

"That question, it is clear, must be decided by the law of the state or country in which the bill was drawn, unless it appears that the law of some other country was contemplated."

See, also, to the same effect, *Amsinck v. Rogers*, 189 N. Y. 252, 82 N. E. 184, 12 L. R. A. (N. S.) 875, 121 Am. St. Rep. 858, 12 Ann. Cas. 450; *Brownell v. Freese*, 35 N. J. Law, 285, 10 Am. Rep. 239; *Briggs v. Latham*, 36 Kan. 255, 13 Pac. 393, 59 Am. Rep. 546; *Hunt v. Standart*, 15 Ind. 33, 77 Am. Dec. 79; 3 R. C. L. p. 1142, § 357; 5 R. C. L. 964, 965, § 47.

As evidence of the law of the state of Alabama, the official reports of the cases of *Josiah Morris v. Alabama Carbon Co.*, 139 Ala. 620, 36 South. 764, and *Stone River National Bank v. Lerman Milling Co.*, 9 Ala. App. 322, 63 South. 776, were introduced and used under a stipulation of counsel.

A consideration of these cases leads us to the conclusion, foreshadowed in what has already been said, that the law of Alabama is in accord with the law of Virginia and generally elsewhere. Both of the Alabama cases relied on clearly recognize the controlling distinction between a deposit for collection and an unqualified and unconditional deposit for credit treated as cash. In the one case the title remains in the depositor, and in the other it passes to the bank.

The first case relied upon, *Morris v. Alabama Carbon Co.*, gives rise to no difficulty whatever, because the report of the case shows that the item involved was a draft drawn in favor of the cashier of a bank merely for the purpose of enabling the collector of the bank to apply the proceeds thereof to the drawer's credit, and was inclosed in a letter to the cashier, requesting him to collect the draft and place it to his credit. The decision plainly draws the distinction between a deposit for collection and a purchase by the bank, and shows that the bank "took the paper, not as a purchaser, but in the capacity of a collecting agent for the forwarding bank."

The case of *Stone River National Bank v. Lerman Milling Co.*, the other case relied upon by the defendant in error, is in its facts more nearly like the case at bar, and goes further than the former case in sustaining the contention that under the Alabama law the Fourth National Bank did not take title to the draft, but merely took it as the collecting agent of Covington. It seems perti-

nent to observe that this decision was rendered by an intermediate and not by the Supreme Court of Alabama. Furthermore, it is apparent that the opinion throughout proceeded upon the assumption that the bank, as a matter of fact, received the deposit for collection, and accepted it "merely as the agent of the defendants for collection," and "the claimant was not a purchaser of the draft, and had no interest whatever in it." The court further says:

"The case would be different if claimant bank had purchased the draft, which would have happened if it had at the time actually paid the defendants the cash, or other equivalent consideration, for it, or had, by agreement with defendants, credited the amount of it on a debt owed claimant by defendants. In any such case, the claimant would have been a purchaser of the draft, and could not rightfully be deprived of its proceeds by another creditor of the defendants."

In the case at bar counsel for defendant in error asked an officer of the bank, who was on the stand, this question:

"Mr. Joseph, you don't buy those checks or drafts? It is not your understanding that you buy them?"

And the answer was:

"It is my understanding that we buy them with recourse on the depositor."

[5, 6] We are the more ready to construe the law of Alabama as being the same as the law of Virginia because that construction is in accord with the great weight of authority elsewhere, and with the sound policy of promoting efficiency and preserving uniformity in the application and operation of the Negotiable Instruments Law. The question of what is the law of another state is one of fact, but the interpretation of a foreign statute or judicial decision is a question of law. 10 R. C. L. § 319, p. 1113; *De Sobry v. De Laistre*, 2 Har. & J. (Md.) 191, 3 Am. Dec. 535. The case of *Bank v. Miller*, supra, cited by this court in *Bank v. Summers*, supra, throws light upon the proper interpretation of the Alabama law, and while we may not resort to that case as evidence, because it was not introduced at the trial, we may look to it as an authoritative repository of legal principles for our guidance in the interpretation of the decisions which were introduced in evidence. That case, as already pointed out, is in line with the current of authority.

[7] On behalf of the defendant in error, stress is laid upon the fact that the bank officials testified that, in cases of this kind, they would always have recourse on the depositor if the drawee failed to pay the draft. That is not only true in this case, under the practice of the Montgomery bank and its understanding with its customers, but it is true everywhere as a matter of law. The existence and recognition of such a right does not

in any way affect the title of the bank to the paper in question. *Burton v. United States*, supra; *Ditch v. Western National Bank*, supra; *Michie on Banks and Banking*, supra.

[8] Nor do we attach any importance to the form of the indorsement placed upon the draft by the Montgomery bank before forwarding the same to its correspondents for collection. That indorsement was as follows:

"The Fourth National Bank of Montgomery indorses this draft solely for the purposes of collecting it, and does not, in receiving payment or otherwise, guarantee the title, possession, delivery, quantity, quality or other condition of the goods mentioned in the attached bill of lading and will not be responsible in any way therefor."

This was a precautionary measure which the bank had the right to adopt without affecting the contract between it and the depositor. As said by Mr. Justice Peckham in *Burton v. United States*, supra:

"The forwarding of the check 'for collection,' as stated by Mr. Brice, was not a collection for defendant by the bank as his agent. It was sent forward to be paid and the Riggs Bank was its owner when sent."

It is manifest that the Montgomery bank, forwarding this draft as its own property, wished to protect itself against any question that might arise as to the title, quantity, or quality of the goods. Such questions do arise in cases where the title of the forwarding bank to the draft itself is undisputed. See 4 Va. Law Reg. 391; *Brinkley & Co. v. Carlyle M. & G. Co.*, 6 Va. Law Reg. 778.

[9] Under the law, as applied to the facts of this case, we are of opinion that the Montgomery bank is entitled to the proceeds of the draft in question, and that the evidence is such that no verdict or judgment to the contrary could be sustained. The facts are fully before the court, and there is no reason to suppose that upon another trial any new or different evidence might be introduced which ought to affect the result. Section 6365 of the Code of 1919 prescribes the following rule of decision in this court:

"The appellate court shall affirm the judgment, decree or other order if there be no error therein, and reverse the same in whole or in part if erroneous, and enter such judgment, decree or order as to the court shall seem right and proper, and shall render final judgment upon the merits whenever in the opinion of the court the facts before it are such as to enable the court to attain the ends of justice. A civil case shall not be remanded for a trial de novo except where the ends of justice require it."

In our opinion the only proper result in this case is a judgment for the plaintiff in error, and, pursuant to the section just quoted, we will enter here a final order to that effect.

Reversed.

(127 Va. 65)

**HEEKE v. ALLAN et al.**(Supreme Court of Appeals of Virginia.  
March 18, 1920.)**1. SPECIFIC PERFORMANCE §121(3) — EVIDENCE HELD TO SHOW TITLE IN PLAINTIFF VENDOR.**

In vendor's action for specific performance, evidence held to show that vendor's grantor was the sole heir of former owner.

**2. DESCENT AND DISTRIBUTION §127, 134—COMMON-LAW RULE AS TO LIABILITY OF LAND FOR DEBTS OF ANCESTOR STATED.**

At common law, lands descended were liable in the hands of the heir only for debts of record and specialty debts in which the heir was specially named, such liability continuing only as long as debt was enforceable and the land remained in the hands of the heirs who could at any time after ancestor's death discharge land from liability by aliening it to a purchaser with or without notice of such debts.

**3. DESCENT AND DISTRIBUTION §134—LAND IN HANDS OF BONA FIDE PURCHASER HELD NOT SUBJECT TO LIEN FOR DEBTS AFTER ONE YEAR.**

Upon expiration of the year following decedent's death within which creditors have lien upon land, the land, where conveyed by bona fide conveyance, is not liable for decedent's debts under Code 1887, § 2667, unless suit shall have been commenced and lis pendens docketed as required by Code 1904, § 3566, and Code 1919, § 6469, or unless a report has been filed of the debts and demands of creditors.

**4. DESCENT AND DISTRIBUTION §124—PURCHASER FROM HEIR WITHIN YEAR MAY CONVEY GOOD TITLE AFTER ONE YEAR.**

Purchaser from heir within one year after ancestor's death could sell and transfer a valid title after expiration of such year, since such conveyance by the heir was not absolutely void, but void merely as to creditors, and since heir's purchaser, having the heir's interest in the land under Code 1904, § 2438, had the power to give good title to purchaser for value and without notice free from creditor's lien upon expiration of the year if no suit was pending nor list of demands of damages had been filed, under Code 1887, § 2667, and in view of legislative history thereof.

**5. ACKNOWLEDGMENT §20(2)—TRUSTEE IN DEED OF TRUST MAY TAKE ACKNOWLEDGMENT OF DEED WHICH IS PART OF TRANSACTION.**

Acknowledgment of deed of bargain and sale by notary who was named as trustee in deed of trust executed as part of same transaction did not render the deed of bargain and sale void, the deed of bargain and sale and the deed of trust being separate and independent instruments, and the notary not being financially or beneficially interested in the deed of bargain and sale.

Appeal from Chancery Court of Richmond.

Suit by Edgar Allan, Jr., against Henry G. Heeke and others. Judgment for plaintiff, and named defendant appeals. Affirmed.

Leake & Buford, of Richmond, for appellant.

Edgar Allan, Jr., and Arden Howell, both of Richmond, for appellee.

BURKS, J. Mrs. Annie B. Clarkston, a widow, died intestate in April, 1917, seized and possessed of two lots on Floyd avenue, Richmond, Va. There survived her, as her sole heir, a daughter, Imogene B. Clarkston, who afterwards intermarried with Harry M. West. Within one year after the death of her mother, to wit, on November 1, 1917, Mrs. West united with her husband in a deed conveying said lots to the appellee, Edgar Allan, Jr. On January 5, 1918, Allan entered into a written contract with the appellant whereby Allan agreed to sell, and the appellant agreed to purchase, said lots on terms set forth in said contract. Under the terms of said contract, the lots were to be conveyed to the appellant by proper deed duly acknowledged and made ready for recordation, and the appellant was to pay \$2,950 cash and to assume the payment of certain liens on the property for the balance of the purchase money. As evidence of this assumption, the appellant was to sign the deed of conveyance which contained a proper covenant on his part to pay off and discharge said liens. It was further stipulated that the deed and cash should be delivered to trustees designated in the contract, and that the transfer of the title and the final settlement for the lots should not be made until May 15, 1918, when more than one year should have elapsed since the death of Mrs. Annie B. Clarkston. The contract concludes with the following stipulation:

"It is mutually agreed by the said vendor and the said vendee and it is a distinct part of the agreement that the said vendee, Henry G. Heeke, shall not be required to comply with any of the provisions of this contract unless the said Edgar Allan, Jr., and his wife, can one year after the death of Annie B. Clarkston make a valid conveyance of said real estate as fully and effectually as the same could then be made by the said Imogene Clarkston West and her husband, had they not made their said deed dated November 1, 1917, hereinbefore referred to."

Allan executed the deed required of him and delivered it to the trustees designated and fully complied with the contract on his part. He then called upon the appellant to make the cash payment and to sign the deed, but he declined to do so, and this suit was instituted on March 12, 1918, to compel the appellant to specifically perform his said contract. The trial court entered a decree com-

PELLING specific performance, and from that decree this appeal was granted. The appellant resisted performance on three separate grounds, all of which the trial court rejected, and their rejection is made the basis of the assignments of error in the petition for this appeal.

[1] 1. It is assigned as error that the testimony does not sufficiently establish the fact that Mrs. Imogene B. West was the sole heir of Mrs. Annie B. Clarkston. The fact is clearly established by the testimony of the mother and half-sister of Mrs. Clarkston, and there is no evidence to the contrary. It would be a waste of time to discuss this assignment.

2. The second error assigned is that—

"Under the laws of Virginia, Allan, having purchased from an heir within one year of the ancestor's death, could not, after the expiration of such year, sell and transfer a valid title."

Before discussing this assignment of error, it might be well to state that the decree appealed from was entered February 3, 1919, and that prior to that time the personal representative of Mrs. Clarkston had settled her final account as administratrix, and that no debts appeared against her estate except those for which complainant had agreed to assume the payment, and that appellant does not now claim that there are any such debts in existence, but simply that he does not know that there are none such, and if it should turn out in the future that there are such debts the lots in controversy would be liable for their payment.

[2] At common law, lands descended were liable in the hands of the heir only for debts of record and specialty debts in which the heir was expressly named. This liability upon the land continued as long as the debt was enforceable and the land remained in the hands of the heir, but the heir could at any time after the death of the ancestor readily discharge the land from this liability by aliening it to a purchaser with or without notice of such debts. *Winfield v. Burton*, 79 N. C. 388, 392. As early as December, 1789 (1 Rev. Code 1819, c. 105, § 6), the Legislature of the state enacted a statute declaring that any heir liable to pay the debts of his ancestor in regard to lands descended, who should sell the same before action brought or process sued out against him, should be answerable for such debts to the value of the land sold, but expressly providing that the lands bona fide aliened before action brought should not be liable to such execution. This afforded but little protection to the creditor, as the heir might still freely "bona fide alien" at any time before action brought. A further step for the benefit of creditors was taken by the act of March 17, 1842 (Acts 1841—42, c. 98, p. 55), whereby real estate of a decedent was made liable for the payment of contract debts evidenced by writing signed by

the decedent. It was not until the adoption of the Code of 1849 that real estate was made assets for the payment of all debts and demands against the decedent. Section 5 of chapter 131 of the Code of 1849 is as follows:

"Any heir or devisee who shall sell and convey any real estate which by this chapter is made assets, shall be liable to those entitled to be paid out of the said assets, for the value thereof with interest; in such case, the estate conveyed shall not be liable, if the conveyance was bona fide, and at the time of such conveyance no suit shall have been commenced for the administration of the said assets, nor any report have been filed as aforesaid of the debts and demands of those entitled."

This still left it possible for the heir to defeat the creditor's right to resort to the land by a bona fide sale soon after the death of the testator. But so the law continued down to the revision of 1887, when the revisors of the Code annexed to section 5 of chapter 131 of the Code of 1849, the following proviso:

"Provided, that no alienation of such estate, made by an heir or devisee, within one year after the death of the testator or intestate, shall be valid against creditors of such testator or intestate, although no suit shall have been commenced or report of debts and demands filed within said year." Code 1887, § 2667.

[3] This proviso was added manifestly in the interest of the creditor of the decedent, and gave him a quasi lien on the real estate of the decedent for a period of one year. Nothing the heir or devisee could do within the year could relieve the real estate of the decedent from liability for his debts, and the statute was notice to all the world of this fact. So that during this period of one year there could be no such thing as a purchase from the heir or devisee without notice. But this provision for the creditor was limited to "one year after the death of the testator or intestate." After the expiration of that time, the creditor is remitted to his rights under the other provisions of the section which declare that "the estate conveyed shall not be liable, if the conveyance was bona fide, and at the time of such conveyance no suit shall have been commenced for the administration of such assets, nor any report have been filed as aforesaid of the debts and demands of those entitled," and even a pending suit would not preserve the rights of such creditor as against a bona fide purchaser, unless a lis pendens was docketed as required by section 3566, Code 1904 (sec. 6469, Code 1919).

[4] The most that can be claimed for the proviso is that it renders any conveyance made by the heir or devisee within the year void as to creditors of the decedent—not absolutely void, but void as to such creditors. If void as to such creditors, then as to them it was as if it had never existed. If it never existed as to them, then, after the expiration of one year from the death of the de-

cedent, the heir could make good title to a purchaser for value and without notice, if no suit was pending nor list of debts and demands filed. What were the rights then, after the expiration of the year, of an alienee of the heir made during the year? The deed from Mrs. West and her husband to Allan was valid between the parties thereto, and conveyed to the grantee "all the estate, right, title, and interest whatever, both at law and in equity, of the grantor in or to such lands." Code 1904, § 2438. The effect of the deed was to transfer to the grantee all of the grantors' rights and powers over the land and to invest him with the same right to convey free from debts of the decedent as the grantors themselves had. It placed him in at least as good a position as the heir herself occupied. This result does no injury to the creditors, but gives them all the benefits the statute intended to bestow. It treats the deed made during the year as a nullity as to the creditors of the decedent, and leaves them and the heir just where they would have been if no such deed had been made by the heir until after the expiration of the year. But it goes no further. If the creditors wish to subject the land in the hands of the alienee, they must proceed against it before the alienee transfers it to a purchaser for value without notice of the debts, else the latter will take the land free from liability for such debts. Notwithstanding the conveyance of the heir in this case during the year, a purchaser from Allan will occupy at least as good a position as to the debts of the decedent as he would have occupied if the heir had held the land for more than a year, and then conveyed it to the purchaser. We express no opinion as to the liability of Allan for any debts of the decedent that may hereafter appear, as that question is not here involved.

North Carolina has a statute very similar to ours, in which the period of forbidden alienation by the heir or devisee is fixed at two years after the death of the debtor. In *Badger v. Daniel*, 79 N. C. 372, 391, it was said:

"It is of course conceded that the sale by Henry Joyner, of the lands devised to him, to Whitfield, having been made within two years after the death of Andrew Joyner, was void as to the plaintiffs. Whitfield held the land as Henry Joyner did, and sales by Whitfield after the two years passed unincumbered estates to his vendees."

The same view was taken in *Davis v. Perry*, 96 N. C. 260, 1 S. E. 610.

The case of *Hopkins v. Ladd*, 12 R. I. 279,

102 S.E.—42

was cited by counsel for appellant as taking a different view of a similar statute, and the following language therefrom is quoted:

"This language seems sufficiently plain, and must be taken to mean that a deed \* \* \* made by the heir before the time specified would be void as to creditors. This, we believe, was the general understanding of the profession."

This in no wise conflicts with the views hereinbefore expressed.

[5] 3. It is further assigned as error that the acknowledgment of one of the deeds in Allan's chain of title was invalid because taken before a notary who was interested in the transaction. The facts were that a deed of bargain and sale was made, and the grantee therein, as a part of the same transaction, reconveyed the property to a trustee to secure the deferred payments of the purchase money. The notary who took the grantor's acknowledgment to the deed of bargain and sale was named as trustee in the deed of trust to secure the purchase money. He had no other connection with nor interest in the transaction, and was not a party to the deed of bargain and sale. While the deed of bargain and sale and the deed of trust are to be regarded parts of the same transaction for some purposes, especially for the purpose of giving the vendor the first lien on the property conveyed for the purchase price thereof, they are wholly separate and independent instruments. The notary was not a party to the deed of bargain and sale, nor in any way interested in the property conveyed or the purchase money therefor. He was, at the time of taking the acknowledgment, a total stranger to the transaction; that is to say, he was not financially or beneficially interested in the instrument to which he took the acknowledgment. Whatever might be the effect of other instruments to be executed, either then or thereafter, it cannot be said that, in taking the acknowledgment to the deed of bargain and sale, he was acting as "a judge in his own case or a ministerial officer in his own behalf." The acknowledgment before him therefore was a valid acknowledgment.

We do not deem it necessary to cite or comment upon the many cases which have come before us on the sufficiency of acknowledgments to deeds, as none of them is in conflict with our present holding, and it would be a useless consumption of time and space to point our analogies or differences.

For the reasons hereinbefore stated, we are of opinion that the decree of the chancery court of the city of Richmond should be affirmed.

Affirmed.

(127 Va. 116)

**SHERRY, Chief of Police of City of Richmond, v. LUMPKIN.**

(Supreme Court of Appeals of Virginia. March 18, 1920.)

1. MUNICIPAL CORPORATIONS  $\S$  185(5)—MAYOR IS NOT BY CONSTITUTION GIVEN AUTHORITY TO REMOVE POLICEMAN; "SUCH OFFICERS."

Const.  $\S$  120, declaring that the mayor shall see that the duties of the various city officers and members of the police and fire departments are faithfully observed, and that he shall have power to suspend such officers and members of the police and fire departments and to remove such officers and also members of said departments when authorized by the General Assembly, does not of itself give the mayor of city power to remove members of the police and fire departments, the expression "such officers" referring to city officers as distinguished from policemen and firemen, and the power of removal, if conferred on the mayor, must be found in the statutes.

2. MUNICIPAL CORPORATIONS  $\S$  124(5)—CONSTITUTIONAL PROVISION AS TO POWERS OF MAYOR NOT A GRANT OF POWER.

Const.  $\S$  120, relating to the powers of mayors of cities, and declaring that the mayor shall have power to remove city officers and members of the police and fire departments when authorized by the General Assembly, is not a grant of power to the General Assembly, but a mere recognition of its sovereign powers by virtue of which it might authorize the mayor of the city to remove policemen.

3. MUNICIPAL CORPORATIONS  $\S$  180(1) — POLICEMEN ARE "STATE OFFICERS"; "MUNICIPAL OFFICERS."

Policemen are "state" and not "municipal" officers.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Municipal Officer; State Officer.]

4. MUNICIPAL CORPORATIONS  $\S$  185(5)—MAYOR OF RICHMOND NOT AUTHORIZED TO REMOVE POLICEMEN.

Neither under Code 1904,  $\S$  1033, relating to the duties of mayors which specifically authorizes them to suspend members of the police and fire departments, nor under Richmond Charter Act of 1918, authorizing the mayor of Richmond to appoint a director of public safety, which director is authorized to appoint a chief of police, removable at his pleasure, the chief being given the power to remove policemen with the approval of the director, is the mayor of the city of Richmond authorized to remove policemen; the statutes preserving the distinction between municipal officers and members of the police and fire departments found in Const.  $\S$  120.

5. MUNICIPAL CORPORATIONS  $\S$  124(5)—WHETHER OFFICIAL'S POWER OF REMOVAL IS EXCLUSIVE DEPENDS ON INTENTION.

Whether a power of removal, as of members of a city police force, vested by the Constitu-

tion in specified officers, is exclusive, is a question of intention.

6. MUNICIPAL CORPORATIONS  $\S$  124(5)—LEGISLATURE MAY NOT PROVIDE METHOD OF REMOVAL INCONSISTENT WITH CONSTITUTION.

Where the Constitution fixes a procedure for removal of inferior officers of a municipality, as well as members of the police and fire departments, the Legislature may not provide inconsistent methods.

7. CONSTITUTIONAL LAW  $\S$  48—STATUTE NOT UNCONSTITUTIONAL UNLESS CLEARLY REPUGNANT TO CONSTITUTION.

The courts should not declare an act of the General Assembly unconstitutional unless fully satisfied that the act is repugnant to the Constitution.

8. MUNICIPAL CORPORATIONS  $\S$  124(5)—RICHMOND CHARTER GIVING CHIEF OF POLICE POWER TO REMOVE OFFICERS IS VALID.

While Const.  $\S$  120, gives the mayor power to remove city officers and members of police department, when authorized by the General Assembly, Richmond Charters, Act of 1918, providing that the terms of officers and members of the police force shall be during good behavior and efficiency, and that any officer or members of the force may be fined, removed, or suspended by the chief of police subject to the approval of the director of public safety, is valid.

9. MUNICIPAL CORPORATIONS  $\S$  185(4)—CHIEF OF POLICE ON REMOVING OFFICER NEED NOT GRANT FORMAL TRIAL.

Under Richmond Charter,  $\S$  86, providing that the chief of police subject to approval of the director of public safety may remove a policeman whenever the same shall in the judgment of the chief be for the good of the service, etc., the chief of police enjoys an absolute power of removal subject to approval of the director, notwithstanding the declaration that members of the department shall hold during good behavior and efficiency, so the chief of police need not as a condition of removal afford the officer proceeded against a formal trial, and the right to appear by counsel and offer evidence.

10. MUNICIPAL CORPORATIONS  $\S$  185(4)—CHIEF OF POLICE BY FURNISHING CHARGES DID NOT ABROGATE ABSOLUTE POWER OF REMOVAL.

That the chief of police furnished policeman with statement of charges against him, and authorized policeman who was suspended to bring witnesses to testify in his behalf, was in no way an abrogation of the chief's absolute power of removal, and the policeman suspended was not entitled to appear by counsel and have a formal trial.

#### Error to Hustings Court of Richmond.

Application by M. F. Lumpkin for writ of mandamus against C. A. Sherry, Chief of Police of the City of Richmond. Peremptory writ of mandamus was issued against respondent requiring him to permit relator, a policeman, at his trial on charges preferred

to summon witnesses, etc., and respondent brings error. Reversed, and writ dismissed.

George Wayne Anderson and H. R. Polard, both of Richmond, for plaintiff in error.

Nunnally & Miller, of Richmond, for defendant in error.

**SAUNDERS, J.** The facts necessary for an intelligent understanding of this case may be briefly stated.

C. A. Sherry, plaintiff in error, is chief of police of the city of Richmond. M. F. Lumpkin, the defendant, is a member of the city police force. On June 11, 1919, Lumpkin was suspended from duty by the said Sherry. At or about the time of this suspension, the chief of police filed charges against Lumpkin, and caused to be served upon him a copy of the following paper:

"Officer M. F. Lumpkin, City—Dear Sir: You are hereby summoned to appear at police headquarters, Wednesday morning, December 24, 1919, at 10:00 o'clock to answer the following charges now pending against you:

"Charge: Conduct unbecoming an officer and gentleman.

"Specifications: That in violation of the rules and regulations of the police department Officer M. F. Lumpkin did, within the twelve months last past enter into an agreement to accept and receive from one L. B. Stern the sum of one hundred (\$100.00) dollars, more or less, as a consideration for obtaining for him from the police court of this city one trunk, the property of W. T. Horman, the brother-in-law of the said L. B. Stern; the said trunk having been seized on the 23d day of November, 1918, by the said Officer M. F. Lumpkin and Officer J. A. Waters when found to contain seven quarts of ardent spirits, which was being transported into this state in violation of the prohibition law, and delivered to the police court of this city on the 19th day of December, 1918; and that in accordance with said agreement the said officer M. F. Lumpkin did obtain the said trunk for the said L. B. Stern and accept and receive the said sum of one hundred (\$100.00) dollars, more or less, for performing such service and appropriate the same to his own use.

"Wit: L. B. Stern, 100 Virginia Street.

"Ira Stern, 100 Virginia Street.

"Miss Ether Moseley, 100 Virginia Street.

"Berkley Goode, 15th & Main Sts.

"J. J. Crutchfield, Police Justice.

"W. A. Shields, Police Court.

"Col. W. M. Myers, City Hall.

"Lieut. A. C. Holt.

"You will have present at this time such witnesses as you desire to testify in your behalf.

"C. A. Sherry, Chief of Police."

This suspension of the defendant, Lumpkin, was ordered by the director of public safety of the city of Richmond, and the notice cited, supra, was designed to advise the defendant in detail of the nature of the charges preferred, and to give him an opportunity to present his defense through witnesses of his own choosing.

The hearing of the inquiry on the charges and specifications, for reasons that need not be stated in this connection, was postponed from time to time; the day finally set being December 31, 1919. Prior to that date, the defendant, Lumpkin, applied to the Honorable E. H. Wells, judge of the hustings court, part II, of the city of Richmond, for a writ of mandamus, praying: First, that he be restored and reinstated as an active member of the said force; second, that the said C. A. Sherry, chief of police as aforesaid, be commanded to refrain from holding himself out as authorized and empowered to suspend and remove the defendant from the said force; and, third, that all proceedings which shall be had in this cause on said charges, marked "Exhibit A," be had in conformity with, and according to, the mandate of section 120 of the Constitution of Virginia and the laws in pursuance thereof.

After hearing argument upon this application for a writ of mandamus, the hustings court declined either to restrain the chief of police from trying the said Lumpkin, or to order the latter's reinstatement as prayed, but did order that a peremptory writ of mandamus "be issued, to the said C. A. Sherry directed, requiring and compelling him to permit the said M. F. Lumpkin at his trial aforesaid on said charges to summon witnesses in his own behalf, to appear by counsel and have an open and fair trial of all charges preferred against him." To this judgment of the hustings court, upon the petition of C. A. Sherry assigning error, a writ of error was allowed, and a supersedeas awarded, by one of the judges of this court.

The plaintiff in error, the said Sherry, insists that the suspension of the said defendant, and his citation to appear and produce witnesses, were within the scope of his lawful powers, derived directly from the statute laws of Virginia, and were not in contravention of the Constitution. Further, that under existing law, subject to the approval of the director of public safety, the plaintiff in error had the absolute power to suspend, or remove, the defendant. He denies that this absolute power of suspension and removal was abrogated, or in any wise diminished, by his voluntary action in affording to the defendant in error an opportunity to produce witnesses to testify in his behalf upon the charge preferred.

The defendant in error maintains that the mayor of Richmond enjoys the exclusive power to suspend, or remove, a member of the police force, and insists that, in a case of removal, reasonable notice must be given to the officer complained of, and a formal trial conducted, with the incidental right to the officer to be heard in person, or by counsel, and to present testimony in his defense. The solution of these conflicting claims requires

an examination of the Constitution and laws, respectively, cited and relied upon by the plaintiff in error and the defendant in error.

[1] Section 120 of the Constitution relates to and deals with the duties and powers of city officers. This section, in part, is as follows:

"The mayor shall see that the duties of the various city officers, members of the police and fire departments, whether elected or appointed, in and for such city, are faithfully performed. \* \* \* He shall also have power to suspend such officers and the members of the police and fire departments, and to remove such officers, and also such members of said departments, when authorized by the General Assembly, for misconduct in office or neglect of duty, to be specified in the order of suspension or removal; but no such removal shall be made without reasonable notice to the officer complained of, and an opportunity afforded him to be heard in person, or by counsel, and to present testimony in his defense. From such order of suspension or removal, the city officer so suspended or removed shall have an appeal of right to the corporation court. \* \* \*"

It will be noted that this section gives the mayor of a city the power to suspend such officers (that is, the city officers), and the members of the police and fire departments, and the further power to remove such officers, and also the members of said departments, when authorized by the General Assembly. The mayor derives his power to suspend the persons described, and to remove such officers, that is, the city officers, directly from the organic law. But this instrument does not give him the power to remove members of the police and fire departments. This power, by the very language of the section, must be derived from the General Assembly.

[2] It is insisted that this section of the Constitution confers upon the General Assembly the power to authorize the mayor to remove a member of the police force. To this view we cannot give our assent. The language used refers to the possible exercise by the General Assembly of a power which it enjoys of right, and which it is competent to set in motion in the free exercise of legislative discretion. It is not true that this section is a source of power for the General Assembly, or that it directly affords to that body the authority to empower the mayor to remove the members of the police force. Further, it is insisted that, not only does this section confer power upon the General Assembly to extend this authority of removal to the mayor, but that this power, so conferred, is the sole power which the General Assembly enjoys in this connection. That body, in its discretion, may or not, so it is contended, exercise this power; but, if it declines to afford the authority to the mayor to remove the members of the police force, it may not, then or thereafter, afford this authority to any other official.

The General Assembly possesses all the sovereign powers of a free people not clearly and necessarily taken from it by the Constitution. The language of the section cited, *supra*, is not a grant of power, but a reference merely to the exercise of an existing legislative power, namely, the power of legislative control over the police force of the several cities of the commonwealth. In this view of the situation, the power of a mayor to remove a policeman, if it exists at all, must be derived from some act, or acts, of the General Assembly, subsequent to the Constitution. There are three acts proper to be cited in this connection, to wit: Section 1033 of the Code (1904); the act of March 4, 1916 (Acts 1916, p. 176); and the act of March 6, 1918 (Acts 1918, p. 180).

[3, 4] Section 1033 of the Code is a general act. The acts of 1916 and 1918, respectively, are amendments of the charter of the city of Richmond. Section 1033, *supra*, provides that the mayor shall see that the duties of the various city officers, and members of the police and fire departments, are faithfully performed. It is manifest that the language repeats a distinction already noted between the city officers and the members of the police department. The distinction is more than nominal; it is a very real one. The officers referred to are city officers, while policemen are state officers. This distinction is established in the case of *Burch v. Hardwicke*, 30 Grat. (71 Va.) 24, 32 Am. Rep. 640, which holds specifically that policemen are state and not city officers. Hence the right given to the mayor of the city of Lynchburg to remove city officers was not considered to include the right to remove a member of the police department. In the case cited, *Staples, J.*, delivering the opinion of the court, distinguishes very clearly between city officers, such as city engineers, inspectors, surveyors, and others, and the members of the police force, pointing out that in the nature of things the latter are officers of the state. Hence the express power to remove members of the first class was not considered to include members of the other. Section 1033, *supra*, provides further that the mayor shall have the power to suspend such officers (that is, by familiar construction, the city officers above referred to), and the members of the police and fire departments, and to remove such officers (again evidently referring to the city officers), for misconduct. It will be noted that this section directly affords the mayor the authority to remove city officers under the conditions prescribed, but omits to include in this grant of power the members of the police force. That this omission was intentional may be readily seen by looking to the next sentence, which provides that "from such order of suspension or removal, the city officer so suspended, or removed, or the



member of the police or fire department so suspended, unless," etc., shall have an appeal of right to the corporation court. This general statute, therefore, fails to afford to the mayor of the city of Richmond, or to the mayor of any city of the commonwealth, the right to remove a member of the police force, nor does it vest that right in any other official. In March, 1916, and again in March, 1918, the General Assembly amended the charter of the city of Richmond in various particulars. Section 11 of the charter is amended in both acts, but section 11, as it is found in the acts of 1918, which were effective January 1, 1919, is the present law for the city of Richmond.

The charter act of 1918 consolidated authority and responsibility in the hands of the mayor and six departments, one of these departments being the department of public safety. Subject to the confirmation of the council, the mayor is empowered by this act to appoint a director of public safety. This director is charged with the management and control of the police department, and is given power to appoint a chief, who is removable at his pleasure (see section 86). Further, he is authorized to formulate and promulgate rules and regulations for the police force. The chief of police is authorized to appoint the members of the police force, subject to the approval of the director.

Section 86, in part, is as follows:

"The terms of the officers and members of said force shall be during good behavior and efficiency. \* \* \* The chief of police shall be responsible to the said director for the discipline and efficiency of the force. \* \* \* Any officer or member of the force may be fined by the chief of police for good cause shown, such fine to be deducted from his pay, or may be removed or suspended, subject to the approval of the said director, from the force or reduced in rank when the same shall be, in the judgment of the chief of police, for the good of the service."

Section 11 of the act of 1918 charges the mayor with the duty of supervising and compelling the performance of duty by all other officers and employes. In order that these duties may be effectively discharged, the mayor is given the power of suspension and removal. The precise language used in this connection is as follows:

"He shall have power to suspend any of such officers and subordinates, including the members of the police and fire departments, and may remove such officers and subordinates for misconduct in office," etc. "On the removal or suspension of such officer or officers the mayor shall report," etc.

This language is substantially the language used in this connection in section 1033 of the Code, and fails to include, under the head of officials who may be removed, the

members of the police and fire departments. The act of 1918 is the latest evidence of the legislative intent, and the latest exercise of the legislative authority relating to the removal of officials by the mayor of the city of Richmond.

The words "such officers," in section 11, are considered to refer to city officials, and, as the power of suspension is extended in terms to "members of the police department," the omission to use the words, "members of the police department," when the section deals with the power of removal, evidently indicates that the power to remove members of the police department was not intended to be afforded to the mayor by this statute. It has already been pointed out that the bare power to remove city officers would not include policemen, the latter being officers of the state.

[5-8] A further inquiry in this connection concerns the extent of the legislative authority. Unquestionably, the General Assembly is empowered to authorize the mayor to remove a member of the police force, but is that the limit of its authority? Failing to extend this authority to the mayor, may the General Assembly lodge it in some other city official? Even if the Constitution invested the mayor with this power of removal, it would not follow of necessity that this was an exclusive power. For instance, in *State v. Adams*, 46 La. Ann. 830, 15 South. 490, it was held that the power given to the courts by the Constitution to remove municipal officers was not exclusive, and a city charter authorizing the common council to remove recorders of the recorder's court on impeachment proceedings was valid. See, also, 28 Cyc. p. 434. Whether or not a power of removal is an exclusive power is a question of intent, and much depends upon the precise language used. On this question of exclusive intent, see *McCurdy v. Smith*, 107 Va. 759, 60 S. E. 78, and *Lowe v. Com.*, 60 Ky. (3 Metc.) 237.

It is, of course, true that the procedure provided by the Constitution for cases of removal must be followed by the official, or officials, exercising the power. The Legislature may not provide methods for removing officers inconsistent with the Constitution. 28 Cyc. p. 1406.

Section 120 of the Constitution does not undertake to prescribe any method of procedure for the removal of members of the police force. The procedure which it prescribes is limited in terms to city officers. For instance, in the exercise of his power of removal, the mayor, pursuant to the Constitution (section 120), is required to give the officer (evidently a city officer) notice before removing him. The words, "member of the police department," are not used in this connection. The language of the section is as follows: " \* \* \* but no such removal shall

be made without reasonable notice to the officer complained of." The word "officer" plainly meaning a "city officer." Further in the sentence next following the words last cited, an appeal of right to the corporation court is afforded to the "city officer." This appeal of right is not given to a member of the police force.

The General Assembly, in section 86 of the act of 1918, has undertaken to give the chief of police of the city of Richmond the right to remove, or suspend, a policeman, subject to the approval of the director of public safety. A part of this section cited *supra* is reproduced in this connection:

"Any officer or member of the force may be fined by the chief of police for good cause shown, such fine to be deducted from his pay, or may be removed or suspended, subject to the approval of the said director, from the force or reduced in rank when the same shall be, in the judgment of the chief of police, for the good of the service."

If this act is constitutional, the power which it undertakes to afford is validly conferred. Is there any sufficient reason for holding that this act is repugnant to the Constitution, and therefore void? The act itself is evidence that the General Assembly believed that it could confer this power upon the chief of police, and this court should sustain the action of the General Assembly and make effective the legislative intent, unless it is fully satisfied that the act is repugnant to the Constitution. The principles appropriate in this connection have been repeatedly announced.

In *Burch v. Hardwicke*, *supra*, the court held as follows:

"This court has been repeatedly called on to pronounce legislative enactments void upon the ground of their repugnancy to the Constitution, and it has always declined to do so unless this repugnancy is, in its judgment, beyond all reasonable doubt."

In *Ogden v. Saunders*, 12 Wheat. 212, 6 L. Ed. 606, cited in *Cooley's Constitutional Limitations*, the court declared that—

"It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body, by which any law is passed, to presume in favor of its validity, until its violation of the Constitution is proved beyond all reasonable doubt."

This court is not satisfied that section 86 is plainly repugnant to the Constitution; on the contrary, it regards the act as a valid exercise of legislative authority. The corollary of this conclusion is that the chief of police is lawfully vested with the power to remove or suspend a member of the police force, subject always to the approval of the director of public safety.

But the question may be asked, in this connection, whether the power of suspension,

which, this statute lodges in the chief of police, is incompatible with the like power lodged in the mayor by the Constitution, or, to change the question somewhat, does the grant of this power to the mayor, by section 120 of the organic act, preclude the General Assembly from granting a like power to the chief of police?

In our view there is no incompatibility. The bare grant of power to the mayor to suspend a member of the police department affords no ground for the conclusion that the Constitution thereby intended to exclude the General Assembly from lodging a like power in some other official. It is altogether proper that the mayor, as the executive head of the city, should possess the authority of suspension; but the exercise of a like authority by another official is in no wise, in our view, incompatible with good government or the constitutional intent. There are many obvious—indeed, imperative—reasons of public interest why this authority should be confided to the chief of police.

[9, 10] Having reached the conclusion that the statute of 1918 confers upon the chief of police of the city of Richmond, subject to the approval of the director of public safety, the right to remove a member of his force, the next inquiry in due course is into the nature and character of the power conferred. Is this power to remove an absolute power, or, by virtue of the language used, do the members of the police force hold during good behavior and enjoy the right to a formal trial on charges preferred, with the incidental right to produce witnesses in their behalf, and to appear by counsel? The answer to these inquiries will be found in the case of *Smith v. Bryan*, 100 Va. 199, 40 S. E. 652. In that case the charter authorized the mayor of the city of Roanoke to appoint the chief of police, and his subordinates, with the further provision that the officers so appointed should hold their respective positions during good behavior, or until they are severally removed by the mayor, or by a three-fifths vote of the council after notice to and failure of the mayor to act, after having been requested to do so by the council. Whittle, J., delivering the opinion of the court, interpreted the section cited, *supra*, as follows:

"The sentence, in its entirety, imports an official tenure during good behavior, but subject, nevertheless, to the limitation that the mayor, or city council (should the former fail to act on request), shall have the absolute power of removal. This practically constitutes the tenure, quoad the authorities named, tenure at will; but forbids, as an implied incident to the higher tenure, the removal of a policeman by any other authorities than those designated, except for cause." 100 Va. 203, 40 S. E. 653.

Apart from the weighty effect of the decision cited, it is evident that under section 86 of the act of 1918, quoad the chief of police

of the city of Richmond, provided his action is approved by the director, the tenure of the members of the police force is at will. By the express terms of section 86 it is provided that the chief of police, subject always to the approval of the director, may remove a policeman whenever the same shall be, in the judgment of the chief, for the good of the service. Enjoying this absolute power, the chief of police is not required to proceed by formal trial to effect a removal. It is true that in the instant case the chief of police issued a citation to the defendant, Lumpkin, to appear on a day, and at a place named, to answer the charge and specifications set out in the citation. Further, the defendant was given the opportunity to produce at the hearing "such witnesses as he might desire to testify in his behalf." In the view of the learned judge of the hustings court, this action of the chief of police in preferring a specific charge against the defendant, in giving him the opportunity to summon witnesses, and in fixing a date for the trial on this charge, divested the chief of his absolute power of removal, and entitled the defendant to demand all the rights incident to a formal trial. In this view of the learned judge this court cannot concur. Section 120 of the Constitution provides the procedure to be followed in a case of removal of a city officer by the mayor of the city. But this is not a case in which the mayor is taking action, nor is the officer proceeded against a city officer. The instant case is an exercise of authority by the chief of police, pursuant to an act of the General Assembly fixing his powers, and the tenure of the members of his force. He was not required by this statute to take the steps cited supra, nor should those steps, when taken, be considered in derogation of his authority, or an enlargement of the rights of the defendant. The mere fact that the chief of police afforded the defendant opportunities that the latter was not entitled to demand, as a matter of right, should not divest the former of the power of action afforded by the statute. The steps taken were in aid of the defendant, by affording him precise knowledge of the charges preferred, and extending to him an opportunity to appear with his witnesses, and be heard. But the voluntary action of the chief of police in respect to the proceedings taken, and the opportunities which he afforded to the defendant, did not divest that official of the authority expressly lodged in him by the statute, or afford to the defendant rights which he was not entitled to demand either under the Constitution or the statute.

For the foregoing reasons, we are of opinion that the judgment of the hustings court, part II, of the city of Richmond, should be reversed, and the petition of the defendant in error for a writ of mandamus be dismissed.

Reversed.

# RECTOR et al. v. HANCOCK.

(Supreme Court of Appeals of Virginia.  
March 18, 1920.)

## 1. LIMITATION OF ACTIONS §27 — PAROL AGREEMENT FOR RELEASE OF NOTES HELD BARRED BY LIMITATIONS.

Where the makers of notes secured by deed of trust on land agreed by parol that the holder of the notes and beneficiary of the deed should be allowed to go into possession, etc., and enjoy the rents and profits and that the makers would remain on the property in the employment of the beneficiary and perform services on the property without compensation except their board and keep, and that at the maturity of the notes the beneficiary should cancel the obligation and release the deed of trust, the makers' right of action, if the agreement be regarded as a transaction separate and distinct from the notes, which might be asserted by an independent suit or by counterclaim, is barred by the five-year period of limitations.

## 2. BILLS AND NOTES §162—NEGOTIABLE INSTRUMENT MUST BE PAYABLE IN MONEY.

Both under Code 1919, § 5746, and the law merchant, it is an attribute of a negotiable note that it be payable in money.

## 3. EVIDENCE §397(2)—PAROL EVIDENCE TO ADD TO TERMS OF WRITING INADMISSIBLE.

When parties deliberately put their engagements into writing in such terms as import a legal obligation without any uncertainty as to the objects or extent of such engagement, it is conclusively presumed that the whole engagement of the parties and the extent and manner of their undertaking was reduced to writing, and parol evidence is inadmissible to contradict or vary the terms of the written agreement.

## 4. EVIDENCE §465 — CONTEMPORANEOUS AGREEMENT THAT NOTES SHOULD BE DISCHARGED OTHERWISE THAN BY PAYMENT OF MONEY INADMISSIBLE.

As a negotiable note imports payment in money, parol evidence is inadmissible to show a contemporaneous agreement by the parties that the notes which were secured by deed of trust were to be satisfied by the makers' rendition of service for the holder, as well as the act of the makers in allowing the holder to go into possession and enjoy the rents and profits of the land mortgaged.

## 5. ACCORD AND SATISFACTION §19 — EVIDENCE §466—ACCEPTANCE OF ACCORD NECESSARY; PAROL EVIDENCE ADMISSIBLE TO SHOW ACCORD DISCHARGING NOTES.

Where the makers of notes secured by deed of trust agreed to place the holder in possession of the lands mortgaged, the holder agreeing that, in consideration of the rents and profits and the makers' services, he would release the lands at maturity of the obligation, etc., there would be an accord and satisfaction if the holder accepted the possession of the property and rendition of services in satisfaction of the notes, in which case, if the holder afterwards refused to release the deed of trust, parol evidence would be admissible to establish the accord and satisfaction.

**d. LIMITATION OF ACTIONS §40(1)—WHERE CONTRACT IS ACCORD AND SATISFACTION, LIMITATIONS INDEPENDENT OF PRINCIPAL TRANSACTION WILL NOT RUN.**

Where a contract whereby holder of notes and deed of trust was to accept profits of lands mortgaged, etc., until maturity of the obligation, and at that time to release the notes, etc., was executed so as to become an accord and satisfaction, limitations, independent of the principal transactions, will not run against the right of the makers to compel release.

**7. ACCORD AND SATISFACTION §1—IMPLIES PRE-EXISTING DEBT OR DISPUTE.**

An accord and satisfaction implies a pre-existing debt or dispute, so a parol agreement as to discharge, made contemporaneously with the execution of notes, cannot be treated as an accord and satisfaction of the notes.

**8. ACCORD AND SATISFACTION §19—BILL HELD INSUFFICIENT TO SHOW ACCORD AND SATISFACTION OF NOTES.**

A bill by makers of notes and deed of trust, who asserted that the parties had contemporaneously agreed that the holder should be allowed to enter into possession of lands and enjoy the rents and profits, etc., until maturity of the obligation, which would then be discharged, but that the holder, although he entered into possession of the lands, refused to carry out the agreement, is insufficient to make out an accord and satisfaction, not showing any actual acceptance of the parol contract by the holder.

**9. ACCORD AND SATISFACTION §19—MUST BE ACTUAL ACCEPTANCE AND NOT A MERE AGREEMENT TO ACCEPT.**

In order to constitute a valid accord and satisfaction, whether the substituted contract be executory or executed, there must be an actual acceptance, and not a mere agreement to accept.

**10. ACCORD AND SATISFACTION §19—WHERE CONTRACT ACCEPTED IN SATISFACTION, ORIGINAL DEMAND SATISFIED.**

An executory contract, oral or written, may be accepted in satisfaction of a pre-existing demand or controversy; and, when so accepted, the original demand or controversy is wiped out and satisfied, although a new cause of action may arise by reason of the transaction.

Appeal from Circuit Court, Henrico County.

Bill by George N. and Mary D. Rector against N. J. Hancock. From a decree dismissing the same, complainants appeal. Affirmed.

Scott & Buchanan and Jno. L. Ingram, all of Richmond, for appellants.

Smith & Gordon, of Richmond, for appellee.

KELLY, P. This is an appeal from a decree dismissing a bill in equity, brought to enjoin a trustee from selling certain real es-

tate, conveyed to him by deed of trust to secure a loan of money. The bill, after alleging that the complainants, George N. and Mary D. Rector, are the joint owners of 100 acres of land in Henrico county, proceeds as follows:

"(2) That on the 19th day of May, 1911, they conveyed to R. A. Lancaster, Jr., the above-described property in trust to secure to the holders of the notes the payment of the sum of \$2,120, evidenced by three negotiable notes date May 19, 1911, drawn by your complainants and payable at the National Bank of Virginia, Richmond, Va., to the order of your complainants, and indorsed by them as follows: One principal note for \$2,000, payable one year after date, and two interest notes for \$60 each, payable 6 and 12 months after date, respectively.

"(3) The said loan, secured as above described, was made by N. J. Hancock, who thereupon became the owner of said notes and is now the owner of said notes.

"(4) That at the time the said loan was made an agreement was entered into between said N. J. Hancock and your complainants to the effect that said Hancock would take possession and control of the said real estate during the term of the said loan and manage the same for his benefit, taking all the rents and profits arising therefrom for his own use, and that your complainants would remain on the property in the employment of said Hancock during the term of the loan and serve him and perform services thereon without compensation, except their board and keep, and in consideration therefor the said Hancock then and there agreed that at the maturity of the said loan he would fully release the same unto your complainants, and have the property conveyed in trust to secure the same fully discharged and released from the lien of the deed of trust herein described. Your complainants aver that the said Hancock took exclusive possession and control of said property under and pursuant to the foregoing agreement, and not only took the rents and profits of the said property for the term immediately succeeding the said loan, but did not give up possession and control until the spring of 1915; that during all of said time your complainants fully and faithfully performed all of the terms of the foregoing agreement on their part to be performed, and faithfully labored for and served the said Hancock in and about all matters connected with his operation of the said property under and pursuant to the aforesaid agreement.

"(5) That at the expiration of the said two (7) years immediately succeeding the date of said loan, your complainant repeatedly requested the said Hancock to comply with his agreement, and fully discharge and acquit them from the foregoing deed of trust debt and release their real estate herein described from the lien of said deed of trust, but, though often so requested, the said Hancock had failed and refused to do so, and your complainants aver that he, on the — day of May, 1917, ordered and requested R. A. Lancaster, Jr., trustee in the deed of trust herein described, to sell at public auction the property of your complainants for the satisfaction of the debt secured in said deed of trust, alleged by the said

Hancock to be now due and unpaid to him, with the interest thereon."

The defendant, Hancock, construing the alleged collateral agreement as a matter separate from and independent of the contract represented by the notes and deed of trust, interposed a plea of the statute of limitations, averring:

"That the supposed cause of action in the said bill mentioned did not accrue to the said plaintiffs within three years next before the issuing of process to begin this suit, nor within five years next before the issuing of process to begin this suit."

[1] No evidence was taken in the case, and it was heard simply upon the bill and exhibits and plea of the statute of limitations. The alleged contract for service, however, was and is conceded to have been by parol. The court was therefore right in sustaining the plea and dismissing the bill, if the parol agreement was to be regarded as a transaction separate and distinct from the notes and deed of trust. Regarded thus, its breach by the defendant merely entitled the complainants to a right of action which they could assert either by independent proceeding or as a counterclaim or offset against the notes. The oral contract was to be completed, according to the allegations of the bill, in May, 1912; this suit was brought in June, 1917; and the plea was therefore necessarily good.

[2-4] But the complainants, while conceding that the alleged agreement for services was by parol, and that any counterclaim thereunder would be barred, claim the right to rely upon it as a pure defense, against which no limitation would run, taking the position that it had been fully performed by them, and "in effect amounted to no more and no less than a payment of the notes secured by the deed of trust."

The infirmity in this position is that there had never been any acceptance of the possession of the land and the services of the complainants as a payment of the notes. The situation is illustrated by the case of *Doody v. Pierce*, 9 Allen (Mass.) 142, in which it was contended that the note involved was paid in labor at or before maturity. The court said:

"But it does not appear that the note was thus paid. When it was given Pierce and Marshall were partners, and it was made payable to their firm. They agreed with the plaintiff that he should work for them, and that they would apply his wages to the payment of the note. On the 1st of January, 1858, they dissolved their partnership, and the note and mortgage were assigned to Marshall. The plaintiff agreed with him to continue to work for him, and that his wages should be applied in the same way. It appears by the master's report that before the principal became due the plaintiff's wages amounted to more than enough to

pay the note and interest. But no indorsement has been made on the note, and no actual application of any part of the wages has ever been made to the payment of the note. It thus appears that the agreement as to the application of the wages was a mere executory contract, and requires a further act to be done before it can operate as payment. The note and mortgage remain legally valid till such application is made. *Cary v. Bancroft*, 14 Pick. 315 [25 Am. Dec. 303]; *Dehon v. Stetson*, 9 Met. 345."

See, also, *Gray v. White*, 108 Mass. 228.

One of the essential attributes of a negotiable note is that it is payable in money. Code 1919, § 5746; Bigelow on Bills and Notes, p. 27. The notes in this case are described as negotiable in the bill, and upon their face are plainly payable in money. Their terms leave nothing uncertain or equivocal as to the medium of payment, and they thus fall within the general rule that—

"When parties have deliberately put their engagements into writing in such terms as import a legal obligation without any uncertainty as to the objects or extent of such engagement, it is conclusively presumed that the whole engagement of the party and the extent and manner of their undertaking was reduced to writing; and all (such) oral testimony \* \* \* as would tend to substitute a new and different contract for the one which was really agreed upon, to the prejudice possibly of one of the parties, is rejected. In other words, as the rule is now more briefly expressed, 'Parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument.'" 1 Greenleaf on Ev. § 275.

See, also, 4 Wig. Ev. 2430(3) p. 3427; *Towner v. Lucas*, 13 Grat. (54 Va.) 705, 710; *Martin v. Lewis*, 30 Grat. (71 Va.) 672, 682, 32 Am. Rep. 682; *Slaughter v. Smither*, 97 Va. 202, 205, 206, 33 S. E. 544; *Percy v. Bank*, 110 Va. 129, 132, 65 S. E. 475; *Lynch v. O'Brien*, 115 Va. 350, 352, 79 S. E. 389. Mr. Line's note to *Slaughter v. Smither*; 5 Va. Law Reg. 316; *Brown v. Spofford*, 95 U. S. 485, 24 L. Ed. 508.

In the case of *Brent v. Richards*, 2 Grat. (43 Va.) 542, it was held that where a slave had been sold under a written bill of sale which appeared to be formal and complete, the vendor might prove a contemporaneous parol agreement on the part of the vendee, giving the former the right to repurchase the slave on certain conditions. It may not be altogether easy to harmonize the decision in that case with some of the subsequent decisions in this state dealing with the parol evidence rule; but the case cited gives no trouble here, because the opinion was based upon the ground that the parol agreement "was neither inconsistent with nor contradictory of the bill of sale," and, further, that the bill of sale represented exclusively a stipulation of the vendor, while the parol agreement related to a collateral and not inconsistent undertaking on the part of the

vendee. In the present case the alleged parole agreement embodied an undertaking on the part of the makers of the notes, and one, too, which is in direct conflict with the manner of payment provided for therein. By the notes they agreed to pay in money; by the parole contract they were not to pay in money but in labor.

In *Meredith v. Salmon*, 21 Grat. (62 Va.) 762, the bond involved was "to be paid in current funds," and the court held that the maker might prove by parole evidence that at the time of the execution of the bond he was given the right to pay in Confederate currency; and again, in *Stearns v. Mason*, 24 Grat. (65 Va.) 484, in the case of a bond payable "in current money of Virginia," extrinsic evidence was resorted to in order to determine the medium of payment which the parties had in mind. But in both of these cases the court held that the words to be construed were equivocal, and such as that "men might honestly differ as to their construction." Consequently, the parole evidence did not tend to vary or contradict, but merely to explain and aid in the interpretation of the written instruments. As stated by Judge Staples in *Meredith v. Salmon*, citing *Thorington v. Smith*, 8 Wall. 1, 19 L. Ed. 361, such evidence "simply explains an ambiguity which under the general rules of evidence may be removed by parole. It enables the court simply to interpret the written terms according to the real intent and agreement of the parties, and to understand what was meant by the words they have employed."

Upon the precise question now before us—the admissibility of parole testimony to show that a note or other obligation in terms payable in money was in fact to be discharged in some other way—we have found no Virginia decision, but the authorities cited above and the reason of the matter would seem necessarily to lead to the conclusion that such evidence is inadmissible. There is some conflict of authority upon the question, but it is believed that the conflict is more apparent than real, and due, in some cases at least, to the failure to distinguish between a contemporaneous parole contract intrinsically connected with the written contract and one which is extrinsic and independent of the writing. The former, if challenged, cannot be availed of for any purpose, while the latter may be the basis of an independent action, or of an offset or counterclaim against a demand upon the written contract. This distinction is concretely illustrated by the case in hand, and it is frequently adverted to by courts and text-writers in discussing the parole evidence rule as applied to money obligations. In 4 Wigmore on Evidence, § 2436, the author says:

"For the same reason as in the foregoing class of cases [agreements not to sue, or not to enforce, etc.], an agreement concerning the mode

or medium of payment of an obligation cannot be established, when the document in any respect deals with that subject; but documents bear such variances of detail in these matters that no fixed rule can be laid down. An agreement of renewal, though it might be construed as virtually affecting the length of term of an obligation, seems really to concern a new and different obligation. An agreement of counterclaim or set-off, provided it is not in form or essence a mere qualification of the mode of payment specified in the document, may properly be established, for it concerns a separate obligation."

Again, Mr. Wigmore, discussing the application of the parole evidence rule to negotiable instruments, says (section 2444):

"An extrinsic agreement as to the mode of payment, or the amount of payment, must be, by the foregoing tests, ineffective, since the parties have expressly dealt with these matters in the instrument; and although an agreement to concede a credit or counterclaim, as offsetting the obligation of the instrument, would be a separate transaction and therefore valid, yet the distinction between the two may sometimes be hard to draw."

In *Clement v. Houck*, 113 Iowa, 504, 85 N. W. 765, there was an action on a promissory note. The case brings out and illustrates clearly the distinction under discussion here. The defendant claimed that, by an oral agreement prior to the execution of the note, he had purchased certain goods from the plaintiff, with the stipulation that if he should be unable to sell them by a certain time he would be allowed to return them to the plaintiff at their original cost; that he sold part of the goods; that before the expiration of the time within which he was to be allowed to return them, he executed the note sued on, reserving his right to return such as he could not sell, and that he had been unable to sell a part of the goods which he had on hand when the note was executed and for which it was given, and stood ready to return them. His pleadings admitted the execution of the note, but offered the agreement: (1) as a defense to the action; and (2) as an offset or counterclaim. The court said:

"1. On the trial the defendant offered to prove that the alleged oral agreement was entered into at the time he purchased the goods; that he exposed and offered the goods for sale at the proper season, and that said goods proved to be unsuited for the trade supplied by him; that, after diligent effort to sell the same at a reasonable profit, he offered to return said goods to the plaintiff, and packed and set aside the same, and has since held them subject to the order of the plaintiff; that the price of said goods, as charged to defendant, was \$803.75. Defendant also offered to prove that at the time he gave the note in suit he expressly reserved his rights under said agreement. To these offers plaintiff objected as seeking to vary by parole the terms of the note, and the objection was sustained. Under a well-established and undis-

puted rule of law this evidence was not admissible to vary or contradict the terms of the note, and therefore not admissible in support of the defense pleaded. The note is payable in money, not in goods; and to entertain this defense as such, and to admit the evidence in support thereof, would clearly vary the terms of the note by making it payable in goods, instead of money. There was no error in excluding this evidence, so far as the alleged defense is concerned, nor in withdrawing the defense from the consideration of the jury.

"II. We now inquire whether the defendant was entitled to introduce the offered evidence in support of his first counterclaim. His counterclaim shows a cause of action against the plaintiff for a money recovery, which he is entitled to have set off against the amount due the plaintiff, unless by giving the note in suit he has waived said right. \* \* \* If it is true, as defendant offered to prove, that his rights under the agreement were expressly reserved at the time the note was given, then there was neither waiver nor settlement of those rights. It is insisted that this evidence is not admissible, because it varies the terms of the note. Defendant, in this counterclaim, does not question the plaintiff's right to a money judgment for a balance due on the note, but he is in the attitude of saying that, because of the matters alleged in the counterclaim, \* \* \* the plaintiff owes him a sum of money, which he asks to have set off against that confessed to be due to the plaintiff. If these rights were not waived nor settled, then the defendant has a cause of action against the plaintiff, the enforcement of which as a set-off does not vary the terms of the note, though it may operate, as any other rightful set-off would, as a partial or total payment of the amount due to the plaintiff. \* \* \* We conclude \* \* \* that the court erred in excluding this offered evidence in support of the first counterclaim, and in withdrawing that counterclaim from the consideration of the jury."

In *Stein v. Fogarty*, 4 Idaho, 702, 43 Pac. 681, there was an action on a promissory note. The defendant admitted the execution of the note, but alleged that contemporaneously with its execution he and the plaintiff mutually agreed that the note should be paid by the defendant in work and labor as a plumber, at the usual rates, upon a house then being constructed by the plaintiff. The court, holding the parol evidence inadmissible, said:

"The question involved in this case is whether parol evidence of an oral agreement made contemporaneously with a promissory note which contains an absolute promise to pay a specified number of dollars, at a specified time, is admissible to prove that such note was to have been paid in work and labor. It is a well-settled principle, based on public policy, that parol contemporaneous evidence is inadmissible to vary or contradict the terms of a valid written instrument. 1 Greenleaf on Evidence, § 275."

See, also, to the same effect, *Mumford v. Tolman*, 157 Ill. 258, 41 N. E. 617; *Vradenburg v. Johnson*, 3 Neb. (Unof.) 326, 91 N. W.

496; *Linville v. Holden*, 2 McArthur (D. C.) 329; *Thornburgh v. Newcastle Railroad Co.*, 14 Ind. 499; *Lang v. Johnson*, 24 N. H. 302; *Roundtree v. Gilroy*, 57 Tex. 176; *Holt v. Chandler* (Tex. Cr. App.), 29 S. W. 532.

[5, 6] There is a line of cases holding that an executed or fully performed contemporaneous verbal agreement for the discharge of a note, as distinguished from an executory contract for the same purpose, may be shown by parol, and will constitute a good defense. 43 L. R. A. 483, note. We are unable to give our assent to the doctrine of these cases, except in so far they may be construed to mean that such a contract, when fully performed by the maker of a money obligation and accepted as such by the payee, amounts to an accord and satisfaction. Thus, for example, in *Buchanan v. Adams*, 49 N. J. Law, 636, 10 Atl. 662, 60 Am. Rep. 668, the evidence showed that lumber was in fact received as a payment instead of money. The collateral contract must have been executed in the sense that something else than money has been actually given and received in satisfaction of the debt. When this has been done, the debt has been discharged. It will be true in practically all cases that the collateral agreement is executory at the time it is made, and we are unable to see any valid ground upon which to hold that a different rule of evidence should apply to such a contract after it has been performed, except, as indicated above, in cases where the performance has been accepted in discharge of the obligation. Until there has been such acceptance and consequent discharge of the written obligation to pay money, it matters not whether the parol contract remains executory or has been fully executed so far as the rules of evidence are concerned, because in either case the purpose is to prove a contract different from that which is evidenced by the writing. Of course, an executed contract will generally be of much more value to the defendant as a counterclaim or offset against an action on the written obligation than a contract which still remains executory; but neither one can be engrafted by parol upon such obligation so as to vary its terms in regard to matters completely covered by it.

In the instant case, if the bill had alleged that, subsequent to the execution of the notes, the defendant accepted the possession of the property and the services of the complainants in satisfaction of the notes and afterwards refused to release the deed of trust, we would have no difficulty in holding that parol evidence should be admitted to prove such acceptance. This would simply be proving by parol an accord and satisfaction equivalent to payment, which is always permissible. And, as against a defense based upon the state of facts here supposed,

the statute of limitations would not constitute a bar. Thus, in *Blackshear v. Dekle*, 120 Ga. 766, 48 S. E. 311, it was held that where, in a suit on a note, the defendant pleaded payment, alleging that the plaintiff had accepted lumber in satisfaction of the note, the defense was not barred by limitation, even though it would have then have been too late to sue for the value of the lumber or to set up its delivery as a counterclaim. See, also, 17 Cyc. 1063; 17 R. C. L. 745.

[7-10] But the allegations of the bill do not make a case of accord and satisfaction. This is true because: First, the written and verbal contracts were contemporaneous, whereas an accord implies a pre-existing debt or dispute; and, second, there was no in present acceptance of the verbal arrangement as a substitute for and discharge of the written contract, but only an agreement to accept in futuro a performance of the verbal arrangement. The bill affirmatively shows that there never has been any substitution of the one contract for the other, the allegation being that the defendant "is now the owner of the notes," and that, though repeatedly requested, he has failed and refused to comply with his agreement to accept the possession of the land and the services of complainants in discharge thereof. In order to constitute a valid accord and satisfaction, whether the substituted contract be executory or executed, "there must be an actual acceptance, and not a mere agreement to accept." 2 Min. Inst. (3d Ed.) p. 169.

There has been no contention before us that the alleged verbal contract was intended as a substitute for the contract in writing, or that it amounted to an accord and satisfaction. We have mentioned the question because the conflict in the authorities as to the effect, in cases like this, of an executed verbal contract is, in our opinion, due to a failure to distinguish between facts which constitute an accord and satisfaction and facts which cannot be so construed. An executory contract, oral or written, may be accepted in satisfaction of a pre-existing demand or controversy, and when so accepted the original demand or controversy "is then wiped out; it is satisfied; and the right of action for it is gone, albeit it may be that out of the transaction designed as a satisfaction of the original wrong a new cause of action may arise." 2 Min. Inst. (3d Ed.) 166. See, also, 1 Cyc. 313, 314, note 46; 1 Am. & Eng. Ency. L. (2d Ed.) 423; 1 R. C. L. p. 199, § 36.

For the reasons stated, we are of opinion that the court did not err in dismissing the complainants' bill, and the decree complained of is therefore affirmed.

Affirmed.

(85 W. Va. 621)

WAGNER et al. v. BEAVERS. (No. 3807.)  
(Supreme Court of Appeals of West Virginia.  
March 2, 1920.)

(Syllabus by the Court.)

1. TAXATION  $\S$  763—RECITAL OF SHERIFF'S RETURN OF SALE AS TO QUANTITY OF LAND PREVAILS OVER RECEIPT ISSUED TO PURCHASER.

Where the return of sales of lands sold for the taxes delinquent thereon made by a sheriff shows that a fractional part of a certain town lot was sold for the taxes charged against the whole of such lot, and purchased by a particular individual, and the sheriff issues a receipt to such purchaser showing that he purchased the whole of said lot for the taxes so delinquent thereon, such purchaser will not be entitled to a deed for any larger interest than that shown to have been sold to him by the sheriff's return of sales. The recitals of this return will prevail over the statements of the receipt issued to the purchaser.

2. TAXATION  $\S$  783—EFFECT OF TAX DEED FOR LARGER INTEREST THAN THAT SOLD STATED.

Where the clerk of the county court makes a deed to a tax purchaser for a larger interest than that shown by the sheriff's return of delinquent sales to have been purchased by him in a town or city lot, such deed will be held to be a cloud upon the title to the extent that it attempts to convey anything in excess of the interest shown to have been purchased by the sheriff's report of sales, but will be held to be valid as to such interest.

Poffenbarger, J., dissenting.

Appeal from Circuit Court, Wyoming County.

Action by Charles Wagner and others against A. D. Beavers. Decree for defendant, and plaintiffs appeal. Reversed and rendered.

Cook & Howard, of Welch, for appellants.

RITZ, J. Plaintiffs became the owners of lot No. 3 in the town of Bramblett, in Wyoming county, in the year 1915. Prior to the conveyance to them the lot was entered upon the land books for the year 1915 in the name of their vendor, and the taxes thereon charged against the same in his name. These taxes were not paid, and the sheriff returned the lot delinquent for the nonpayment thereof, and the lot was subsequently offered for sale in satisfaction of the taxes charged against it, at which sale the defendant, according to the sheriff's return of sales, purchased one-fourth of the lot for the taxes and charges, and, according to the receipt given him by the sheriff, purchased the whole thereof for such taxes and charges. The lot was not redeemed within the time required by law, and upon application of the



defendant the clerk of the county court made a deed to him conveying the whole lot. Alleging many irregularities in the tax sale, and also alleging that only one-fourth of the lot was purchased by the defendant for the taxes, and exhibiting a certified copy of the sheriff's return of sale as evidence of this fact, the plaintiffs brought this suit to cancel said tax deed. The defendant by his answer denied all of the allegations of the bill except the allegation that the sheriff's return of sales showed that he only purchased one-fourth of the lot, but as to this allegation he alleged that he had in fact purchased the whole lot, and exhibited the receipt issued to him by the sheriff as evidence of this fact. The case was submitted upon this state of the record, and the circuit court dismissed the plaintiff's bill. It will be noticed that the only question involved is whether the receipt issued by the sheriff to the purchaser or the return of sales made by the sheriff to the county clerk will control in making the deed. If the return made by the sheriff to the county clerk's office controls, then the county clerk improperly made a deed for more than one-fourth of the lot. If, on the other hand, the receipt issued by the sheriff to the purchaser is the paper which controls, the deed made by the clerk is proper. Under our statute the sheriff making a tax sale gives to the purchaser a receipt showing the land sold, in whose name it is sold, the amount paid therefor, and the interest purchased therein, together with certain other information. This receipt is not recorded, and is not in any sense, under the statute, a muniment of title, but is simply a memorandum in the possession of the purchaser showing the transaction had by him with the sheriff. The law does, however, require the sheriff to make a report of the sales so made by him to the clerk of the county court. This report he must make under oath, and it must contain, among other information, the description of the land sold, the party in whose name sold, the name of the purchaser, and the interest purchased. This report is required to be recorded, and is a muniment of title of the tax purchaser. The object of this report is to perpetuate the facts showing the transaction, to enable the owner of the land to learn from the record the fact that his land has been sold, and to whom, and to guide the officer intrusted with the power in the execution and delivery of a conveyance to the purchaser. From this return the owner or any other person interested is always enabled, by going to the office of the county clerk, to ascertain with certainty the evidence of the sale, and to protect his interest in the premises by redemption; and the officer intrusted with the power of making conveyances is enabled to ascertain the description of the land, the name

of the purchaser, the quantity sold, and every other thing which the law requires to be stated in the deed. It is argued that the receipt given to the purchaser is a paper of superior dignity, for the reason that both parties are represented in its execution, while the sheriff's return of sales is an *ex parte* document. We do not think the faith and credit to be given to these papers is to be thus determined, but rather is their status to be fixed by the purpose which they are intended to accomplish. As before seen, the purpose of this report of the sheriff is to give notice to the owner and any other person interested of just what has been done. The owner, upon going to the record and finding that only a part of his land has been sold for taxes, may prefer to let the purchase stand rather than redeem, or it may be that one having a lien on the land, upon going to the record and seeing that only one-fourth of it has been sold, and knowing that three-fourths of it is ample security for his debt, would fail to redeem, and then, if the receipt issued by the sheriff to the purchaser, of which no one else has knowledge, is to control over this report, the creditor, thus misled, would be deprived entirely of his security, as well as the right to redeem by the lapse of time. In the state of Iowa it seems that there is a statute somewhat similar to ours in regard to issuing a receipt to the purchaser at a tax sale, as well as a requirement of a report being made and recorded. Under this statute it is held that such report will control when it is in conflict with the receipt given by the selling officer. *McCready v. Sexton & Son*, 29 Iowa, 356, 4 Am. Rep. 214; *Henderson v. Oliver*, 32 Iowa, 512; *Clark v. Thompson*, 37 Iowa, 536. There are some holdings in Minnesota to the effect that the certificate issued by the selling officer to the purchaser will control over a report made by the selling officer, but that is for the reason that under the statute in that state this certificate is the purchaser's muniment of title. It becomes his deed if the land is not redeemed within the time given the owner to do so, and it is recorded and treated in all respects as a deed conveying the title without the execution of any other paper, and the statute in express terms makes it *prima facie* evidence of what it contains, so that it cannot be said that these cases are pertinent authority upon the question involved here.

[1] We are of opinion in this case that the report of sale made by the sheriff must control as to the interest sold by him, and that the purchaser was not entitled to a deed for any larger interest than that shown to have been purchased by the report of sales. Section 25 of chapter 31 of the Code provides that a deed conveying a less amount than that shown to have been purchased will not be void, but does not provide that

a deed may convey a larger interest than is so shown to have been purchased.

But can it be said that the deed is absolutely void as contended for by the plaintiffs? It is insisted that under the decision in the case of *Shrewsbury v. Horse Creek Coal Land Company*, 78 W. Va. 182, 88 S. E. 1052, this deed is absolutely void, and of no effect to pass any title whatsoever to the purchaser. We do not think that case is authority for the proposition contended for. In that case the sheriff undertook to sell an undivided interest in land which it has been repeatedly held was a void sale, and then after the sheriff had sold this undivided interest the purchaser undertook to divide the land between himself and the other joint owner and take a deed for the part laid off to himself. It was held in that case that the sale and the deed made under it were void. In this case the sale is not questioned. The only defect is the imperfect execution by the clerk of the power conferred on him to make a deed. Instead of making a deed for a one-fourth undivided interest in this town lot as he was authorized by law to make, his deed attempted to convey the whole thereof. This act was unauthorized so far as it went beyond the conveyance of the interest purported to have been sold; but can it be said that it is any more than an illegal and defective performance by the clerk of the duty imposed upon him which is cured by the provision of section 25 of chapter 31 of the Code? We are of opinion that this imperfect execution by the clerk of the county court of the power conferred upon him, so far as it affects the interest purported to have been sold, is cured, and that the deed is good to pass the one-fourth undivided interest.

[2] Our conclusion, therefore, is to reverse the decree of the circuit court of Wyoming county and enter a decree here canceling the tax deed to the extent that it attempts to convey a larger interest than a one-fourth, undivided, of the lot referred to, as a cloud upon the title of the plaintiffs thereto.

POFFENBARGER, J. (dissenting). I am unable to concur in this decision. The turning point is in conflict between the list of sales and the memorandum of sale executed by the sheriff and delivered to the purchaser, the former having been made by the sheriff, presumptively in the absence of the purchaser and after all the sales had been completed, and the latter presumptively at the time of the particular sale in question and in the presence of the purchaser; the giving of the receipt being an inter partes act, and the making of the report an ex parte act.

In the Iowa cases referred to in the opinion prepared by Judge RITZ and adopted by my Associates the statute required the certificates given to the purchasers to be

made from the record of the sales filed, and not at the time of the sale. The report or list of sales was first made up and recorded or filed for record, and then the receipt or certificate was made from and based upon that report or record. The receipt or certificate was required by express terms of the statute to conform to the record; whether the latter was right or wrong. Under our statute the receipt is not based upon the list of sales nor made after the filing thereof. It is an original paper and antedates the preparation and filing of the list of sales. In Minnesota the order of procedure and relation in point of time between the delivery of the certificate to the purchaser and the making of the record are the same as they are under ours, and there the certificate is regarded as the better or superior evidence, and hence allowed to prevail over the record, in instances of conflict. *McQuade v. Jaffray*, 47 Minn. 326, 50 N. W. 233.

In my opinion, the difference between the legal status of the purchaser's certificate under the Minnesota statute and the receipt provided for by ours does not afford any good ground of escape from the effect of the precedent found in the decision above cited. Our receipt is a formal, statutory one which the selling officer is bound to give and for which the purchaser pays a fee. It contains the same columns and provides for the same data that the list of sales is required to have, in so far as it pertains to the tract of land embraced in it. While it does not convey title, it is evidence of the purchaser's right. It constitutes in part the basis of right to obtain a deed for the land mentioned in it. From it is to be ascertained the date of the expiration of right in the former owner to redeem by express provision of the statute. The form of deed prescribed recites expiration of such right "as appears by the sheriff's receipt for the purchase money." Code, c. 81, § 19. By virtue of section 15 of that chapter it is made determinative of the amount of the purchase money and the date from which to calculate interest thereon, in the event of a redemption. Though not rising to the dignity of a Minnesota certificate in all respects, it confers absolute and substantial right respecting both the land and the purchase money, and it is an inter partes paper embodying the evidence of a transaction between two persons, as does the Minnesota certificate. Nowhere in the statute is the list of sales declared to be prima facie correct, nor does the prescribed form of deed refer to it in any way. The higher character of the receipt is shown by the two instances in which it is expressly adopted as being true. Moreover, every receipt is by the common law deemed to be prima facie correct, and the burden rests upon him who denies its correctness to overthrow it by proof.

This is more than a mere receipt for money. It is a statutory memorandum of a sale of land, amounting to a contract authorized by law. While it does not pass title, it is a contract having the same dignity and sanctity as other contracts. Regarded as a contract, it is just as sacred and entitled to just as much respect as the Minnesota certificate. Again, there is no intimation of any imperfection or mistake in any receipt. Nowhere is there a provision curing defects in it. But the statute does assume probability of errors and omissions in the ex parte list of sales. Section 25 of the chapter says:

"No irregularity, error or mistake in the delinquent list, or the return thereof, or in the affidavit thereto, or in the list of sales filed with the clerk of the county court \* \* \* shall, after the deed is made, invalidate or affect the sale or deed."

The statutory preference of the receipt over the list of sales in the two instances noted does not argue lack of intent to make it prevail in others, under the rule "*Expressio unius est exclusio alterius*." In giving it such effect in these two instances, the list of sales is not mentioned. The preference is effected only by necessary implication. Nothing is said of the relative rank and dignity of the two papers anywhere in the statute. It merely deals with and recognizes the receipt as the superior evidence in the two subsequent transactions contemplated, redemption and the making of a deed in default of redemption. Recognition of its superiority in these two instances argues legislative impression or assumption of general superiority, or intent to confer it, and that impression, assumption, or intent agrees with the general principle of law that a contract between two men, solemnly made, stands upon higher ground, in any controversy between them respecting its subject-matter, than the subsequent conduct of one of them in the absence of the other by which their relative rights in the subject-matter may be affected. Acts of public officers are presumed to be right, but the presumption is rebuttable. An unimpeached contract between two men is right as matter of law, not as a matter of mere rebuttable presumption, even though one of them acts as a public officer, and the other in his private capacity. That the receipt is evidence of a contract made by the sheriff acting for the state or some other principal there can be no doubt. The statute denominates the transaction a sale, and a sale always involves a contract. Money is paid by the purchaser in exchange for which he receives a paper signed by the sheriff and giving him conditional right to call for a deed which the statute makes prima facie evidence of good title against the former owner and persons claiming under him and conclusive evidence thereof

against other persons. That paper, when produced, proves a conditional sale of certain land. That there is a point in the proceeding at which a sale is effected the statute necessarily implies. At what point can that take place? Obviously at the exchange of the money for the memorandum of sale. The purchaser's bid initiates the transaction, and it is completed by delivery of the memorandum. All that precedes and follows is ex parte. Now, the statute says:

"No sale or deed of any such real estate under the provisions of this chapter shall be set aside, or in any manner affected by reason of the failure of any officer mentioned in this chapter to do or perform any act or duty herein required to be done or performed by him after such sale is made, or by the illegal or defective performance, or attempt at the performance, of any such act or duty after such sale." Code, c. 31, § 25.

This statute has been enforced agreeably to its letter. *State v. McElldowney*, 55 W. Va. 1, 47 S. E. 653; *Starr v. Sampselle*, 55 W. Va. 442, 450, 47 S. E. 255. The sale having been completed by delivery of the signed memorandum, the making out of the list of sales is an act or duty required by the sheriff "after such sale is made," and the statute says total failure to perform, it shall not invalidate the deed still later made.

Reference to the history of tax deed legislation proves legislative purpose neither to make the deed depend upon the list of sales nor to make it conform thereto. Section 19 of chapter 31, Code of 1868, did require such conformity, saying the deed should recite "all the material circumstances appearing in his [the recorder's] office in relation to the sale." In *Jones v. Dils*, 18 W. Va. 759, a deed conveying a less quantity of land than was shown by the list of sales to have been purchased was set aside in 1881. At the next session of the Legislature the requirement of that recital was struck out of the statute by an amendment, and has never appeared therein since. Acts 1882, c. 130, § 19. At the same time section 25 was so amended as to prevent the setting aside of deeds on the ground of the decision in *Jones v. Dils*. At the same time section 19 was so amended as to require the deed to recite the receipt or memorandum of purchase, instead of the list of sales. And again section 25 was then amended by insertion of the broad curative provision above quoted, inhibiting the setting aside of any sale or deed for any omission or error on the part of any officer after sale was made.

In view of the superiority thus given to the receipt or memorandum of purchase, I do not see how it can be held that in case of a discrepancy the list of sales can be permitted to prevail over it. The deed would be good if there were no list of sales at all. How can a list shown by the contract to be erroneous be permitted to invalidate it?

(85 W. Va. 684)

**GEO. E. WARREN CO. v. A. L. BLACK COAL CO. et al. (No. 8999.)**(Supreme Court of Appeals of West Virginia.  
March 2, 1920.)*(Syllabus by the Court.)***1. SPECIFIC PERFORMANCE §75—CONTRACT FOR PURCHASE OF COAL NOT SUBJECT.**

Equity will not entertain a suit for the specific enforcement of a contract for the purchase of coal, to be thereafter mined and shipped on the purchaser's orders, in stated quantities monthly, until the entire quantity purchased has been delivered. The remedy by an action at law for the breach of such contract is adequate.

**2. SPECIFIC PERFORMANCE §5—INSOLVENCY OF SELLER DOES NOT GIVE JURISDICTION TO SPECIFICALLY ENFORCE CONTRACT FOR PURCHASE OF COAL.**

Insolvency of the seller does not confer jurisdiction on a court of equity to enforce such contract; the accident of insolvency does not affect the question of jurisdiction in such case.

**3. CORPORATIONS §579(1)—STOCKHOLDERS OF INSOLVENT CORPORATION MAY ORGANIZE NEW CORPORATION RELIEVED OF OBLIGATIONS OF OLD.**

The stockholders of an insolvent corporation, whose property is about to be sold in a judicial proceeding against it, may organize a new corporation for the purpose of buying the property, and, if their purchase at the judicial sale is fair and free of fraud or collusion, the new company will take the property relieved of the obligations and contracts of the old company unless expressly assumed.

*(Additional Syllabus by Editorial Staff.)***4. SPECIFIC PERFORMANCE §62—CONTRACTS REQUIRING EXERCISE OF MECHANICAL SKILL AND CONTINUOUS OVERSIGHT NOT SUBJECT.**

Equity will not decree specific performance of a contract for the sale of coal to be mined, since it involves the service of skilled engineers in conducting coal mining operations requiring time for its performance.

Appeal from Circuit Court, Monongalia County.

Suit by the George E. Warren Company against the A. L. Black Coal Company and others for specific performance. From an order refusing to dissolve an injunction and an order appointing a receiver, the named defendant appeals. Reversed, and injunction dissolved.

Moreland & Guy, of Morgantown, and Hofheimer & Templeman, of Clarksburg, for appellant.

Glasscock & Glasscock, of Morgantown, for appellee.

**WILLIAMS, P.** This suit was brought by the George E. Warren Company, a cor-

poration, against the Serepi Coal Company and A. L. Black Coal Company, also corporations, and others to compel specific performance of a contract made on the 1st of May, 1919, whereby the Serepi Coal Company sold to the George E. Warren Company 50,000 tons of coal at the price of \$1.75 per ton, f. o. b. the mine, to be shipped at such times and in such quantities as the buyer should designate, the shipments to be as nearly in equal quantities per month as practicable. The coal was to be run of mine produced at the Serepi Company's mine No. 1, located at Madsville, Monongalia county, and was to be delivered in quantities of 4,550 tons per month. Payment was to be made not later than the 25th of each month for all shipments made pursuant to the buyer's orders during the preceding calendar month. The buyer resold the coal to the New York Central Railroad Company, and the seller carried out its agreement for only a short time and then failed in its contract, and hence this suit. The Serepi Company was seriously embarrassed financially at the time of the contract with plaintiff, and suits were then pending against it. Its property was sold under a decree in those suits, and purchased by the codefendant, the A. L. Black Coal Company. Learning that the seller was making deliveries of coal to other purchasers, plaintiff presented its bill to the judge in vacation and obtained an injunction restraining the aforesaid companies, their officers, agents, and servants, from selling and shipping coal from the aforesaid Serepi mine No. 1, until they shall have first shipped to plaintiff's order at least 4,550 tons in any month during the continuance of the contract, provided they should mine so much as that quantity, and in the event they should mine less than that quantity they were enjoined from shipping any portion of it otherwise than to the plaintiff's order. The injunction was awarded on the 31st of October, 1919, and an injunction bond in the penalty of \$500 required. On the 18th day of November, 1919, the A. L. Black Coal Company moved the judge in vacation to require an increase in the amount of the injunction bond sufficient to cover any loss or damage which defendant might suffer in case the injunction should be dissolved, which motion plaintiff by counsel resisted and the judge overruled. The A. L. Black Company then demurred and answered, and plaintiff was given leave thereafter to file in the clerk's office its general and special replication thereto. The A. L. Black Coal Company thereupon, on the 21st of November, renewed its motion, made on the 18th, to dissolve the injunction, and leave was given to both plaintiff and defendant to file affidavits and take depositions respecting said motion. In support of its motion, defendant filed the affidavits of Ben Green,

Max Dalinsky, and Ben Oppenheimer, officers and stockholders in both companies, and leave was given plaintiff's counsel to cross-examine them, which was done. Whereupon defendant's motion was overruled, "for the present," and the order suspended for 20 days to give defendant an opportunity to apply to this court for an appeal. On the 24th of November on plaintiff's motion, and pursuant to notice, the judge in vacation appointed a receiver to take charge of and operate the coal mine, known as Serepi mine No. 1, lately owned by the Serepi Coal Company, and authorized him to employ servants to mine the coal therefrom, and to ship the same to the orders of the plaintiff in quantities of 4,550 tons per month until the minimum amount provided for by the contract between said Serepi Company and plaintiff shall be delivered according to the terms thereof, and required the receiver to make semimonthly reports to the court from the date of his appointment and qualification, and required him to execute a bond in the penalty of \$25,000, and any coal mined during any month, in excess of the quantity purchased by plaintiff, was directed to be sold at the highest price obtainable and the proceeds thereof to be applied to the existing debts of the A. L. Black Coal Company. From the decrees, refusing to dissolve the injunction and appointing a receiver, defendant has appealed.

[1, 2] In order to ascertain whether or not the judge properly overruled defendant's motion to dissolve the injunction, it is necessary first to determine whether the contract sued on is one which can be specifically enforced by a court of equity. Ordinarily, courts of equity will not enforce contracts for the purchase or the sale of personal property to be used for purely commercial purposes, the remedy at law for damages for a breach of such contracts being regarded generally as complete and adequate. There is hardly any article of commerce that is more easily obtained in the open market than coal. It is true plaintiff alleges that it made diligent effort to buy other coal of similar quality to that contracted for, and had not been able to do so; but this is denied in the answer, and the abundance of the product itself discounts the averment. That plaintiff may not have been able to buy coal from the producers to whom it applied does not show that it cannot do so in a reasonable time by applying to others. The coal contracted for is not shown to be of peculiar quality and different from coal produced from other mines in the same vicinity. Coal is abundant, and if plaintiff is willing to pay the price it can get it. That it may have rendered itself liable to an action for damages by contracting to sell the same coal to the New York Central Railroad, on the strength of its contract for the delivery thereof by the Serepi

Coal Company, does not give equity jurisdiction; neither does the alleged insolvency of the Serepi Coal Company and of the purchaser of its property at the judicial sale, the A. L. Black Coal Company, confer jurisdiction. It is true some courts have held that insolvency is a consideration in determining whether or not a contract should be enforced; but, on the contrary, other courts have held that insolvency furnishes an additional reason for denying jurisdiction, for the reason that performance of his contract by an insolvent defendant would enable a plaintiff to obtain a preference over the defendant's other creditors. Although equity jurisdiction to compel performance of contracts is not confined to those relating to real estate, still, before it will enforce contracts relating to the sale or purchase of personal property, there must exist reasons clearly showing that the remedy at law for a breach thereof is inadequate, such for instance as that the article cannot be obtained on the open market, or is affected with a pretium affectionis, or that the injury to plaintiff is not compensable in damages. But coal is a commodity of such universal use and great abundance, and is of such vital necessity to the industries of the country and the comfort of the people, that the government in its wisdom has seen fit to regulate its price for a time. All the coal capable of being produced by the numerous coal mines in the vast coal region in the northern part of this state certainly was not sold, so that the amount of 50,000 tons could not have been obtained by plaintiff to take the place of that it had contracted for, between May 1st when the contract was made, and October 31st when this suit was brought. A case where a plaintiff's damages for a breach of contract can be ascertained more certainly and definitely than in the case here presented can scarcely be imagined. Equity jurisdiction is not affected by the accident of defendant's insolvency. 'If the contract is not of that class which equity will enforce, defendant's insolvency will not aid the jurisdiction; it must exist independently of that fact. *Pomeroy's Spec. Performance* (2d Ed.) § 26; *Knott v. Mfg. Co.*, 30 W. Va. 790, 5 S. E. 266; *Dills v. Doebler*, 62 Conn. 366, 26 Atl. 398, 20 L. R. A. 432, 36 Am. St. Rep. 345; *Gillett v. Warren*, 10 N. M. 523, 62 Pac. 975; *Hellman v. Union Canal Co.*, 37 Pa. 100; *Crawford v. Bradford*, 23 Fla. 404, 2 South. 782; *McLaughlin v. Platti*, 27 Cal. 451; *United N. J. R. R. & C. Co. & P. R. R. Co. v. Hoppock*, 28 N. J. Eq. 261.

That compensation in damages furnishes a complete and satisfactory remedy for the breach of the contract in this case denies equity jurisdiction. *Hissam v. Parrish*, 41 W. Va. 686, 24 S. E. 600, 56 Am. St. Rep. 892; *United Fuel Gas Co. v. W. Va. Paying Co.*, 74 W. Va. 484, 82 S. E. 329; *Black Diamond Coal Mining Co. v. Jones Coal Co.*, 200

Ala. 276, 76 South. 42; *Javierre v. Central Altargracia*, 217 U. S. 502, 30 Sup. Ct. 598, 54 L. Ed. 859. Mutuality is the well-recognized principle of specific performance, and it cannot be doubted for a moment that, if plaintiff had failed to carry out its obligation with defendant, defendant's remedy in an action for damages at law would have been adequate. This is merely an additional argument to show that equity does not have jurisdiction to enforce the contract.

[4] Another reason why equity does not have jurisdiction in this case is because the contract involves the service of skilled engineers in conducting coal mining operations, requiring time for its performance, and courts of equity do not ordinarily undertake the performance of contracts requiring the exercise of mechanical skill and continuous oversight. *Martin v. South Bluefield Land Co.*, 81 W. Va. 62, 94 S. E. 493; *Grape Creek Coal Co. v. Spellman*, 39 Ill. App. 630.

[3] The bill alleges that the A. L. Black Coal Company was conceived and formed for the purpose of taking over the property of the Serepl Company; that the officers and stockholders of the two companies are made up principally of the same individuals; and that the officers of the A. L. Black Company had knowledge, at the time they purchased the property at the judicial sale, of the existence of the unfulfilled contract between plaintiff and the Serepl Company. It also appears that on the 1st of May, the date of the contract sued on, the Serepl Company was largely indebted, and that certain vendors' lien suits had been brought against it and were then pending, one brought by *Darla Layton* to enforce a vendor's lien on 55 acres of coal, one portion of defendant's property, and another brought by the *Cass Coal Company* to enforce a vendor's lien against both pieces of coal property owned by defendant, and later a third vendor's lien suit was brought by *David H. Courtney* against it; that the two first-named suits were heard together on the 24th of May, 1919, and a sale ordered of defendant's property and commissioners appointed and authorized to make sale thereof; that they did sell it to the defendant the A. L. Black Coal Company, at public auction, it being the highest bidder, at the price of \$70,000, of which amount it paid in cash a one-third part, and executed its two purchase-money notes for the residue, payable on January 24, 1920 and 1921, respectively; and that this sale was confirmed on the 10th day of October, 1919. The bill does not allege that these suits were collusive, nor that there was any fraud in procuring the sale to be made, nor that the A. L. Black Company purchased the property with assets belonging to the Serepl Company. In fact, the bill alleges that both the Serepl Coal Company and the A. L. Black Company are insolvent. The contention seems to be that,

because the new company is formed of the same stockholders and directors that formed the old company, and purchased with knowledge of plaintiff's contract, it is merely the successor to the old company and is bound to fulfill its contract. This can hardly be the law. A corporation is liable only to the extent of its assets, and for aught that appears in the record it took all the proceeds from the sale of the Serepl Company's property to pay off the debts against it. If the sale was fair and free from fraud, and there is no averment or showing to the contrary, the purchaser would take it discharged of the debtor's obligations. In addition to the debts for which suits had been brought against it, the bill avers that trust deed liens on the Serepl Company's property, aggregating more than \$19,000, existed in favor of *Dalinsky, Green, and Oppenheimer*, and were created before the date of plaintiff's contract. Furthermore, the bill alleges that, on the 6th of October, before the sale of its property, the Serepl Company confessed judgments in favor of the aforesaid parties, severally, and one in favor of the *Long Powder & Supply Company*, aggregating more than \$8,500. It is not alleged that these debts were fraudulent, or that the judgments were fraudulently obtained; but, on the contrary, it is alleged that the Serepl Company owed other debts besides these and was insolvent. There is no pretense that any of the stockholders in the new company were indebted to the old company for stock in it at the time of the formation of the new company. On what theory, then, can the new company be held liable for the obligations of the old one? Certainly not for the simple reason that it is composed principally of the same officers and stockholders. The stockholders of the old company, if they acted in good faith, and there is no averment that they did not, had a right to organize a new corporation to buy the property of the insolvent one, and when the new company purchased at the judicial sale it took the property free from the obligation of plaintiff's contract. 7 *Fletcher, Corporations*, § 4988; 4 *Cook, Corp.* §§ 460 and 490; *National Foundry & Pipe Works v. Oconto City Water Supply Co.*, 105 Wis. 49, 81 N. W. 125; *Hukle v. Railway Co.*, 71 Kan. 251, 80 Pac. 603, 6 Ann. Cas. 83; *Allen v. M. E. Church*, 127 Iowa, 96, 102 N. W. 808, 69 L. R. A. 255, 109 Am. St. Rep. 366, 4 Ann. Cas. 257; *Moyer v. Ft. Wayne, Cintl. & Louisville Ry. Co.*, 132 Ind. 83, 31 N. E. 567; and *Equitable Trust Co. v. United Box Board & Paper Co.* (D. C.) 220 Fed. 714.

The fact that the sale of the Serepl Company's property was an involuntary one, and that no fraud is alleged on the part of the purchaser, the A. L. Black Company, render the authorities cited by appellee's counsel inapplicable.

Equity being without jurisdiction to entertain the suit, it follows that the judge had no right to grant the injunction, which was only for the purpose of compelling compliance with its contract by the defendant, and likewise no jurisdiction to appoint a receiver to take charge and operate defendant's property. Even if the court had had jurisdiction to entertain the suit, it was improper to appoint a receiver and invest him with power to mine the coal and deliver it to plaintiff's order, not to exceed the quantity provided by the contract to be delivered monthly, in advance of the final hearing of the case upon its merits. The effect was to give final relief to the plaintiff in advance of the hearing, and gave it a decided advantage over defendant. The status quo of the parties should be preserved, as nearly as possible, until the final hearing upon the merits. The prime object of a receivership is to preserve the subject-matter until the suit is finally determined. *Rainey v. Freeport Smokeless Coal & Coking Co.*, 58 W. Va. 424, 52 S. E. 528; *Krohn v. Weinberger*, 47 W. Va. 127, 34 S. E. 746.

The decrees appealed from will be reversed, the injunction dissolved, and the cause remanded, with instructions to the lower court to discharge the receiver after he has made proper settlement of his accounts.

Reversed and remanded.

(85 W. Va. 700)

CALLISON v. BRIGHT et al. (No. 3911.)

(Supreme Court of Appeals of West Virginia.  
March 9, 1920.)

*(Syllabus by the Court.)*

1. WILLS §=695(2)—EQUITY WILL CONSTRU WILLS ONLY WHEN NECESSARY.

Generally jurisdiction in equity to construe wills arises only in cases where there is necessity for such construction in relation to actual controversies as to matters which are proper subjects of equity jurisdiction. There must be something more in the suit than the mere construction of an instrument.

2. TRUSTS §=271½—EQUITY WILL CONSTRU INSTRUMENT ONLY WHERE IMMEDIATE NECESSITIES REQUIRE CONSTRUCTION.

A fiduciary will be permitted to come into a court of equity, for construction of an instrument under which he is acting, only for the purpose of guidance in the administration of the estate intrusted to his care as immediate necessities may require, and a court of equity will decline to extend its construction to cover contingencies which may never arise, or, if at all, at some remote date. The decision of such questions will be postponed for future consideration upon the application of such fiduciary, or other person interested, when the occasion therefor arises.

3. EQUITY §=195—CROSS-BILL MUST BE LIMITED IN SCOPE TO SUBJECT-MATTER OF BILL.

A cross-bill, or an answer in the nature of a cross-bill, praying for relief, must be limited in its scope to the subject-matter of the bill. It cannot introduce new and distinct matter, even though the same may be related in some way to that set up in the bill.

4. EQUITY §=195—IN EXECUTOR'S SUIT FOR CONSTRUCTION OF WILL, WIDOW'S DEMAND FOR ASSIGNMENT OF DOWER WAS NOT PROPER FOR CROSS-BILL.

In a suit brought by an executor of a decedent's estate to obtain the aid of a court of equity in the administration thereof, an answer in the nature of a cross-bill, filed by the testator's widow, asking that her dower be assigned in the real estate, and also asking that a claim which she asserts against her husband's estate may be adjudicated, and the amount thereof determined and decreed to her, does not present proper matter for a cross-bill or answer in the nature of a cross-bill, and an exception thereto is properly sustained.

Appeal from Circuit Court, Pocahontas County.

Suit by George W. Callison, executor of James K. Bright, deceased, against Mattie J. Bright, Nannie K. Marshall, Roswell C. Bright, and others, for a construction of will. From a decree in favor of Roswell C. Bright, Nannie K. Marshall appeals. Reversed in part, and affirmed in part.

L. M. McClintic and F. R. Hill, both of Marlinton, for appellant.

Henry Gilmer, of Lewisburg, and W. A. Bratton, of Marlinton, for appellees.

RITZ, J. On the 11th day of April, 1918, one James K. Bright died seized of a considerable estate, leaving a will which, omitting the formal parts, is as follows:

"1st: After the payment of all my just debts and *burial expenses* I 'will and bequeath' to my wife, Mattie J. Bright, all my property real and personal, to have the full use and benefit of during her natural life. 2nd: At my wife's death I 'Will and bequeath' to my wife's niece and my namesake 'Nannie Kyle Callison' (if she is living at that time) all my property real and personal of every kind and *descriptions* to have and to hold forever. If the said Nannie Kyle Callison is not living at that time, then I 'will and bequeath' to my brother Roswell C. Bright, now of Clarence Shelby County, Mo., all my property real and personal. If aforesaid Nannie K. Callison should come in *possession* of the property and should die without 'issue' and there is any part of my estate not used by her up to that time, I want it to go to my brother Roswell."

He left surviving him his widow, the defendant Mattie J. Bright, named in the will, and also the defendant Nannie K. Marshall, who is the same person as Nannie Kyle Cal-

lison, she having subsequent to the making of said will intermarried with one Marshall, and also his brother, Roswell C. Bright, who is likewise mentioned in the will. The plaintiff, George W. Callison, pursuant to the appointment made in the will, qualified as executor thereof. The estate consisted of a considerable amount of personal property and a small piece of real estate. The widow, Mattie J. Bright, renounced the provision made for her in the will and elected to take the provision made for her by law in such cases. The executor filed his bill, alleging that he has converted all of the personal property into money or interest-bearing securities, and holds the same in his hands; that the debts of the estate are inconsiderable, and that he is in doubt as to what disposition to make of the personal property—Nannie Kyle Marshall claiming that she is entitled to receive the whole thereof remaining after paying to the widow the provision made for her by law, and the defendant Roswell Bright insisting that said Nannie Kyle Marshall is only entitled to receive the beneficial use of such property during her life after the death of the widow, the same to pass to any children she may leave surviving her, or, in case she leaves no children surviving, the same to go to the said Roswell C. Bright.

It will be observed by the will that provision was made for the widow by giving her a life estate in all of the property, and the defendant Nannie K. Marshall was given the remainder, if she should be living at the death of the widow; and the further provision is made that, in case the said Nannie K. Marshall should not be living at the death of the widow, then the estate should go absolutely to Roswell C. Bright, or, if the said Nannie K. Marshall should be living at that time, and should come into the use of the estate, and die without issue, it should go to the said Roswell C. Bright. Nannie K. Marshall contends that the will gives her a vested remainder in the estate after the death of Mattie J. Bright, and that the provisions made therein for Roswell C. Bright are void and cannot take effect. The executor has doubt, as he alleges, as to what should be done with the part of the estate not going to the widow. Of course, the provision made for the widow under the law is clear, and there is no doubt thereof, nor is the aid of the court asked in that regard; but, after paying to the widow the part of the personal estate to which she is entitled under the law, there is left in the hands of the executor two-thirds thereof, and he asks the advice of the court as to what disposition to make of this money. The court below decreed that he should retain this in his possession and invest the same until the death of Mattie J. Bright, holding that Nannie K. Marshall had no right to the possession of any of such estate, unless she survived her aunt, the testator's widow, and

no objection is made to this part of the decree by either party.

The executor asked the court to go further and advise him what disposition to make of the estate at the death of Mattie J. Bright, and in pursuance of this request the court construed the will, advising the executor what to do under the various contingencies that might arise, or the various conditions that might exist at that time. The executor is advised that, in case Nannie K. Marshall departs this life before the widow, Mattie J. Bright, the estate shall be turned over to the defendant Roswell C. Bright; that in case the said Nannie K. Marshall survives the widow, then the executor shall retain the estate in his hands and pay to Nannie K. Marshall the income arising therefrom during her life and, in case she dies without issue, turn over the corpus thereof to the defendant Roswell C. Bright; or if, on the other hand, she should die leaving living issue, the corpus thereof to be turned over to such living issue. It will thus be seen that the court's decree provides for future contingencies, some of which can never arise, and none of which may arise.

[1, 2] Courts of equity have no jurisdiction to construe wills, except as an aid to the fiduciary in administering the estate. The jurisdiction of courts is exercised for the purpose of determining actual controversies, and not for the purpose of settling in advance matters which may or may not arise, depending upon whether certain conditions exist at a particular future time. It may be that Nannie K. Marshall will have died without issue before the death of Mattie J. Bright, in which event there will be no controversy to settle, and the question upon which the circuit court passed as to the proper construction of this will will become a purely academic one. The holdings of this court have uniformly been that equity jurisdiction only exists to construe a will where there is necessity therefor in relation to actual controversies existing at the time such construction is sought. There must be a present need for the aid of the court in the administration of the estate, and the court will go no further in such construction than the immediate necessities require. It will decline to extend its jurisdiction to the solution of problems which may possibly arise in the future. Such questions will be postponed for future determination, upon the application of the fiduciary, or some party in interest, if the contingencies upon which they depend ever come into existence. *Pritchard v. Pritchard*, 83 W. Va. 652, 98 S. E. 877; *Buskirk v. Ragland*, 65 W. Va. 749, 65 S. E. 101; *Martin v. Martin*, 52 W. Va. 381, 44 S. E. 198. It follows that the decree of the circuit court, so far as it provides for future possible contingencies, is improper.

[3, 4] The defendant Mattie J. Bright filed



(102 S.E.)

an answer in this case, in which she set up a claim for \$2,000 against the estate of her husband, insisting that her husband received this amount of money belonging to her, and that the estate should account for it, and asked that an account be taken in this case, and the same decreed to her. She also asks that her dower in the real estate be assigned in this suit. While her answer is not formally an answer in the nature of a cross-bill, it may be treated as such. The court below, however, upon exception, refused to adjudicate the questions presented by her. In this he was clearly right. The bill filed in this case was solely for the purpose of securing the aid of a court of equity in the administration of the estate by the executor. The bill is not for the purpose of settling the decedent's estate, nor is any suggestion made in the bill that there is necessity for resort to a court of equity for that purpose, nor is there any declared intention in the bill of having the real estate disposed of in any way, either by the assignment of dower or otherwise.

Matters sought to be set up in a cross-bill answer must be pertinent to the object and purpose of the original bill. A defendant cannot make the suit a new suit, and change its purpose, by bringing into it by cross-bill other matters which may be involved between the parties. Such cross-bill, or answer in the nature of a cross-bill, must be limited in its scope to the subject-matter of the bill. It cannot introduce new and distinct matter, even though such subject may be related in some way to that of the bill, or to the matters being litigated between the parties. *Root v. Close*, 83 W. Va. 600, 98 S. E. 733; *Peters v. Case*, 62 W. Va. 33, 57 S. E. 733, 13 L. R. A. (N. S.) 408; *Hansford v. Chesapeake Coal Co.*, 22 W. Va. 70; *West Virginia Oil & Oil Land Co. v. Vinal*, 14 W. Va. 637. The matters set up by the defendant Mattie J. Bright in her answer are in no wise defensive to the bill. In fact she avers in her answer that she is not at all interested in the controversy which the bill is brought to have settled. The court therefore properly sustained the exceptions to her answer, for the reason that the questions therein sought to be presented for adjudication are not proper to be so presented in this suit. If she desires to have her dower laid off in the real estate, and the interested parties cannot agree thereon, she may bring a suit for that purpose. If she has a claim against the estate of her deceased husband, and the validity of it is denied, she may bring her suit to establish the same.

It follows, from what we have said, that so much of the decree of the circuit court as directs the executor what to do with the estate upon the death of Mattie J. Bright, under the various contingencies or conditions which may exist at that time, will be reversed, and these questions left open to be de-

termined upon the facts found to exist when that event arrives. In all other respects the decree will be affirmed.

(85 W. Va. 712)

# MULLENS REALTY & INS. CO. v. KLEIN et al. (No. 3787.)

(Supreme Court of Appeals of West Virginia.  
March 9, 1920.)

(Syllabus by the Court.)

## 1. LANDLORD AND TENANT §116(4)—ABANDONMENT OF LEASE BY OPERATION OF LAW RESULTS FROM ACTS IMPLYING MUTUAL CONSENT TO TERMINATION.

A surrender or abandonment of a lease by operation of law results from acts of the parties which imply mutual consent to a termination of the tenancy. Whether such surrender has occurred is a question of intention.

## 2. LANDLORD AND TENANT §116(4)—INDEFINITE TENANCY OF BUILDING TERMINATED BY TENANT'S FAILURE TO PAY RENT AND LESSOR'S RE-ENTRY AND LEASE TO ANOTHER.

A tenancy of a building devoted to mercantile pursuits may, where no definite term is prescribed, be terminated by notice of the lessee's intention to abandon and his abandonment thereof manifested by the actual removal of his stock of goods therefrom, his failure thereafter to pay the rent as and when it became due, and the lessor's re-entry and lease of the same property to another for a like purpose, and the occupancy thereof by the latter pursuant to such contract.

## 3. LANDLORD AND TENANT §133(3)—WHERE REMEDY AT LAW IS INADEQUATE, EQUITY MAY ENJOIN INTERFERENCE WITH TENANT'S POSSESSION.

Where the remedy at law is inadequate, equity has jurisdiction, at the suit of a lessor, to enjoin repeated and threatened acts of interference with the possession of one tenant by another who asserts a prior pretentious right to the possession of the same property, but which tenancy he voluntarily surrendered or abandoned, or which has terminated by operation of law.

## 4. INJUNCTION §175, 188—CIRCUIT JUDGE ON NOTICE TO PARTY TO BE AFFECTED MAY DISSOLVE AN INJUNCTION IN VACATION WITHOUT COSTS.

Though a circuit judge lawfully may, upon notice duly served upon the party to be affected thereby, dissolve an injunction in vacation, he cannot in the order of dissolution so entered award costs for or against either party to the cause.

## 5. INJUNCTION §189 — JUDGE OF CIRCUIT COURT MAY AWARD AN INJUNCTION AFFECTING RIGHTS OF PARTIES TO CAUSE PENDING IN COURT OF ANOTHER CIRCUIT.

A judge of one circuit in some circumstances lawfully may award an injunction affecting the rights of the parties to a cause pending in

a court of another circuit, and, when he does so, such order becomes the order of the court wherein the cause is pending.

**6. INJUNCTION**  $\Leftrightarrow$  229—WHERE JUDGE OF ONE CIRCUIT AWARDS INJUNCTION AFFECTING RIGHTS OF PARTIES TO CAUSE PENDING IN COURTS OF ANOTHER CIRCUIT, HE CANNOT AWARD A RULE CHARGING A CONTEMPT OF THE INJUNCTION ORDER.

In such case, the judge who awarded the injunction cannot lawfully award a rule charging a contemptuous disregard of the injunction order, and, if he does so, the pendency of the rule, though served upon the accused, does not prevent him from moving the court to dissolve the injunction so awarded.

*(Additional Syllabus by Editorial Staff.)*

**7. INJUNCTION**  $\Leftrightarrow$  14—RELIEF CONFINED TO CASES OF "IRREPARABLE INJURY."

Ordinarily, equity will not interpose by injunction, where there is no other ground of equitable interposition, unless the injury about to be inflicted is "irreparable," which term does not always mean what it seems to signify, that is, a physical impossibility of reparation, but, as judicially defined, it means only a grievous or substantial injury, one not adequately compensable in damages, or where the compensation cannot safely be measured.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Irreparable Injury.]

**Appeal from Circuit Court, Wyoming County.**

Suit for injunction by the Mullens Realty & Insurance Company against D. M. Klein and others. From a vacation decree dissolving an injunction theretofore awarded, pursuant to the prayer of the bill, plaintiff appeals. Reversed, injunction reinstated, and cause remanded.

Grover C. Worrell, of Mullens, for appellant.

Toler & Moran, of Mullens, for appellees.

**LYNOH, J.** The right to have the protection afforded by an injunction against the defendant Klein's unlawful interference with the quiet enjoyment by plaintiff, a corporation, of a lot and building in the town of Mullens, the title to which is undisputed, is presented for determination upon this appeal from a vacation decree dissolving an injunction theretofore awarded pursuant to the prayer of the bill filed in the cause. According to the allegations of the bill, plaintiff leased the property to defendant D. M. Klein for mercantile purposes some time prior to January 1, 1918, from month to month, upon a \$30 monthly rental payable in advance on the first day of each succeeding month. This rental defendant paid as agreed until December 1, 1918, and entered into the possession of the property and continued to occupy it until about that date, when he ceased and has

not since resumed payment of the rental, and abandoned the leased premises and therefrom removed his stock of goods to another building in Mullens, where he since has carried on the same business. Thereupon plaintiff entered into a new lease with E. H. Lopinsky for the building thus vacated, and it is for the purpose of restraining defendant from interfering with the new tenant that this suit was instituted.

The chief disagreement between the allegations of plaintiff's bill and defendant's answer is as to the duration of the lease term, the abandonment of the premises, and the removal of the stock of merchandise. According to the latter, the lease was to continue indefinitely from month to month, and defendant insists that he did not surrender or abandon it on December 1, 1918, but left remaining in the building a material part of his stock of goods. The answer is silent as to the payment or tender of the rental due and payable on and subsequent to December 1st until after defendant knew plaintiff had leased the property to defendant's competitor in the same line of business, when defendant offered to increase the amount of the rental from \$30 to \$65 per month. But as neither contract was in writing, the duration of neither term could extend beyond the period of one year from the date it was entered into except by the mutual acquiescence of the parties. Clause 6, § 1, c. 98, Code 1918 (Code 1913, sec. 4171).

[1, 2] Though it is true abandonment of rights under a lease depends to some extent upon the intention of the party against whom it is to be applied, yet where every act of his and his conduct respecting the premises leave no doubt as to the existence of a design and purpose to abandon the leased building, and the landlord with knowledge of such intention re-leases to another, thereby accepting or acquiescing in the abandonment, the intention of both parties to terminate the former tenancy clearly discloses itself. *Suit v. Hochstetter Oil Co.*, 63 W. Va. 317, 329, et seq., 61 S. E. 307. In view of these facts, it is not material whether the lease under which defendant claims was one for a definite term ending on December 1, 1918, or one continuing from month to month; for in either event the parties have shown by their actions that their mutual rights thereunder were surrendered and terminated on the date above mentioned. Klein left the property, moved his goods out of it with the possible exception of a few boxes and tables, took them to another building and there offered and exposed them for sale, ceased to pay rent for the premises vacated, and did not thereafter pretend to exercise the right to control the latter until he ascertained that a business rival had leased the building, purchased and caused to be shipped to Mullens a stock of merchandise similar to his, and was about to

display them therein to the public for sale in competition with him. Then it was that he for the first time asserted a claim of right to the leased premises, contending that at no time had he abandoned his rights under the tenancy from month to month.

Acting upon the assumption of a terminated right and abandonment of the premises by defendant, plaintiff first granted to a contractor the privilege of storing therein temporarily lumber purchased for use in the erection of a nearby structure. This privilege the contractor availed himself of until plaintiff contracted to lease the premises to E. H. Lopinsky, to whose occupancy and enjoyment thereof defendant seriously objected and undertook to hinder and prevent until restrained by the inhibitive process later dissolved and subsequently restored by the award of this appeal.

There is, it seems to us, no merit in the asseveration of defendant that he had not removed all of his stock of merchandise from the premises prior to December 1st, but had left therein a substantial part of the stock for sale by his employes, who were selling the same when plaintiff entered into the contract with Lopinsky. Such claim is merely pretentious. It has no substantial foundation on which to rest except his own unsupported affidavit, which is contradicted and proved to be unfounded by Early, the contractor, who says that no one was in charge of the building when he unlocked it for the purpose of storing his lumber, and that nothing else was stored there except paper boxes and some tables, and on the front door in display letters printed in chalk were the words, "Moved to New Building next to Bank of Mullens." Harry Klein corroborates Early as to what was in the building on December 6, 1918, including the lumber placed therein by the latter for the bank and from whom Klein obtained the key. Besides, in neither of two letters written by defendant Klein to L. N. Frantz, representing plaintiff, did Klein pretend not to have abandoned the premises, and demanded nothing except a payment for improvements made by him upon the property, and complained only because the building was to be occupied by a competitive business instead of by a drug store, according to the assurances given, as he claims, by G. C. Worrell, plaintiff's attorney, as to which Worrell also contradicts him. The motive, if not the animus, impelling the conduct displayed by defendant in his relentless effort to molest and annoy plaintiff, and especially Lopinsky, was his desire and intention expressed to Frank Cray, and not denied, that all he wanted was to keep Lopinsky out of the building until after the holiday season had passed, and doubtless he would have accomplished that purpose but for the restraining process of the court. As Lopinsky had possession of the demised premises since early in December, 1918, he took and holds it ap-

parently only because of the protection afforded him by that process, which still is in force and effect.

By every act of his until enjoined, defendant attempted to prevent the entry of Lopinsky upon and into the property without the slightest pretense of a substantial right to interfere with him, and these often repeated acts were of a highly vindictive character. After having removed his goods from the premises and in order to delay and prevent the occupation of the building by Lopinsky under his contract with the plaintiff, Klein made repeated efforts to resume possession of the building so vacated by him, caused the arrest of Lopinsky's employes, agents, and servants to hinder their arraignment before his codefendant W. S. Thompson, a justice of the peace, upon warrants charging them with breaking and entering the building with intent to steal and appropriate to their own use the goods and property therein found, which, as we have seen, were of the most trifling character. And while such employes and agents were in legal custody under the authority of the warrants, Klein re-entered upon and resumed possession of the building theretofore abandoned by him, and through and by and with the aid and assistance of Deputy Sheriff L. O. Belcher, without authority of law and by threats, menace, and force, retained and held such possession and refused to permit the representatives of the plaintiff or the agents of its tenant to enter again upon the property for the purposes of the tenancy, and persisted in such refusal until ordered by the court to cease his interference with the right of the plaintiff and his tenant respecting the property.

The charge of the bill, not denied, is that the justice, Klein, and Belcher by their concerted and fraudulent action will, if not restrained, persist in their unlawful efforts to prevent the adverse reoccupation of the premises, in which event liability will attach to plaintiff for the loss so occasioned its tenant; that the remedy at law is inadequate because of the uncertainty of the extent and measure of the damages that may ensue as a result of the loss and depreciation in the value of the more than \$15,000 worth of goods purchased by the tenant for sale in the building during the current holiday trade season and their unfitness for sale at any other season of the year; and further that the remedy at law is inadequate to give occupancy to plaintiff's tenant within a reasonable time and to secure him in the quiet enjoyment of the premises.

[3, 7] Jurisdiction in equity to grant an injunction against the commission of trespass upon real estate, though regarded as well established, is to be exercised sparingly and is confined ordinarily to cases where from the very nature of the property affected or the frequent repetition of the trespass the injury sustained is not susceptible of remediable

damages, and therefore the injury may properly be deemed irreparable. 1 High on Injunctions (4th Ed.) § 697. The actual and threatened molestation of the free and quiet enjoyment of property accorded by law to the acknowledged rightful owner or tenant evidently is of such serious character as warrants a more certain, speedy, and full remedy than that afforded by the less satisfactory and less flexible resort to repeated actions at law made necessary by the frequent repetition of the trespass. The liability anticipated by plaintiff is not fanciful or unsubstantial but a real danger. Its duty to the rightful tenant requires protection against the unauthorized act of the defendant Klein. Neither the plaintiff nor its tenant is without legal remedy in the strict sense of that term, it is true. But resort to such remedy is fraught with delays, uncertainty, and doubt, making it more precarious and less prompt and grossly less adequate to meet the exigencies of the situation. In the meantime property rights become less valuable if, as threatened, defendant persists in the purpose to defeat the exercise of the natural proprietary rights incident to ownership. If the effect of such acts is the substantial impairment of the use and enjoyment guaranteed by law to the owner and through him to his lessee, and he is without other remedy competent to afford him an equally prompt and adequate relief against threatened trespass, equity will not hesitate to exercise its powers in his behalf. *Gaffey v. Northwestern Mutual Life Insurance Co.*, 71 Neb. 304, 98 N. W. 826; *Boston & Maine R. R. v. Sullivan*, 177 Mass. 230, 58 N. E. 689, 83 Am. St. Rep. 275; *United States Freehold Land & Emigration Co. v. Gallegos*, 89 Fed. 769, 32 C. C. A. 470. This principle this court has frequently applied in cases of waste or injury to the corpus of real estate and in those involving the production from leasehold oil and gas estates. Ordinarily, equity will not interpose by injunction where there is no other ground of equitable interposition unless the injury about to be inflicted is irreparable, yet the term "irreparable" does not always mean what it seems to signify, that is, a physical impossibility of reparation. As judicially defined, it means only a grievous or substantial injury, one not adequately compensable in damages (*Haskell v. Sutton*, 53 W. Va. 206, 220, 44 S. E. 533), or where the compensation cannot safely be measured (*Bettman v. Harness*, 42 W. Va. 433, 26 S. E. 271, 36 L. R. A. 566). These principles established by the authorities cited the decree entered in this cause wholly disregarded. *Gaffey v. Northwestern Mutual Life Insurance Co.*, supra.

[4, 5] An "injunction may be dissolved in

vacation by the judge of the circuit court of the county in which the same is pending" upon reasonable notice in writing of the time and place of the motion therefor duly served upon the opposite party. Section 12, c. 133 (sec. 4958), Code. But the power of such judge in vacation is limited and restricted to but one issue, the right to have and maintain the writ upon the facts alleged in the bill. In other words, the power to dissolve does not include the right to do more than the statute plainly purports to authorize him to do in chambers. It does not and was not intended to warrant the award of costs for or against either party to the cause as the decree appealed from undertook to do. As said in *Monroe v. Bartlett*, 6 W. Va. 441:

"Under the provisions of the Code of this state, a judge of a circuit court has no power or authority to render a decree in vacation, which purports to be final, as to any subject embraced by it."

The same statement of law is reiterated in *Rollins v. Fisher*, 17 W. Va. 578. The award of costs has some of the elements of finality and is binding upon the parties until it is reversed upon appeal or corrected by the court that entered the decree, order, or judgment. *Gilmer v. Baker*, 24 W. Va. 72, declares to be "erroneous and perhaps void" a vacation decree adjudicating adverse claims or rights though the parties interested in the cause assented to its entry. Chapter 65, Acts 1917 (section 27, c. 131, Code 1918; Code Supp. 1918, c. 112, § 10a, II [sec. 4557a]), does, however, enlarge the scope of the power of circuit court judges, and permits them to hear and determine in vacation the merits of chancery causes and law actions and therein to pronounce decrees, orders, and judgments, by and with the consent of the interested parties in writing entered of record in the cause, and, presumably, not otherwise, except as therein specifically provided.

[6] We deem it unnecessary to notice, except casually, the objection that, until Klein had purged himself of the contempt due to his alleged disregard and violation of the express terms of the injunctive process, the court over plaintiff's protest ought not to have entertained the motion to dissolve. Whether well founded or not, the contempt, if any, concerned only the circuit court of Wyoming county, and, so far as appears, that court has not taken cognizance of any attempt to do anything inhibited by the injunction order. Apparently the rule was issued by and made returnable before the judge of the circuit court of a different county.

Decree reversed, injunction reinstated, and cause remanded.

(85 W. Va. 706)

C. M. ELLIOTT & CO. v. JOHNSON et al.  
(No. 3850.)(Supreme Court of Appeals of West Virginia.  
March 9, 1920.)*(Syllabus by the Court.)*

1. FRAUDULENT CONVEYANCES ¶271(3), 278  
(1) — PLAINTIFF HAS BURDEN OF PROVING FRAUD; WHERE ALLEGED FRAUDULENT TRANSACTION IS BETWEEN NEAR RELATIVES SLIGHT EVIDENCE WILL SHIFT TO DEFENDANT THE BURDEN OF SHOWING BONA FIDES.

Generally the burden of proof rests on him who charges fraud, and not on him whose conduct is charged to be fraudulent. But where the transaction assailed is between brothers or other near relatives, only slight evidence is required to shift the burden of showing its bona fides.

2. FRAUDULENT CONVEYANCES ¶295(2)—  
PROOF MAY BE CIRCUMSTANTIAL.

In cases where it is difficult, if not impossible, to demonstrate by direct proof the fraudulent nature of the transaction, the circumstances surrounding the parties and their dealings one with another frequently constitute the only available evidence and may be sufficient to establish the fraudulent intent, in the absence of direct and satisfactory proof to the contrary.

3. FRAUDULENT CONVEYANCES ¶278(1)—  
PROOF OF CIRCUMSTANCES AND PRESUMPTION OF SUSCEPTIBILITY OF RELATIVES TO FAVORITISM MAY SHIFT BURDEN OF ESTABLISHING FREEDOM FROM FRAUD TO THE ONE CHARGED WITH FRAUD.

Where the transaction assailed is between persons whose relationship by blood or marriage is so intimate as fairly to create the presumption of their susceptibility to influences prompting favoritism by the one towards the other, and the proof introduced or circumstances surrounding the dealings of the parties tend to show that such was the course pursued, the burden of establishing freedom from fraud as against creditors shifts to him who is charged therewith.

4. FRAUDULENT CONVEYANCES ¶278(1)—TO OVERCOME CHARGE OF FRAUD SECURED CREDITOR MUST PROVE MORE THAN THAT DEBT IS JUST AND AMOUNT UNPAID; WHERE DEED OF TRUST REPRESENTS SETTLEMENT OF MUTUAL ACCOUNTS BETWEEN BROTHERS, THE SECURED CREDITOR MUST SATISFACTORILY EXPLAIN CHARACTER OF EACH ITEM.

To overcome a charge of fraud and sustain a debt impugned as fraudulent, the creditor secured by the deed of trust must prove more than that the debt is just and the amount thereof unpaid; and where it represents the final result of a settlement of mutual accounts between him and the debtor, his brother, comprising numerous and various items and transactions covering a period of several years, including charges and countercharges, checks and cash payments, he must also show with reasonable certainty by what combination of the several items such debt was ascertained, and in ad-

dition thereto satisfactorily explain the nature and character of each of such items, notes, and other charges.

5. FRAUDULENT CONVEYANCES ¶100(1)—  
DEED OF TRUST SECURING WHOLE DEBT PARTIALLY INVALID MAY BE WHOLLY VACATED BY CREDITOR SO FAR AS HE IS SUBSTANTIALLY PREJUDICED THEREBY.

Though a debt may to some extent be valid, but otherwise invalid because fictitious or not established with the degree of certainty required by law, a deed of trust purporting to secure the whole of it may be vacated in its entirety at the suit of a creditor in so far as he is substantially prejudiced thereby.

Appeal from Circuit Court, Tucker County.

Suit by C. M. Elliott & Co. against James Johnson and Raymond W. Johnson. Decree for plaintiff, and defendant Raymond W. Johnson appeals. Affirmed.

A. Jay Valentine, of Parsons, for appellant.  
Chas. D. Smith, of Parsons, for appellee.

LYNOX, J. The fraud charged in the original and amended bills and denied in the answers the decree entered in the cause found to exist, notwithstanding such denial, and from that decree Raymond W. Johnson alone appeals. James Johnson and appellant are brothers, the former the grantor and the latter a beneficiary in the deed of trust dated August 24, 1916. They were also parties defendant to the suit of Smith v. Johnson et al., heretofore pending in this court, the opinion in which is reported in 78 W. Va. 395, 89 S. E. 3. The deed of trust purports to secure Tucker County Bank of Parsons in the payment of a note for \$1,300 and Orlando Johnson, Troy Johnson, and Raymond W. Johnson sureties thereon; Raymond W. Johnson in the payment of a note for \$1,086 executed to him by the grantor, and "such sum as is found to be due to the said Raymond W. Johnson as balance on said consideration, costs, and expenses of litigation which may be due upon settlement between Raymond W. Johnson and James Johnson, and for which amount, when such settlement is made, the said James Johnson is to execute his note," payable within two years from its date with interest.

The Tucker County Bank note, it is conceded, was for the purpose of raising a fund sufficient to pay the debts involved in the Smith-Johnson suit, and its genuineness is not controverted. "Whereas" paragraphs of the trust deed set out with much elaboration the conveyances by James Johnson to his brothers Raymond and Orlando, declared fraudulent and void in that suit, stating as the consideration therefor \$2,500 paid in cash, a reconveyance by Raymond to James of the said land, and an understanding between them as to the repayment of the con-

sideration therein named, subject to a credit not now necessary to notice, and the payment of the costs and expenses incurred in defending the title involved in that suit, the amount of which costs and expenses was to be determined upon a settlement later to be made but not made, if at all, until after the execution of the deed of trust and the decree entered in this cause. The right to the benefit of this provision in the deed of trust neither one of the two brothers James and Raymond now insist upon; rather they impliedly admit lack of genuineness and enforceability as a charge against the land conveyed as security therefor.

Thus there is eliminated from this controversy the bank debt and the unascertained liability growing out of the matters involved in the former suit. That suit is important or worthy of note now only because of its tendency or weight or influence in ascertaining the personal attitude or inclination of the two brothers respecting the fraud charged against them in this suit, not only in regard to the debt of \$1,086, but also the unascertained and abandoned liability in regard to the matters involved in the former suit.

Though described in the trust deed as a note for \$1,086, the parties immediately concerned in the creation of that liability, if it be such, now admit that it never assumed that form, but resulted from the combination of one or more prior notes and the various items of unsettled accounts held by each brother against the other, ranging in dates from January 22, 1912, to July 28, 1916, the last item antedating the trust less than one month, or, to be exact, only 27 days. Neither in their answers nor in their testimony does either Raymond or James Johnson pretend to have made any attempt to settle or adjust between themselves these accounts, before or since the deed of trust was executed, in order to ascertain how or in whose favor the balance stood. Nor did either Lipscomb or Scott, the commissioners to whom the cause was referred in turn, attempt to do so, judged by the reports filed by them, the last of which served as the basis of the decree complained of. Read and considered together, they merely exhibit mutual accounts covering a period of  $4\frac{1}{2}$  years and ranging in items, some of them less than \$1, some of them less than \$5, and none for more than \$114.75, the gross amount of which, all considered, seems impossible of satisfactory ascertainment to accord with the debt secured to appellant. Neither report of the commissioners, neither of the Johnsons, and no other person called to testify on their behalf pretend to speak with any degree of definiteness or precision with regard to the real status of the accounts, and by no apparent combination or elimination of items, charges, and countercharges, including notes and checks, is it reasonably possible to ascertain a balance sufficient to indicate with certainty a liability

against James Johnson in favor of his brother Raymond which added to the note would aggregate \$1,086, the amount named in the trust. The parties most vitally concerned as debtor and creditor utterly fail, indeed did not seriously attempt, to disclose the mode, manner, or method pursued by them to determine the amount growing out of such accounts. If that result is even approximately attainable by any reasonable process of computation or combination of the items of the accounts in whatever form they may exist, upon these defendants devolves the duty to show how or by what method they ascertained that amount. Apparently what they undertook to do, and did, was to produce a list of selected items of an account or accounts which, together with notes for various amounts without dates or other explanation, make a total sum of \$1,086. Naturally, and therefore reasonably, the presumption is that, as they are supposed to have kept the accounts, they were familiar with the numerous items composing them, and for that reason could explain them. But they produced no books, no memoranda, nothing to show the correctness of the items except checks for various amounts, the total of which, including the checks interchanged by the parties and exhibited to Lipscomb, some of which appear twice in the accounts, exceeds \$1,086, exclusive of the duplications and the note, which, it is said, constitutes part of that sum. We think this failure on their part affords ground sufficient to permit the reasonable inference of the existence of a purpose unduly to encumber the land conveyed to secure the debts and liabilities of James Johnson.

[1-3] The mere relationship of these defendants, it is true, does not of itself have such significance as warrants condemnation of the transaction they attempted to consummate for their own mutual benefit and advantage. If bona fide, dealings between brothers stand upon the same plane as dealings between strangers; they are not presumptively fraudulent. The chief difference in regard to transactions between those who are and between those who are not so related or connected by the ties of kinship or marriage is not so much a difference in kind as it is in degree and the burden of proof requisite to give their dealings the appearance characteristic of justice and fairness when assailed as fraudulent. As a general rule the burden of proof rests on him who charges fraud, and not on him whose conduct is charged to be fraudulent. But, where the transaction assailed is between brother and brother or other near relatives, only slight evidence is required to shift the burden of showing its bona fides. *Mankin v. Davis*, 82 W. Va. 757, 97 S. E. 206; *Carlsbad Mfg. Co. v. Kelley*, 100 S. E. 65. Frequently, however, it is extremely difficult; if not impossible, to demonstrate by direct proof the fraudulent nature of the transaction, and in such cases the circum-

(102 S.E.)

stances surrounding the parties and their dealings one with another often constitute the only available evidence and may be sufficient to establish the fraudulent intent. *Florence W. McCarthy Co. v. Saunders*, 83 W. Va. 612, 98 S. E. 800. Therefore where, as here, the transaction assailed is between persons whose relationship by blood or marriage is so intimate as fairly to create the presumption of their susceptibility to influences prompting favoritism by the one towards the other, and the proof introduced or circumstances surrounding the dealings of the parties tend to show that such was the course pursued, the burden of establishing freedom from fraud as against creditors shifts to him who is charged therewith. *Carlsbad Mfg. Co. v. Kelley*, supra. In such case the law imposes upon the latter the duty to show with reasonable certainty the genuineness of the transaction, and requires a court of equity to scrutinize it with the utmost diligence to ascertain whether it is in fact fraudulent, and, if so, to cancel and annul it at the suit of a plaintiff whose rights are affected injuriously thereby. *North American Coal & Coke Co. v. O'Neal*, 82 W. Va. 186, 195, 95 S. E. 822. As said in point 5 of the syllabus in *Colston v. Miller*, 55 W. Va. 490, 47 S. E. 268:

"Relationship between the parties, by blood or affinity, calls upon the court for careful and close scrutiny of the transaction and the conduct of, and evidence offered by, the grantee."

See, also, *Knight v. Capito*, 23 W. Va. 639; *Bierne v. Ray*, 37 W. Va. 571, 16 S. E. 804; *Wood v. Harmison*, 41 W. Va. 376, 23 S. E. 560.

[4] To overcome a charge of fraud and sustain a debt impugned on that score, a defendant must do more than state the debt is just and the amount unpaid. Nor is it sufficient to produce notes, checks, accounts of cash payments, and other similar or like items originating in various small transactions, as trading horses or other animals, without any explanation other than that revealed by the documents. There must appear some correlation between them and the fact to be proved. Their presence without explanation signifies but little where the relevancy is doubtful. Both must unite and agree in order to establish the fact in dispute. Where they disagree and are irreconcilable, they furnish no substantial aid in solving the issue as to the real character of a particular transaction. *Coal & Coke Co. v. O'Neal*, cited.

[5] The same rule obtains and requires the production and proof of the source and origin of the \$916 note which is said to be included in the \$1,086 debt secured by the trust deed. If its genuineness be conceded, the concession cannot affect the ultimate result of this discussion. Though the trust deed may to that extent secure an honest liability or indebtedness, it is tainted, nevertheless, by contact

with the part that does not represent such a debt. Courts almost invariably hold invalid an entire conveyance where a material part of the debt which it purports to secure is fictitious or had no actual or substantial existence, or, if it had, its existence is not established with that degree of certainty required by law. 1 *Moore on Fraudulent Conveyances*, p. 229; *Bump on Fraudulent Conveyances* (4th Ed.) p. 46; *Baldwin v. Short*, 125 N. Y. 553, 26 N. E. 928. See, also, *Gilbert v. Peppers*, 65 W. Va. 355, 64 S. E. 361, 36 L. R. A. (N. S.) 1181, Syl. pt. 5.

Perceiving no error in the decree, we affirm it.

(85 W. Va. 720)

STATE ex rel. McDERMOTT v. UNITED STATES FIDELITY & GUARANTY CO. et al. (No. 8953.)

(Supreme Court of Appeals of West Virginia.  
March 9, 1920.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS  $\S$  189(1)—ACTION ON BOND OF POLICE OFFICER FOR CARRYING WEAPONS MUST BE MAINTAINED IN THE NAME OF THE MUNICIPALITY.

An action on a bond executed by a municipal police officer for carrying weapons, conditioned as prescribed by section 7 of chapter 148 of the Code 1918 (Code 1913,  $\S$  5291), in which the municipality, not the State, is made the obligee, cannot be brought or maintained in the name of the State, but must be brought in the name of the municipality, obligee, as plaintiff, the common-law rule applicable not having been modified or abrogated by statute. If brought in the name of the state, a demurrer to the declaration should be sustained.

Error to Circuit Court, Summers County.

Action by the State, on the relation of T. J. McDermott, administrator of J. L. Spicer, deceased, against the United States Fidelity & Guaranty Company and others. Demurrer to declaration overruled, and defendants bring error. Reversed, demurrer sustained and cause remanded, with leave to amend and for further proceedings.

T. N. Read, of Hinton, for plaintiffs in error.

R. F. Dunlap, of Hinton, for defendant in error.

MILLER, J. This was an action of covenant upon a bond with collateral conditions, executed by the defendant Wickline, principal, and the United States Fidelity & Guaranty Company, a Corporation, surety, wherein they acknowledged themselves to be "held and bound unto the City of Hinton, a municipal corporation, in the just and full sum of thirty-five hundred dollars (\$3,500.00) to

which payment well and truly to be made to the City of Hinton, W. Va.," they bound themselves, their heirs, executors and administrators jointly and severally firmly thereby.

The condition recited in the bond is as follows:

"The condition of the above obligation is such that whereas the above bound M. N. Wickline has this day been appointed Police Officer of the City of Hinton, W. Va., for a term ending on the 31 day of December, 1918, and desiring the right to carry a pistol, revolver and billy; he files this his bond in the penalty of thirty-five hundred dollars, conditioned according to law which license is coextensive with this State.

"Now, therefore, if the above named M. N. Wickline will not carry the said weapon except in accordance with his application and as authorized by law, and will pay all costs and damages to anyone by the accidental discharge, or improper negligent or illegal use of said weapons, then this obligation to be void; otherwise to remain in full force and virtue."

The declaration, which sets out said bond in full, avers a breach of the covenant therein, and as the result thereof the killing of J. L. Spicer by the said Wickline, while he was and continued to be a police officer of said city, laying the damages sustained at ten thousand dollars.

Though the bond was made payable to the City of Hinton, the suit was brought in the name of the State of West Virginia for the use and benefit of T. J. McDermott, administrator of Spicer. One of the grounds of demurrer to the declaration, overruled by the trial court, and renewed here as one of the grounds for reversal, is that the suit cannot be maintained in the name of the State of West Virginia, not a party to the bond, but that under the law it could only be brought and maintained in the name of the City of Hinton, the obligee named therein. If this point of error is well founded, it must result in the reversal of the judgment, and a remanding of the case, with leave to plaintiff to amend, if so advised and amendment is available, and if not, a dismissal of the suit.

Section 7 of chapter 148, Barnes' Code 1918 (Code 1913, § 5291), relating to the carrying of weapons generally, excepts from the prohibition of the statute among other officers—

"all regularly (regularly) appointed police officers of their respective cities, towns or villages, from carrying such weapons as they are now authorized by law to carry, who shall have given bond in the penalty of not less than thirty-five hundred dollars, conditioned for the faithful performance of their respective duties, which said officers shall be liable upon their said official bond, for the damages done by the unlawful or careless use of any such weapon, whether such bond is so conditioned or not."

Whether Wickline ever gave any bond as such police officer other than the one sued on in this case is not averred, nor is the fact one

of any importance in the disposition of the case on demurrer. If he had given a general bond as such officer, conditioned as the law prescribes, as we recently decided, the statute just referred to would write into it, in addition to the general condition prescribed, the condition relating to the carrying of deadly weapons, and give action thereon in favor of any one injured by a breach thereof, the same as if such condition was actually written in the bond. *Town of Lester v. Trail*, 101 S. E. 732.

In the case at bar we have a bond with the condition relating to the carrying of weapons generally written into it. But being made payable to the City of Hinton, can this action thereon in the name of the State, though for the use of the estate of the deceased, be maintained? We decided in *Town of Lester v. Trail*, supra, where the bond was the regular official bond of the officer, that the action might be and was properly brought in the name of the municipality, the obligee named in the bond. Citing authorities for this proposition, we said in that case that by executing their bond so payable the obligors thereby made the obligee, in that case the municipality, trustee for any and all parties who might be injuriously affected by the breach of its conditions. It is thought by counsel for plaintiff that this case establishes a new principle of law in this state. But an examination of the authorities cited there, and other authorities, it seems to us, simply affirms a well recognized principle of the common law, that an action on such a contract, in the absence of statute, can only be maintained in the name of some one in privity with the obligors. Such is the rule laid down in *Murfree on Official Bonds*, § 475. But counsel say in reply that the common-law rule has been changed by chapter 10 of our Code, relating to official bonds. Section 5 of that chapter (sec. 255), among other things, does provide that—

"Any bond to be given by an officer of a municipal corporation, county or district, or which may lawfully be prescribed by the ordinances, by-laws or regulations thereof, may be made payable to the State as aforesaid, or to the said municipal corporation, county or district."

The contention is that a municipal police officer is a State officer, and as regular official bonds may by statute be made payable to the State or municipality, suit or action thereon may by force of the statute be maintained thereon at the pleasure of any party interested, in the name of the State or municipality. This argument is further predicated on the theory that a municipality is merely a state agency, and this being so, action on such a bond, though payable to the municipality, may nevertheless be brought and maintained in the name of the State regardless of the obligee named in the bond. We do not think this proposition finds proper



bases in the law of contracts. It is conceded that it can find no support in the common law, and we find none in the statutes justifying the contention. Section 1 of said chapter 10 (sec. 251) provides that:

"Every bond required by law to be taken or approved by, or given before, any court, board or officer, shall unless otherwise provided, be made payable to the State of West Virginia," etc.

And section 2 (sec. 252) of said chapter authorizes suits to be brought on any such bond in the name of the State for the benefit of the State or of any county, district or corporation or person injured by a breach of the condition of any such bond, etc. But section 3 (sec. 253) thereof says that the proceedings in any such suit must show for whose benefit it is prosecuted, etc. When we come to section 5, however, relating to bonds of municipal officers, it authorizes such bonds to be made payable either to the State or to the municipal corporation. If to the State, of course, on principles of the common law, the suit would have to run in the name of the State; if to the municipal corporation, upon what principles of the common law or statute can one interested elect an obligee other than the one the parties have chosen? The municipality is a separate and distinct entity from the State; it has an existence with capacity to sue independently of the State; and the parties may elect as their trustee either the State or the municipality; if the State, suit must be in its name; if the municipality, it is the latter that must maintain suit on the bond, not some other person. In *Hunter et al. v. Commissioners of Mercer County*, 10 Ohio St. 515, it was decided that an action on the bond of a county treasurer payable to the State could not be maintained in the name of the County Commissioners, not named as obligees, but only in the name of the State. The several provisions of the statute cited and relied on as modifying the common law, the court held did not in fact do so, nor give right of action to the plaintiffs. In *Albertson v. State*, 9 Neb. 429, 2 N. W. 742, 892, the action was in the name of the State on the official bond of Albertson, county treasurer, payable as the statute required, to the county. In support of the judgment below the attorney general relied on a statute which declared it to be "the duty of the auditor \* \* \* to direct prosecutions in the name of the state for all official delinquencies, in relation to the assessment, collection, and payment of the revenue, against all persons who by any means become possessed of public money or property, due or belonging to the state, and fail to pay or deliver the same, and against all debtors of the state." The court, citing and relying on *Hunter v. Commissioners*, supra, construing similar statutes in Ohio, and referring to the common-law rule that

an action on a bond can only be maintained in the name of the obligee, says:

"If this provision stood alone, it would probably be sufficient to authorize a suit to be instituted in the name of the state."

But referring to other provisions of the statute, particularly to section 101 of the revenue law (Rev. St. Neb., 1866, c. 46, p. 333) the court concluded that statute controlling and as authorizing suit by the county clerk only in the name of the obligee in the bond, and held that the common-law rule had not been changed or abridged by statute. In *Town of La Grange v. Sylvanus S. Chapman and others*, 11 Mich. 499, the bond of a township treasurer was made payable to the People of the State of Michigan instead of the township as required by law, and it was held in accordance with the principles laid down in the Ohio and Nebraska cases that suit could not be brought in the name of the township, and that the failure of the bond to comply with the statute could not be aided by averment and proof. And see on the same subject 15 Enc. Pl. & Prac. 107; 29 Cyc. 1463.

As we have found nothing in our statutes justifying a different holding, we conclude both upon reason and authority that the present suit cannot be maintained in the name of the State, but should have been brought in the name of the City of Hinton, the obligee in the bond, and that for the error therein the demurrer to the declaration should have been sustained. We therefore reverse the judgment, sustain the demurrer to the declaration, and remand the cause to the circuit court with leave to plaintiff to amend, if so advised, and for further proceedings in accordance with the principles herein enunciated.

(35 W. Va. 744)

CARTER et al. v. PRICE et al. (No. 3769.)

(Supreme Court of Appeals of West Virginia.  
March 16, 1920.)

(Syllabus by the Court.)

1. EQUITY §219—DEFENSE OF LACHES MAY BE MADE BY DEMURRER WHEN FACTS APPEAR ON FACE OF BILL.

The defense of laches may be made by demurrer when the facts upon which such defense is predicated appear from the face of the bill.

2. EQUITY §87, 72(4)—WHERE COMPLAINANTS' "LACHES" INJURIOUSLY AFFECTS THE ADVERSE PARTY, A COURT OF EQUITY WILL DECLINE TO GIVE RELIEF.

"Laches" in legal significance is delay in the assertion of a claim which works disadvantage to another, and where it appears that by reason of such delay the adverse party would be injuriously affected because of the death of witnesses by whom the truth of the situation could be proven, or because injury might result to him on account of expenditures made upon the

land in the way of improvements, or where no claim is asserted until after the land has grown in value, either because of the development of the territory or the discovery of valuable minerals thereon, and such delay in asserting such claim is so long as to lead to the belief that it is asserted largely because of the increased value of the land and the altered conditions, a court of equity will decline to give relief.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Laches.]

**3. EQUITY §72(1)—DELAY IN ASSERTION OF KNOWN RIGHTS TO PREJUDICE OF ADVERSE PARTY IS AN ESTOPPEL AGAINST ASSERTION OF SUCH RIGHTS.**

Where a party knows his rights or is cognizant of his interest in a particular subject-matter, but takes no steps to enforce the same until the condition of the other party has, in good faith, become so changed that he cannot be restored to his former state if the right be then enforced, delay becomes inequitable, and operates as an estoppel against the assertion of the right. This disadvantage may come from death of parties, loss of evidence, change of title or condition of the subject-matter, intervention of equities, or other causes. When a court of equity sees negligence on one side and injury therefrom on the other, it is a ground for denial of relief.

Appeal from Circuit Court, Kanawha County.

Suit by Margaret E. Carter and others against James A. Price and others. Demurrer to bill sustained and bill dismissed, and plaintiffs appeal. Affirmed.

A. M. Belcher, of Charleston, for appellants.

Brown, Jackson & Knight and M. F. Matheny, all of Charleston, for appellees.

**RITZ, J.** This suit is brought by a daughter and the heirs at law of two other daughters of Edmund Price, Sr., against a son of said Edmund Price, Sr., and the descendants of his remaining children, and their grantees, for the purpose of having partition of certain real estate of which it is contended said Edmund Price, Sr., died seized; to have an accounting of the rents, issues, and profits derived therefrom, as well as an accounting for waste alleged to have been committed thereon; and to have set aside a deed from said Edmund Price, Sr., to his sons Archibald Price, Edmund Price, Burdette Price, and James Price, dated the 12th day of February, 1848, and recorded in the office of the clerk of the county court of Kanawha county on said 12th of February, 1848, upon the ground that said deed is a forgery.

The bill shows that Edmund Price, Sr., departed this life intestate, leaving surviving him eleven children, one of whom, Harriett Young, and the heirs of two others, are the plaintiffs, and one of whom, to wit, James A. Price, and the heirs at law of the others,

who are deceased, are the defendants, together with sundry of their grantees. It is alleged that at the time of the death of Edmund Price, Sr., he was seized and possessed of a tract of 859 acres of land lying in the county of Kanawha, which was the remainder of a larger tract of more than 1,200 acres theretofore conveyed to him; he having in his lifetime conveyed away certain parcels of this 1,200-acre tract. It is alleged further that there appears of record in the clerk's office of the county court of Kanawha county a deed of February 12, 1848, purporting to be signed by said Edmund Price, Sr., and to be acknowledged on said 12th of February, 1848, before A. W. Quarrier, clerk of the county court of said county, and admitted to record on said date, purporting to convey to Archibald Price, Edmund Price, Burdette Price, and James Price, four of the sons of Edmund Price, Sr., said 859 acres of land, in consideration of one dollar and love and affection; that at the time said deed purports to have been made, to wit, on the 12th of February, 1848, Edmund Price, Sr., was dead, and had been dead for a period of about six months, and that the said deed was executed in the name of said Edmund Price, Sr., by his son, one of the grantees, Edmund Price, Jr.; and that the other grantees in said deed knew of this forgery by their brother and cograntee. The bill further alleges that Harriett Young, daughter of the said Edmund Price, Sr., and her two sisters, ancestors of the other plaintiffs, were not living at the home of their father at the time of his death; that they were uneducated and had no knowledge or information of any kind or character of the recordation of said pretended deed, and were not familiar with the fact that deeds were recorded in the office of the clerk of the county court; and that they permitted their said brothers to live upon, use, and occupy said lands, during all the years from 1848 to 1915, without requiring any accounting from them, or without making any claim to said land, but without knowledge of the existence or recordation of said deed of February 12, 1848. The bill further alleges that there are some two or three small tracts of land, parts of the larger tract conveyed to the said Edmund Price, which do not purport to have been conveyed by the deed of February, 1848, and that as to these tracts plaintiffs are unquestionably entitled to have partition thereof, and an accounting for waste committed thereon. It is further alleged that leases for oil and gas have been made by various claimants of said land under the alleged forged deed, and that large quantities of oil and gas have been taken therefrom, and that plaintiffs are entitled to have an accounting therefor, as well as to have partition of the estate among them. A demurrer was interposed to the bill upon the ground

that the plaintiffs are barred by their laches from asserting their claim, and this demurrer being sustained, and the plaintiffs declining to amend the bill, the same was dismissed.

It will be observed that it is not claimed that the plaintiffs or their ancestors did not know that Edmund Price had this estate at the time of his death, conceding that the deed was a forgery. All they contend is that they did not know that there was such a deed until the latter part of the year 1915, nearly 68 years after it was executed and recorded. It appears from the bill that the grantees in that deed, and those claiming under them, have been in possession of the land during all of these years, and have enjoyed all the advantages thereof. It appears further that for this 68 years none of the plaintiffs has asserted any claim to the land, but that in the latter part of the year 1913 a lease was made covering part of the land for development for oil and gas, and according to the allegations of the bill considerable quantities of oil and gas have been procured from this land. It was then that the plaintiffs discovered that they were interested in the land and, as they say, for the first time discovered the existence of the deed of February, 1848. All of the grantees in that deed are dead except the defendant James A. Price, and he must be a very old man. It does not appear whether or not the clerk of the county court who took the acknowledgment is dead, but more than 70 years have elapsed from the time of the acknowledgment of the deed until the bringing of this suit in June, 1918, and it being fair to assume that said clerk was at least 21 years of age when he was holding office he would, if still living at this time, be a very old man; in fact, it may well be assumed that he has long since departed this life. The allegations of the bill show that the grantees in the deed treated this land as owned by them during all of these years. They conveyed away, according to the bill, various tracts and portions of it, and, as before stated, in quite recent years they and their vendees made oil leases and had the oil and gas removed therefrom, sold the same, and converted the proceeds to their own use. There is no allegation in the bill that the plaintiffs or their ancestors did not know of their alleged rights and interests in this land, nor is there any allegation in the bill that the defendant James A. Price and the ancestors of the other defendants ever occupied the land under any agreement with the other children of Edmund Price, Sr., or any intimation that their occupancy was other than that of sole ownership. It is not alleged that the grantees in the deed of February, 1848, ever accounted to the other children for any rents or profits from the lands, or that such accounting was ever demanded, or that the right thereto was ever recognized or insisted upon. In fact, there is no sugges-

tion that the title of the grantees in that deed, and those claiming under them, was ever questioned in any way until the bringing of this suit more than 70 years after the deed was recorded, and then only after the discovery of valuable deposits of oil under the land.

[1] That the defense of laches can be taken advantage of by demurrer, when the facts from which the defense appears are shown on the face of the bill, is established in this jurisdiction. *Jarvis v. Martin's Adm'r*, 45 W. Va. 347, 31 S. E. 957; *Thompson v. Iron Co.*, 41 W. Va. 574, 23 S. E. 795.

[2, 3] As to whether or not a claim asserted will be barred by laches depends upon the circumstances in each particular case. Lapse of time does not of itself ordinarily bar such a claim. It must be accompanied by some disadvantage to the opposite party. If it appears that it is doubtful whether the adverse party can command the evidence necessary to a fair presentation of the case because of the death of the witnesses to the transaction, or those who might have knowledge of it, this circumstance, connected with long lapse of time, will frequently, unaccompanied by anything else, bar the right to recover, and this is true, even though the period prescribed by the statute of limitations has not run. And so where one has obtained property by fraud or mistake, of which he might be deprived if seasonable resort were had to a court of equity, if the claimants permit a long time to elapse without asserting their claim, during which improvements have been made upon the land, as was the case here, by the developing of the same for oil, or the same has become suddenly valuable by reason of the discovery of minerals of various kinds thereon, or if it has come into the market because of territorial development, relief will ordinarily be denied in equity, even though a very much shorter time has elapsed than in this case. Or, if the rights of third parties have intervened, courts will be slow to upturn the same at the suit of one who has lain by with full knowledge, or the means of knowledge, for a long time and allowed others to deal with the property as though such claimants had no interest therein. 10 R. O. L., tit. "Equity," § 142, etc.; *Story's Equity Jurisprudence*, § 85; *Pomeroy's Equity Jurisprudence*, § 1442, etc. These texts and the authorities cited to support them fully sustain the principles above enunciated. In few of the adjudicated cases do we find a claim so old as the one attempted to be asserted here. We find in this case that, because of the long lapse of time, most of the witnesses who know anything about the original transaction are dead, and their evidence not obtainable. We find further no assertion of their claim by any of the plaintiffs, or those under whom they claim for more than 70 years. We find that the rights of third par-

ties have intervened, that valuable improvements have been made upon the land in the way of developing the same for oil, and that it was not until after it was shown that these developments made the land very valuable that the plaintiffs asserted the claim set up in this suit. It thus appears that nearly all of the elements which the texts say bar a claim for laches exist in this case in a magnified degree. We are therefore of opinion that there was no error in sustaining the demurrer to the bill.

It is insisted further by the plaintiffs that there are two or three small tracts of land not included in the deed of February, 1848, parts of the larger tract of 1,200 and some acres. This allegation cannot be true, for that deed, which is exhibited with the bill, on its face conveys all of the tract of 1,200 and odd acres not theretofore conveyed away by Edmund Price, Sr., so that whatever land Edmund Price, Sr., was possessed of at the date of that deed passed by its terms.

We find no error in the decree of the circuit court, and the same is affirmed.

(85 W. Va. 739)

STATE ex rel. GORDON v. STATE BOARD OF CONTROL et al. (No. 4053.)

(Supreme Court of Appeals of West Virginia. March 9, 1920.)

*(Syllabus by the Court.)*

1. MANDAMUS  $\S$ 84—STATES  $\S$ 191(2)—MANDAMUS DOES NOT LIE TO COMPEL STATE BOARD OF CONTROL TO PERFORM ITS CONTRACT TO SUPPLY CONVICT LABOR.

Mandamus does not lie to compel the State Board of Control to perform the covenants of a contract made between it and a contractor, agreeing to supply him with a certain number of convicts from the state penitentiary to labor in his factory located therein, for a definite period of time at a certain price per day for each convict so employed. Such a proceeding is virtually one against the state and cannot be maintained.

2. MANDAMUS  $\S$ 84—WILL NOT LIE TO COMPEL PERFORMANCE TO PREVENT BREACHES OF CONTRACT INVOLVING DISCRETION.

Unless so provided by statute, mandamus cannot be employed to compel performance, or prevent breaches of contracts involving discretion in the contracting parties.

*(Additional Syllabus by Editorial Staff.)*

3. STATES  $\S$ 191(2) — WHAT CONSTITUTES "SUIT AGAINST THE STATE."

A "suit against the state," within Const. U. S. Amend. 11, is one in which the state is vitally interested, and will have to satisfy the judgment or decree of the court, if satisfac-

tion is made at all, though the suit nominally is one against the state's officers or agents.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Suit against the State.]

Original application for mandamus by the State of West Virginia, on the relation of Isadore Gordon, against the State Board of Control and another. Writ refused.

Everett F. Moore, of Moundsville, and J. M. Ritz, of Wheeling, for relator.

E. T. England, Atty. Gen., and Blue & McCabe, of Charleston, for respondents.

WILLIAMS, P. This is an original application to this court by Isadore Gordon, the relator, for a writ of mandamus to compel the State Board of Control and Joseph Z. Terrell, warden of the state penitentiary, to apportion and deliver to him a sufficient number of convicts to make his quota 275, the number contracted for, and to prevent them from withdrawing from him any of those who have already been delivered to him, and to compel the return to him of those who have been withdrawn after they had been assigned and allotted to him. Relator avers in his petition that on the 27th of July, 1916, he entered into a contract with the State Board of Control whereby, in consideration of 70 cents per day for each convict to be employed under said contract, it agreed to furnish him 275 convicts, male and female, for a period of five years, beginning on the 18th of September, 1916, to work in his factory located within the walls of the penitentiary, and that he has fully and faithfully performed all of the covenants set forth in said agreement upon his part. It is averred the contract provided that, if for any cause there should be a deficiency in the number of convicts available, and the State Board of Control should be unable to furnish the full number of convicts provided for, the contractor should accept the same proportion of the whole number of convicts specified as may be furnished other contractors employing convict labor in the penitentiary; that the State Board of Control thereafter, on the 3d of January, 1920, and while the contract with relator was still in force, entered into a contract with the J. C. Bardall Company whereby it let and hired to said company, for the term of four years and eight months, beginning the 1st of January, 1920, 150 male convicts, with the privilege of as many more as may be mutually agreed upon, for which said company agreed to pay the sum of \$1 per day for each convict so employed, and whereby it was further agreed that the number of convicts previously agreed to be furnished under a contract with said company of date May 31, 1919, should be reduced to 175, instead of 200 as named in the former contract, and that the payment for all

additional labor in excess of 175 men should be made at the price of \$1 per day for each convict; that since the 1st day of July, 1919, the State Board of Control has violated its contract with relator, in that it has at no time, since that date, delivered to him the number of convicts to which he was entitled, although there were available to him during all that time a sufficient number of convicts in the penitentiary, but, instead of furnishing him with his full quota of convicts contracted for, the Board of Control and the warden of the penitentiary have been, since the 1st of July, 1919, and are now, allotting to the said J. C. Bardall Company and to the Kleeson Company, another contractor for convict labor, convicts to which he is lawfully entitled under his aforesaid contract; that on the 3d of February, 1920, 28 of the convicts which had theretofore been assigned to relator, though not then having his complete quota, were withdrawn from him and allotted to the said Kleeson Company and the said J. C. Bardall Company. Petitioner avers that these particular convicts had become skilled laborers and that their withdrawal has materially interfered with the operation of his shirt factory, operated within the walls of the penitentiary. Relator prays for a writ of mandamus to compel the State Board of Control, a corporation composed of E. B. Stephenson, James S. Lakin, and J. M. Williamson, and James Z. Terrell, warden of the penitentiary commanding them, both officially and in their individual right, to allot and deliver to relator a sufficient number of convicts to raise the number to 275, the number contracted for.

[1] Respondents moved to quash the mandamus nisi and also made answer thereto. The motion to quash raises at once the question whether this proceeding can be maintained. The answer depends upon whether or not it is a proceeding against the state. If it is, it cannot be maintained. Section 35, art. 6, of the Constitution, says: "The State of West Virginia shall never be made defendant in any court of law or equity." Although the state is not made a defendant *eo nomine*, it is, nevertheless, a proceeding against the state. The contract is made by and between respondents, "the State Board of Control, a public corporation, acting for the state of West Virginia." Thus by the very terms of the contract the state is shown to be vitally interested in it. The State Board of Control is but the state's agent, and acted in making the contract for and on behalf of the state. A state can contract only through its constituted officers or agents. The purpose of the writ in this case is to compel the Board of Control to carry out the state's contract as made by said board, and is therefore virtually a suit against the state, because the Board of Control is not interested in the contract

otherwise than as the state's agent. Hence to compel it to perform the contract would be in effect to compel the state to do so. The question whether or not such a proceeding is one against the state is not new in this court. It arose in *Miller v. State Board of Agriculture*, 46 W. Va. 192, 32 S. E. 1007, 76 Am. St. Rep. 811. There Miller had contracted with the state, through its commissioners of public printing, to do the state's printing for two years. Claiming that the printing required to be done by it in the exercise of its public functions did not properly fall under that contract, the State Board of Agriculture refused to allow said Miller to do its printing, and employed another printing company to do it. Whereupon Miller applied for a mandamus to compel the State Board of Agriculture to furnish him its printing under his contract with the commissioners of public printing. The writ was there refused on the ground that the proceeding was virtually a suit against the state, and was prohibited by section 35, art. 6, of the Constitution. The same doctrine was again announced in *Miller Supply Co. v. State Board of Control*, 72 W. Va. 524, 78 S. E. 672. That was a suit and not a mandamus proceeding, but the form of the proceeding can make no difference in the application of the principle. It was there likewise held that, although the state was not a party defendant *eo nomine*, the suit was nevertheless one against the state; it being an action against one of its governmental agencies empowered to contract on its behalf in certain matters. In making with relator the contract here involved, the State Board of Control was not acting in a purely ministerial capacity, but exercised in the matter a discretion with which it was vested by the statute creating it and defining its duties, and it likewise had the power to carry out the contract or to refuse to do so. This power it exercises on behalf of the state, and it is not for the court to say whether it is acting morally right in the premises or not. That is a question belonging to the executive and legislative branches of the government. It is only for us to determine whether or not there is any power in the judiciary to compel the Board of Control, the authorized agent of the state, to comply with its contract, and our conclusion is that there is no such power in the courts. The provision of the Constitution is mandatory and prohibitive. The proceeding, being one against the state's contracting agency, brought for the purpose of enforcing a contract made by it on behalf of the state, is therefore virtually a suit against the state itself, and cannot be maintained.

[3] In *Comer v. Bankhead*, 70 Ala. 493, a suit in equity was brought against the warden of the penitentiary to compel performance of a contract entered into between him and

the plaintiff whereby the warden had agreed to hire to plaintiff a certain number of convicts. By the suit plaintiff sought to enjoin the warden from supplying convicts to other contractors in violation of his contract with him, and the court held the suit was in effect a suit against the state and not maintainable in view of the Constitution of that state, prohibiting suits against the state in any of its courts, without its consent. It was once held by the Supreme Court of the United States, in an opinion rendered by Chief Justice Marshall in *Osborn v. Bank of U. S.*, 9 Wheat. 738, 6 L. Ed. 204, that to constitute a suit against the state it was necessary for the state itself to be a party to the record; but this holding has been virtually overruled in a number of subsequent decisions, and the rule now followed by that court is that if the suit be one in which the state is vitally interested, and will have to satisfy the judgment or decree of the court, if satisfaction is made at all, then the suit is one against the state, within the meaning of the eleventh amendment to the Constitution of the United States, even though the suit nominally is one against the state's officers or agents. In *re Ayers*, 123 U. S. 443, 8 Sup. Ct. 164, 31 L. Ed. 216, and cases reviewed in the opinion.

[2] The present case is distinguishable from those cases wherein a state officer may be compelled by mandamus to perform purely ministerial duties involving no discretion. Such use of the writ is illustrated by the case of *State v. Shawkey*, 80 W. Va. 638, 93 S. E. 759. There the State School Book Commission, which was the state's agency authorized to contract with the publishers for the books to be used in the free schools of the state, had met and accepted the bid of W. H. Wheeler & Co., publishers of school books, and had signed the contract of acceptance and adjourned. The commission had exercised its discretion and completely performed its part of the contract. The act creating the School Book Commission made the state superintendent of schools ex officio secretary of the commission, and also made it the duty of the Attorney General to prepare duplicate contracts, one copy for the publisher whose books were adopted by the commission, and the other to be retained by the commission itself. The duplicate copies of the contract had been signed by the chairman of the commission as the act provided, and by W. H. Wheeler & Co., and left in custody of Mr. Shawkey, the secretary of the commission, until the publisher should execute and file a bond as required by the act. But for reasons held by the court to be insufficient in law, the secretary refused to deliver a copy of the contract to the publisher, and the Board of Public Works, for reasons likewise held to be insufficient, had refused to approve the bond filed by the publisher. The court there held that

the contract having been executed, the matter of approving the bond and delivering a copy of the contract to the publisher were not discretionary, but were purely ministerial duties and the writs were awarded for that reason. Indeed, the writ is more often used to compel public officers to perform their purely ministerial duties under the law than for any other purpose. But it is well settled that the writ does not lie to control the discretion of an officer. It will not lie to compel the execution of a contract involving discretion; nor will it lie to compel obedience to the provisions of a contract. *Miller v. Board of Agriculture*, supra; and 18 R. C. L. § 118, p. 193. Writ refused.

(88 W. Va. 16)

**WHITE FLAME COAL CO. v. BURGESS et al. (No. 3898.)**

(Supreme Court of Appeals of West Virginia. March 18, 1920.)

*(Syllabus by the Court.)*

**1. MINES AND MINERALS §49—REQUISITE TO OBTAIN TITLE TO COAL IN TRACT OF LAND STATED.**

To obtain the title to all of the coal in a tract of land, under the law of title by adverse possession, by means of exclusive, open, notorious, and hostile operation of a single mine on the land, it is essential that such possession be taken and held for the requisite period of time, under color of title to the coal.

**2. MINES AND MINERALS §49, 55(2)—DEED EXCEPTING MINERAL RIGHTS RESERVED BY ANY GRANTORS HERETOFORE EXCEPTS MINERALS PREVIOUSLY ACCEPTED BY CONVEYANCES OF LAND BY ORIGINAL GRANTOR AND THOSE SUCCEEDING HIS GRANTEE IN OWNERSHIP OF SURFACE.**

An informal deed, purporting to convey one or more tracts of land and closing with a clause warranting the title, reserving a vendor's lien on the land to secure payment of purchase money and saying, between the warranty and the reservation provisions, "excepting, however, that they [the grantors] do not undertake to convey any mineral rights that were reserved by any of the grantors heretofore," excepts from its operation minerals previously excepted by conveyances of the same land by the original grantor thereof and others succeeding his grantee in the ownership of the surface.

**3. DEEDS §137—EXCEPTION MAY BE MADE IN ANY PART OF A DEED.**

An exception may be made in any part of a deed, by the use of terms expressing intent to effect it.

**4. DEEDS §90—CONSTRUCTION OF INFORMAL DEED IS TO BE BASED ON ALL ITS TERMS, REGARDLESS OF TECHNICAL RULES.**

The interpretation of an informal deed is based upon all of its terms, provisions, and

parts, unfettered by any technical rules or limitations, just as is that of an ordinary contract, a will, or a statute.

**5. DEEDS ¶88—INTENTION INDICATED BY AN UNNECESSARY INFERENCE OR IMPLICATION WILL NOT PREVAIL OVER AN INTENTION EXPRESSED IN WORDS.**

Ordinarily, in the interpretation of a deed or other instrument, intention indicated only by an unnecessary inference or implication, is not allowed to prevail over a different intention expressed in words.

**6. DEEDS ¶90—RULE OF CONSTRUCTION MOST STRONGLY AGAINST CREDITORS IS APPLICABLE ONLY IN CASE OF AMBIGUITY.**

The rule that a deed is to be construed most strongly against the grantor is applicable only in the case of a doubt as to its meaning, insoluble by the application of any other rule of interpretation.

**7. TAXATION ¶529 — ENTRY OF LANDS FOR TAXATION AND PAYMENT OF TAXES THEREON IS PRESUMED.**

There is a presumption of entry of lands for taxation and payment of the taxes thereon, in favor of the owner and persons claiming under him, which stands until overthrown by proof to the contrary.

**8. TAXATION ¶851—BURDEN OF PROOF OF FORFEITURE BY NONENTRY OR TAXATION RESTS ON ONE DEFENDING ON THAT GROUND.**

In the case of a defense to an action of ejectment, based upon the theory of forfeiture of the plaintiff's title, by reason of nonentry of the land upon the land books, for taxation, and outstanding title in the state in consequence of the forfeiture, the burden of proof of such forfeiture and of all facts necessary to establishment thereof, including location of the land, when it is material, rests upon the defendant.

**9. TAXATION ¶529, 848—ERROR IN ENTRY OF LAND OR COAL FOR TAXATION IS NOT A VALID BASIS OF A CLAIM OF FORFEITURE OF THE TITLE TO THE STATE IF THE TAXES HAVE BEEN PAID.**

Neither an error in the quantity of a tract of land or coal, made in the entry thereof for taxation, be it one of excess or deficiency, nor the entry of two or more noncontiguous tracts as one, constitutes a valid basis of a claim of forfeiture of the title to the state, if the taxes imposed by such irregular assessment have been paid, as they are presumed to have been in the absence of proof to the contrary.

**Error to Circuit Court, Kanawha County.**

Ejectment by the White Flame Coal Company against Emma Burgess and others. Judgment for defendants upon a directed verdict, and plaintiff brings error. Reversed, verdict set aside, and cause remanded for a new trial.

A. M. Belcher and J. B. Jones, both of Charleston, for plaintiff in error.

W. E. R. Byrne, of Charleston, for defendants in error.

**POFFENBARGER, J.** The two principal inquiries arising on this writ of error to a judgment in an action of ejectment to recover the coal in a certain tract of land, rendered on a verdict found for the defendants by direction of the court, are whether they have acquired title to it by adverse possession, and whether the title of the plaintiff has been forfeited to the state, by reason of nonentry thereof for taxation.

While the declaration calls for the coal in two tracts of land, the areas of which are not stated, the controversy seems to be limited to the coal in a tract containing about 68 acres, and composed of parts of said two tracts. The plaintiff derails its title regularly from the commonwealth of Virginia, commencing with a grant to Samuel Hollingsworth, of a tract of land containing 47,000 acres and known and designated as the "Sheba" tract. It includes several prior surveys, which were excepted and have been located by the plaintiff in its evidence. The "Sheba" tract passed mediately from Hollingsworth to Matthias Bruen, and thence to his son, A. M. Bruen, who, from time to time, conveyed many portions of it to divers persons, but generally, if not always, excepted, in some form, the coal and iron in the lands, by his conveyances. By a deed dated February 1, 1854, he conveyed a tract containing 296½ acres to Hutchinson McDaniel, and retained the title to minerals in it, by an exception made in the following terms:

"Excepting and reserving all the coal and iron minerals found in and upon said land to the said Alexander M. Bruen, his heirs and assigns, with rights of way of ingress and egress necessary to the full enjoyment and use of this reservation, and granting to the said Hutchinson McDaniel license to use such quantities of said minerals as may be necessary for his household and domestic purposes."

The coal in question is under a part of that tract, the title to which, except as to the minerals therein, is admittedly vested in the defendant Emma Burgess. A portion of it, containing 68 acres, was owned, as to the surface, by August Copen and wife and the Kanawha Valley Bank, in 1891, and they conveyed it to Lucy E. Rock, by a deed containing this exception:

"Subject to the reservations heretofore made of coal, iron, and other minerals in the deeds from A. M. Bruen and others, under which said bank remotely claims, and reference is here made to the said deeds for a more particular statement of said reservation; it being the intention of this deed to convey such land to the third party [Lucy E. Rock], as the same was granted by said Bruen and others and subject to the reservation aforesaid."

The record and briefs are so incomplete and disconnected in narration of the facts that it is difficult, if not impossible, to get

from them a clear comprehension of the history of Mrs. Burgess' title. It seems to be admitted, however, that all of the deeds under which she claims down to one dated March 23, 1907, by which Lucy E. Rock and her husband conveyed a 47-acre tract, part of a 68-acre tract, and a 19-acre tract, to J. L. Burgess, her husband, clearly excepted the coal and iron, either in express terms or by references to prior exceptions and adoption thereof. If the deed of March 23, 1907, contains an exception, it is either in the warranty clause or immediately follows it. The last clause in it reads as follows:

"And the said parties of the first part do hereby covenant that they will warrant generally the title to the property hereby conveyed, excepting, however, that they do not undertake to convey any mineral rights that were reserved by any of the grantors heretofore and they do hereby reserve a vendor's lien upon the same for the unpaid purchase money."

By a deed dated April 29, 1911, J. L. Burgess and wife conveyed said two tracts to Calvin Jones, and the last clause in that deed says:

"And the said parties of the first part do hereby covenant with the said party of the second part that they will warrant generally the property hereby conveyed, excepting, however, the mineral titles that have heretofore been excepted by grantors or vendors of aforesaid land."

Calvin Jones, by a similar deed dated September 26, 1913, conveyed both tracts to Emma Burgess, his daughter, the wife of J. L. Burgess. The last clause of that deed is the same in effect, if not in terms, as in the deed from Burgess to Jones.

[1] Upon the interpretation of the three deeds last mentioned depends the important inquiry whether or not Emma Burgess, her husband, and her father, under whom she holds title, had any color of title to the coal in place that she can invoke in support of their alleged continuous, visible, open, notorious, and actual possession of the coal, by means of mining thereof for commercial purposes, from the year 1907 until the year 1917, the date of the commencement of this action. If, properly interpreted, they, on their faces, granted the coal, and there was such possession as is claimed, the defendant Emma Burgess has perfect title to the whole thereof, by adverse possession of part of it, under color of title to the whole thereof. On the other hand, if any of them did not do so, she has no title to the coal. None of them actually passed such title, for none of the grantors had it; but the requisite possession of part of it, under deeds purporting to pass title to all of it, vested such title, if there were such deeds and such possession.

[2, 3] The "clause" from the deed of March 23, 1907, is not limited to the subject of war-

ranty. Besides warranting title, it reserves a vendor's lien. Between the portions relating to these two subjects, there is language pertaining to previously reserved mineral rights by "the grantors heretofore," the grantors in former conveyances of the same land. Though this language follows the language of warranty, it does not in terms purport to qualify or limit the warranty. It says "they," the parties of the first part, "do not undertake to convey any mineral rights that were reserved" by previous conveyances. Nothing but its position and the use of the word "excepting," making an apparent verbal connection between it and the warranty, can be relied upon as indicating purpose to make it limit or qualify the warranty. Mere inference or implication of such intent arising from the connection and juxtaposition of terms is not a necessary one, and it is inconsistent with the words themselves, which plainly and expressly disavow intent to convey the minerals. Ordinarily, intention disclosed, if at all, by such an inference or implication, is not allowed to prevail over a different intention expressed in terms. *Berry v. Humphreys*, 76 W. Va. 668, 86 S. E. 568, citing several well-considered cases. This is language of exception from the operation of the deed, not merely from the warranty clause. Its logical, and therefore its legal, effect is the same as if the grantor had in terms excepted or reserved the minerals excepted in previous conveyances. An exception by a grantor having title is a mere withholding of title to part of the property described in the deed. Hence, if he declares in the deed that he does not grant or undertake to convey part of such property, he excepts the designated part. The form of an exception is immaterial. It may be effected by the use of any words expressing intention to except. *Freudenberger Oil Co. v. Simmons*, 75 W. Va. 337, 83 S. E. 995, syl. pt. 7, Ann. Cas. 1918A, 873. An exception may appear in any part of a deed. It may be inserted between the habendum and the warranty, and in the same paragraph with the former. Id.

[4-6] Lacking an habendum clause, and embodying three subjects in one compound sentence, this is an informal deed, the interpretation whereof involves consideration of all of its parts and is free from the limitations of technical rules. All of its parts express primary intention. *Freudenberger Oil Co. v. Simmons*, cited. There are few, if any, instances in which any part of a deed other than the habendum has ever been held to express secondary intent, or to perform the function of mere explanation or definition, in the absence of an expression or a necessary implication of such intention. An exception found in any part of a deed eliminates from the granting clause so much of what would otherwise pass by its terms as is embraced in the terms of the exception, and the deed



as a whole passes what is included in the terms of the grant, less what is found to be within those of the exception. Always and everywhere, the interpretation of such a deed as the one here involved is based upon the terms of all of its provisions and parts, unfettered by any technical rules or limitations, just as is that of a simple contract, a will or a statute. *Uhl v. Ohio River R. Co.*, 51 W. Va. 106, 41 S. E. 340; *Devlin, Deeds* (3d Ed.) § 844a.

The familiar rule that a deed is construed most strongly against the grantor, in case of doubt, if applicable between these parties, who are not grantor and grantee, would not apply to the deed, for it may be resorted to only when, after application of all other rules, a doubt still remains. 2 *Kent's Com.* 556; *Hammon, Con.* § 415; 13 *Cyc.* 609.

In view of the insufficiency of this deed for color of title and the period of time elapsing between its date and that of the next one, nearly four years, it is immaterial whether the subsequent ones, properly construed, attempt to pass title to the coal or not; for the possession, if any, would not be long enough to confer title by an adverse holding. The two later deeds are invoked, however, for the proposition that all three are color of title for the defendants, because they construed them as passing the title to the coal, and treated them as having done so, in mining the coal. This position has no legal foundation.

"Adverse possession under and by virtue of a deed is limited to the premises actually covered thereby." 1 *Cyc.* 1134; *Marshall v. Stalnaker*, 70 W. Va. 394, 74 S. E. 48.

[7-9] The burden of proof of forfeiture of the Bruen title by reason of nontaxation was on the defendants. *Wildell Lumber Co. v. Turk*, 75 W. Va. 26, 83 S. E. 83; *Sult v. Hockstetter Oil Co.*, 63 W. Va. 317, 61 S. E. 307. A defense made on the ground of forfeiture of the plaintiff's title is affirmative in its nature. The defendant undertakes to show outstanding title in a third person, a stranger, the state. The defendants have clearly failed to discharge that burden. They have not proved the forfeiture they claim. After having made numerous conveyances of tracts of surface, Bruen caused himself to be charged on the land books, for the year 1868, with lands in fee, amounting to 25,849½ acres, and with a mineral acreage of 20,870, and the latter assessment was carried on the land books, in the name of Bruen or his heirs or devisees, until 1917. The 296¾-acre conveyance of surface to McDaniel occurred in 1854. The surface was divided by numerous conveyances into separate tracts, but the minerals were not. It is plain that Bruen properly endeavored to enter all of the reserved minerals as a single tract. The surface of the 296¾-acre tract was assessed in the name of McDaniel from 1855 to 1864,

inclusive. Then it was apparently charged in the name of Sarah Ramsey from 1865 to 1868, inclusive. In the latter year, she conveyed it to Greenburg Slack, and it was taxed in his name down to 1872, when he conveyed part of it to August Copen. This tends to prove the 296¾-acre tract was not overlooked in taxation, and some of the mineral acreage was taxed to the Bruens, in the same district in which that tract lies, from 1882 down to 1917. But it appears that the Bruens had more than 20,870 acres of minerals—23,877—for all of the period of mineral taxation, or a large portion thereof; and on this fact is based the contention that the plaintiff must prove its small tracts of coal were within the 20,870 acres charged on the land books, under the rule enunciated in *Stockton v. Morris*, 39 W. Va. 432, 19 S. E. 531. That rule applies only to the party bearing the burden of proof. *Cook v. Raleigh Lumber Co.*, 74 W. Va. 503, 82 S. E. 327; *Virginia O. & I. Co. v. Keystone O. & I. Co.*, 101 Va. 723, 45 S. E. 291. Here the defendants carry the burden of proof on the question of the existence of an outstanding title in the state. If the particular part of the Bruen mineral tract, which belongs to the plaintiff, in the absence of forfeiture thereof, has been forfeited, and the issue depends in whole or in part on the location of that tract, the defendant must prove it, as in any other case of an attempt to defeat the plaintiff in an action of ejectment, by proof of an outstanding title.

A claim of forfeiture is asserted on the bare fact that the acreage taxed as minerals is too small, or that there is an excess of acreage owned above the acreage taxed. This claim is equally unfounded. The Bruens caused their coal to be assessed as a single tract, agreeably to the fact. In the taxation thereof there was an error as to the quantity. In such case there is no failure to enter the tract of land, or any part thereof, for taxation, within the meaning of the law. *State v. Cheney*, 45 W. Va. 478, 31 S. E. 920; *Desty, Tax*. 567. Under our tax laws, the subject of taxation, except in the case of a city or town lot, is the tract, not the acres composing it. If the error is an excess in quantity, the public benefits by it. The state gets more than belongs to it. If the error is one of deficiency, there is, no doubt, either an actual or potential remedy by back-taxation, wherefore the state suffers no serious injury in that event. There is absolutely no authority for the proposition that there is a forfeiture in either case, and it is utterly untenable from any point of view.

In connection with this contention, *Logan v. Ward*, 58 W. Va. 366, 52 S. E. 398, 5 L. R. A. (N. S.) 156, is invoked, but there is no similarity between it and this case. In the former, the titles were hostile, and the effort was to make taxation of three specific tracts

under one title, save nearly 25 times as much land under another.

Nor does the fact that the Bruens conveyed some of their land in fee prove anything material. Though only contiguous lands can properly be assessed together, irregular taxation, if there was any, does not forfeit title. *Webb v. Ritter*, 60 W. Va. 193, 54 S. E. 484; *Bradley v. Ewart*, 18 W. Va. 598; *Whitham v. Sayers*, 9 W. Va. 671; *Lohrs v. Miller*, 12 Grat. (Va.) 452. If two or more noncontiguous tracts are assessed as one, and the taxes paid, there is manifestly no forfeiture.

In view of these principles and conclusions, the trial court's direction of a verdict for the defendants is an obvious error. It is equally clear that the court should have given some one of the three peremptory instructions asked for by the plaintiff.

The judgment will be reversed, the verdict set aside, and the case remanded for a new trial.

(86 W. Va. 1)

STATE ex rel. CHURCHMAN et al., State Public Health Council, v. HALL, Mayor, et al. (No. 4056.)

(Supreme Court of Appeals of West Virginia. March 16, 1920.)

*(Syllabus by the Court.)*

1. STATUTES  $\S$  225½—GENERAL AND SPECIAL ACTS ON SAME SUBJECT-MATTER CONSTRUED TOGETHER TO EFFECTUATE MANIFEST PURPOSE.

Where there is an apparent, though not a real or vital, inconsistency between the provisions of a general and a special statute relating to the same subject-matter, courts will, if possible, so construe or interpret them as to effectuate the purpose manifested by their enactment.

2. MUNICIPAL CORPORATIONS  $\S$  191—STATE PUBLIC HEALTH COUNCIL'S POWER TO REMOVE CITY HEALTH COMMISSIONERS APPOINTED BY MAYOR LIMITED BY STATUTE.

Where a provision of a general health statute (section 3, c. 150, Barnes' Code 1918; Code Supp. 1918, sec. 5342i) expressly empowers the state public health council to remove from office a city health commissioner who refuses or neglects to observe and enforce the laws and regulations prescribed by the public health council to control and prevent the spread of an epidemic declared to be dangerous to the public health of such city, the exercise of such power is limited in its scope to the situation therein named, and does not, in the absence of express terms, confer authority to remove for other causes, where, as in Charleston, the charter authorizes the mayor of the city to appoint and remove the city health commissioner therefor.

3. MANDAMUS  $\S$  10—REMEDY NOT APPROPRIATE WHEN THE RIGHT TO RELIEF IS DOUBTFUL.

Mandamus is not an appropriate process to enforce performance of a public duty, where the

right to such relief is of doubtful or uncertain character.

4. MANDAMUS  $\S$  10—RELATOR MUST DISCLOSE CLEAR RIGHT TO ENFORCE PERFORMANCE OF THE DUTY DEMANDED.

To be available or applicable, the petition and proof should disclose a clear and indisputable right on the part of relators to enforce performance of the duty demanded, and a corresponding duty on the part of the officer or agent to perform the act in question.

*(Additional Syllabus by Editorial Staff.)*

5. STATUTES  $\S$  206—EVERY WORD AND PROVISION MUST BE GIVEN EFFECT IF CONSISTENTLY POSSIBLE.

Every word, phrase, paragraph, and provision of a statute must be given full force and effect, if that can be done consistently with its purpose in order to make it effective as far as possible.

Original mandamus by the State, on the relation of V. T. Churchman and others, members of the State Public Health Council, against Grant P. Hall, Mayor of the City of Charleston, and others. Writ denied.

Price, Smith, Spilman & Clay, of Charleston, for relators.

Donald O. Blagg and Geo. W. McClintic, both of Charleston, for respondents.

LYNCH, J. This proceeding in the name of the state at the relation of V. T. Churchman, S. L. Jepson, H. E. Gaynor, H. E. Sloane, J. L. Pyle, W. T. Henshaw, and E. H. Thompson, members of the state public health council, has for its objects the compulsory retirement of Dr. R. A. Ireland from the office or position of health commissioner of the city of Charleston under an appointment by Grant P. Hall, mayor of Charleston and correspondent, pursuant to the provisions of the charter of the city as amended by the January, 1919, session of the Legislature; and enforcement of a renomination by Hall as such mayor of a person other than Ireland for appointment by them as such health commissioner of the city; and such other and further relief as the nature of the case may require.

The allegations of the petition and its prayer proceed upon the theory of a power or right vested in relators to appoint and control the appointment of, and remove county and municipal health officers, and when so removed to require the county or municipal authorities to recommend another and different person for appointment by them as health officer in lieu of the person so removed. The correctness or propriety of that theory depends upon the true construction of the statute creating the state health department, considered in connection with the provisions of the charter of the city of Charleston touching the appointment of a public health com-

missioner for the city. The public health council is an administrative body the members of which are appointed by the Governor by and with the consent of the Senate, according to the plan of the reorganization of the public health department by chapter 24 of the 1913 Acts of the Legislature and amendments thereof by chapter 11, Acts 1915 (chapter 150, Barnes' Code 1918), and by chapter 96, Acts 1919, passed February 20, 1919. Nothing in the original or amendatory acts prior to 1919 conferred upon the state department of health or public health council, as theretofore constituted, the power or right to interfere in any manner, by appointment, removal, or otherwise, with the authorized health department or health officer of a municipal corporation, except by the provisions of section 9, c. 11, Acts 1915 (section 3, c. 150, Barnes' Code 1918; Code Supp. 1918, sec. 53421), and by that section only when in the opinion of the public health council the local health authority has failed or refused to enforce laws and regulations prescribed by the public health council for the prevention or control of infectious or contagious diseases declared to be dangerous to public health, or to act as so directed or required in a public health emergency affecting the territorial jurisdiction of the local health authority, and for the removal of the latter for that reason; and making it the duty of the general municipal authorities immediately upon the event of such removal to nominate a successor of the person so removed. This section, chapter 96 of the 1919 Acts, did not expressly or impliedly alter, modify, or amend in any particular, but permitted it to remain intact and unrepealed and in full force and effect, but did amend section 6, c. 150 (sec. 5339), Code, and added section 3a, and by the latter conferred upon the municipal council as the general administrative authority of a municipality power "to provide for a full-time health officer \* \* \* who shall give his entire time to the duties of his employment and the general health and sanitation of his \* \* \* municipality, \* \* \* and perform such duties in relation thereto as may be prescribed by \* \* \* ordinance of the municipality duly entered," etc. Section 6 of the act, as so amended, upon its face seems to require the public health council, upon the recommendation of the proper authority of a municipal corporation, to appoint a health officer therefor for a term of two years from and after July 1, 1919, "unless sooner removed by the said municipality or by the public health council"; and provides that—

"Should the public health council fail to confirm the nomination of the person recommended as \* \* \* municipal health officer, or should the public health council or other municipal \* \* \* authority remove any such officer, another nomination shall be at once made to the public health council."

Acting upon the assumption of a right to exercise the authority thus impliedly, if not expressly, given with reference to municipal corporations generally, although stated in the alternative, relators informally summoned respondent Ireland before them without the formulation or specification of charges of misconduct on his part in the administration of the office or position to which he was appointed by the mayor of Charleston, or of dereliction in the discharge of the duties required of him by law, or lack of personal or professional qualification on his part for the discharge of such duties, and caused his amotion from the position of city health commissioner and declared the office or position vacant, and demanded of the mayor a renomination of another person having the requisite qualification to act as his successor as such health commissioner. This they did admittedly for no cause whatsoever other than his confessed failure and refusal to devote his entire time to the performance of the duties assigned to him. They did not charge in their petition for this writ or in argument pretend to insist upon any lack of professional or personal qualification or ability, or any neglect or negligence or want of diligence on his part in the administration or discharge of the duties pertaining to the office or position of health commissioner of the city, or that his failure to abandon his general professional practice and devote all of his time and attention to the performance of such duties resulted in injury, annoyance, or inconvenience, or other harmful consequences to any one or more of the residents or inhabitants of the city, or that there was during his tenure of office any real or vital cause requiring the exclusive devotion of his entire time to the protection of the public against the appearance or prevalence of dangerous disease or diseases. The undisputed proof shows no inconvenience or even presence of a danger requiring exclusive devotion of his undivided time and attention to the public wants or necessities by respondent.

Having so summarily dismissed him as such commissioner, and the mayor having refused their demand for the nomination of him or some other person as such officer, and having likewise refused to recognize the validity of the acts of the relators in this respect, they applied for and obtained the nisi writ now before us.

Section 35 of the Charleston Charter (chapter 9, Acts 1919, Municipal Charters) clothed the mayor of the city with ample power and authority to appoint and remove, with one exception, all the officers of the city named in that section, including a health commissioner, apparently without the usual requirement for the confirmation or approval of the city council, and without the interposition or interference of or by any other power or authority. It provides:

"These appointments shall not require any confirmation by the council, but shall be made at the discretion of the mayor, who shall, with like discretion, have the full and complete power of the removal thereof."

In other words, he can, it seems, appoint and remove such officers at will, according to this section, without let or hindrance by or from any source whatsoever. This right of appointment and removal by him and the right claimed by relators the Legislature conferred at the same session, within six days of each other; the first in order of time being the right conferred upon the mayor of the city.

The priority in time does not, as we construe the enactments as they now are, have the significance, weight, effect, or influence or lack of any of the attributes that counsel would have us accord to these statutes. We do not mean to ignore as unworthy of notice the argument predicated upon relator's conception of this difference in the priority of legislative enactments touching the same general subject of legislation. Frequently the order in which inconsistent statutes or inconsistent provisions of the same statute relating to like or similar subjects are enacted has a decisive effect or bearing upon the question of the legislative intent, meaning, and purpose where there is ambiguity, doubt, or uncertainty as to the object intended by it. The operation of this canon of construction, however, is limited in its scope, and has no application where each statute or the different provisions of the same statute may be so interpreted or construed as to render their provisions harmonious.

This brings us to the inquiry whether or not there is such irreconcilable conflict between the provisions of the state public health statute and the provisions of the city charter concerning the power of appointment and removal of the city health commissioner as warrants resort to the canon of construction relied on by relators. Stating the question in a different form: Is not the difference between the statute and the charter, upon a close analysis of their provisions, less a matter of substance and materiality than a casual reading might indicate? The public health statute concedes the right of the mayor of Charleston to nominate and remove a city health officer. It does not purport to alter, amend, modify, or repeal the provision of the city charter relating to such authority conferred upon the mayor. That power no statute expressly revokes. On the contrary, there is in the public health statute an express and unqualified, though general, recognition of the right of the municipal authorities to remove from office a city health commissioner. Its language in that regard is direct, positive, unambiguous, unequivocal. Though amended from time to time, that statute does not clearly manifest an intention to withdraw the appointing and removal power from the chief

executive officer of the city of Charleston. Instead of negating, it discloses a purpose rather to re-affirm and recognize anew, the existence of his right to utilize such power. For, although, as we have seen, section 6, after referring to the duty of the county court to recommend to the public health council for appointment as county health officer a physician qualified to perform the duties of the office, prescribes the tenure of office as one for a term of four years, "unless removed by said state board of health for good cause," the provisions which follow and relate to a city health officer, by whatever name he may be called, and his official tenure, define in the alternative the right of the public health council to remove him from office. That is, while in the case of a county health commissioner such power of the public health council to remove is absolute and unqualified, yet, speaking in general terms, in the case of a city health commissioner it is not absolute or exclusive; and clearly the Legislature did not intend it should be. The deliberate and repeated use of the disjunctive word "or" cannot be ignored. Used as it is in the statute, it serves as notice of a purpose, as applied to Charleston, not to revoke the right of the mayor of that city theretofore granted to him by the Legislature.

Nor is there between the provisions of the statute and charter such an apparent conflict as warrants the conclusion that, if the public health council or the proper city authority may exercise the right of removal, the former acting on its own initiative may do so. If that may be said to be the true construction, utter confusion may result from the inharmonious action by either or both agencies. That such a situation may arise where intense feeling is aroused is readily conceivable. An opportunity to produce that result evidently was not within the contemplation of the Legislature at the time these statutes were enacted. It is therefore our duty to construe and reconcile them so as to avoid, if possible, such confusion as might inevitably be occasioned by a different construction.

[1, 5] Every word, phrase, paragraph, and provision of a statute must in construing it be given full force and effect, if that can be done consistently with its purpose, in order to make it effective as far as possible. *Building & Loan Ass'n v. Sohn*, 54 W. Va. 101, 46 S. E. 222. This is a well-recognized canon of construction, and it is always applicable where necessary to harmonize the provisions of the same or different statutes relating to the same subject-matter. This court applied the rule in the case last cited in the construction of a statute, and in *Hope Natural Gas Co. v. Shriver*, 75 W. Va. 401, 408, 83 S. E. 1011, in the construction of a will and the codicil thereto. In the *Shriver Case* it is said that words general in their terms are to be construed or interpreted in connection with or in reference to their ap-

propriate subject, as shown by other words or provisions of the same or different statutes or any other instrument, whatever its character may be.

[2] The statute establishing the health department and prescribing the duties and defining the powers of the state health council, and the charter of the city of Charleston relating to the same general subject, speak the legislative intent as to the different territorial jurisdictions of the two agencies, and purport to confer upon the general agency the power to act in the more restricted jurisdiction only where the lesser fails or refuses to perform some imperative duty belonging to it over which the greater has supreme control, as provided in section 3, c. 150, Code 1918. And where there is no such emergent condition, each has the right and power to act in its own jurisdiction free from interference on the part of the other. This, we think, is a reasonable, indeed the only justifiable, conclusion, and gives to the statute and the charter the force and effect necessarily due to each, and avoids the possible ultimate confusion already alluded to.

Relators in the exercise of the powers claimed by them, no doubt, honestly conceived their duty to be such as in their opinion necessitated the removal of the respondent Ireland as health commissioner of the city and the enforced vacation of the office held by him by mandamus, and also thereby to compel the nomination of another in his stead. But respondents equally honest, no doubt, refused to submit to the employment of such powers for that purpose, relying upon what they claim to be the law defining their rights and powers in the premises. These adverse contentions are avoidable, and the necessity for such controversy eliminated by a fair and reasonable construction of the statutory authority of each group of contestants, and thereby force and effect is given to both statutes.

Section 3 of chapter 150 of the Code, as we have seen, discloses legislative purpose to empower the public health council to act upon its own initiative in the circumstances detailed by that section. For as therein stated, "the commissioner of health may enforce the rules and regulations of the state department of health within the territorial jurisdiction of such local health authorities, and for that purpose shall have and may exercise," not the powers conferred upon the state authorities by statute, it is to be noted, but "all the powers given by statutes to local health authorities. \* \* \* And in such cases, the failure or refusal of any local health officer or local health body to carry out the lawful orders and regulations of the public health council shall be sufficient cause for the removal of such local health officer or local health body from office," etc. But this power, according to that section, can be exercised on-

ly in emergent conditions affecting the public health within the inferior territorial jurisdictions, as in the case of the prevalence of an epidemic therein likely to affect seriously the public health within such local jurisdiction. The scope and purpose of that section reflect light upon the questions at issue between relators and respondents, and, we think, manifest an intention to make the relators and respondents supreme in their respective jurisdictions in the absence of an express provision declaratory of a contrary intent.

[3, 4] As a general rule, mandamus is an available or appropriate process only where the petition and proof disclose a clear and indisputable right on the part of the relators to enforce performance of the act or thing demanded, and a corresponding duty on the part of the officer to do or perform that particular act or thing. *Hutton v. Holt*, 52 W. Va. 672, 44 S. E. 164; *Martin v. White*, 74 W. Va. 628, 82 S. E. 505; *State ex rel. Smith v. County Court*, 78 W. Va. 168, 88 S. E. 662. The right to demand performance, and the corresponding duty to perform the act demanded, are elements whose existence is essential and determinative of the right to the employment of the process.

Writ denied.

(96 W. Va. 24)

JOHNSON v. TODD et al. (two cases).  
(Nos. 3895, 3895-A).

(Supreme Court of Appeals of West Virginia.  
March 16, 1920.)

(Syllabus by the Court.)

1. CREDITORS' SUIT  $\S$ 11(1) — DEBTOR'S INTEREST IN LAND FRAUDULENTLY HELD IN SECRET TRUST BY HIS JOINT OWNER MAY BE SUBJECTED.

A general creditor may maintain a suit in equity for the purpose of having his debtor's interest in lands, fraudulently held in secret trust by his joint owner, ascertained and subjected to the payment of his debt.

2. CREDITORS' SUIT  $\S$ 56 — WHERE JOINT OWNER SECRETLY HELD LEGAL TITLE CREATING A LIEN SUPERIOR TO THE CLAIM ONLY DEBTOR'S EQUITY MAY BE SOLD.

In such case, where it appears the joint owner who holds the legal title has executed a trust deed, creating a lien upon the land superior to plaintiff's claim, only the debtor's equity of redemption in his moiety can be sold to satisfy plaintiff's demand.

3. CREDITORS' SUIT  $\S$ 56 — DECREE OF SALE OF ENTIRE INTEREST IN LAND IS ERROR UNLESS DEBT CONSTITUTING SUPERIOR LIEN IS DUE AND PAYMENT DEMANDED.

Even though the joint owner in such case may be co-obligor and jointly and equally liable for the discharge of such superior lien, it is, nevertheless, error to decree a sale of the entire interest in the land unless the debt con-

stituting the superior lien covering such interest is due, and payment thereof is demanded by the creditor.

**4. APPEAL AND ERROR  $\S$  231(2)—OBJECTIONS TO ANSWER WILL NOT BE REVIEWED UNLESS MADE THE SPECIFIC GROUND OF AN OBJECTION IN THE COURT BELOW.**

Objection and exception to an answer because it is unsigned by the defendant or by his counsel will not be considered by this court, unless it appears such was made a specific ground of objection in the court below.

**Appeal from Circuit Court, Kanawha County.**

Suit by A. R. Johnson against W. A. Todd, G. R. Edgar, Farmers' & Miners' Bank, and C. J. Van Fleet, trustee. Demurrer to bill by defendant Todd overruled, plaintiff's objection to the filing of an amended answer by defendant Todd and an answer by the Farmers' & Miners' Bank overruled, and from a decree for the sale of the interests of defendants Todd and Edgar, the plaintiff and defendants Edgar and the Farmers' & Miners' Bank appeal. Reversed and remanded.

C. J. Van Fleet, of Charleston, for G. R. Edgar and others.

Miller & Bobbitt and D. W. Taylor, all of Charleston, for A. R. Johnson.

**WILLIAMS, P. A. R. Johnson and W. A. Todd** were partners in a drug store conducted in the city of Charleston by said Todd as the managing partner. Johnson, becoming dissatisfied, brought a suit in equity to dissolve the partnership and settle up the firm's business. Pending that suit a compromise agreement was entered into, and the suit was dismissed. That agreement is the basis of the present suit in equity. By that agreement Johnson purchased the interest of Todd in all the firm's assets and assumed the payment of certain of the firm's liabilities, which were listed, stating the amounts thereof and to whom owing. Todd agreed to pay all debts and obligations of the partnership, if any, other than those listed and assumed by Johnson. Todd failed to comply with his agreement, and Johnson was compelled to pay and did pay, not only the debts which he had assumed, but also other debts which he subsequently learned the firm owed, which Todd had assumed to pay, amounting to \$981.69.

This suit was then brought by Johnson against Todd and others to recover from Todd the aforesaid debt and to subject his interest in certain lots in the city of Charleston to the payment of the same. The said W. A. Todd, G. R. Edgar, Farmers' & Miners' Bank, a corporation, and C. J. Van Fleet, trustee, are made parties defendant. The bill alleges the facts above narrated,

and further alleges that Todd is the secret owner of an undivided one-half interest in two certain lots in the city of Charleston, known as lots K 1 and 2 of block 1 of the Holly Hunt place, as laid off in lots, streets, and alleys upon a map of same filed and recorded in the office of the clerk of the county court of Kanawha county; that these lots were purchased jointly by said W. A. Todd and G. R. Edgar, and that said Todd procured the title thereto to be made to the said G. R. Edgar, not disclosing the said Todd's interest therein, for the purpose of hindering, delaying, and defrauding plaintiff and the other creditors of said Todd in the collection of their debts; that on the 22d of May, 1917, the said G. R. Edgar executed a deed of trust to C. J. Van Fleet, trustee, conveying the aforesaid lots in trust to secure the payment of a note for the sum of \$2,500, made by G. R. Edgar and W. A. Todd, payable to the order of the Farmers' & Miners' Bank; that, on information and belief, the aforesaid note has been paid off and discharged, or partly paid, and the amount yet due thereon, if any, is unknown, and, if any portion remains unpaid, it is the debt of the said Edgar, and not the debt of the said Todd; and that the said Todd is insolvent and has no visible property. Plaintiff prays for a decree against said Todd for his aforesaid debt and that Todd be decreed to be the owner of a one-half undivided interest in the aforesaid lots, and that "all of said real estate be sold, and from the proceeds thereof there be paid from the portion belonging to the said Edgar such amount, if any, as may be found to be due to the defendant Farmers' & Miners' Bank, a corporation, and from the portion thereof procured from the sale of the portion owned by the defendant Todd there be paid the debt due this plaintiff as herein alleged." He also prays for general relief.

Todd demurred to and answered the bill, denying that the firm, at the time the agreement was entered into between him and the plaintiff, owed any other debts than those which the plaintiff had assumed to pay, and denying that the conveyance of the lots to Edgar was made to defraud any of his creditors. He admits the lots were purchased jointly by himself and Edgar, but denies any fraud or fraudulent intent on his part in having the title thereof conveyed to said Edgar. Plaintiff filed the depositions of a number of witnesses, proving thereby the amounts of the various debts which the firm owed and which he paid, but which were not included in the list of debts which he had assumed to pay, but were debts of the firm assumed by Todd. But no proof was taken to show the relation of Todd and Edgar respecting the \$2,500 debt owing to the aforesaid bank, nor when it became due,

nor whether any part of it was paid. It does not appear when it became due, or that it was payable at the time the suit was brought or the decree was entered; nor does it appear whether Todd and Edgar were jointly liable in equity for the said debt, or whether one was only the surety for the other.

The cause was argued and submitted for final hearing on the 10th of May, 1919, upon plaintiff's bill taken for confessed as to all the defendants, except W. A. Todd, the answer of Todd then tendered and filed and general replication thereto, and on the depositions of witnesses on behalf of plaintiff, and the court took the case under advisement until the 11th of June, 1919, when the final decree was rendered. At that time, when the court was about to render its final decree, the Farmers' & Miners' Bank tendered and asked leave to file its answer, and the said Todd also asked leave to amend his answer, to which plaintiff objected, his objection being overruled, and, said answer and amended answer being filed, plaintiff moved to have them stricken out. No exception in writing to the answer was filed, and the record fails to show the grounds of the exception or motion. The amendment to the answer of Todd and the answer of the Farmers' & Miners' Bank simply deny that any part of the \$2,500 owing to the said bank was paid. The bank's answer further alleged that from the time said note was first executed it was continuously secured by a deed of trust upon the two lots purchased by Edgar and Todd jointly mentioned in plaintiff's bill.

[1, 2] The demurrer to the bill had been previously overruled, and properly so, by an order entered the 18th of January, 1919. Plaintiff had a right to maintain this suit in order to have Todd's secret interest in the lots ascertained and declared, and to have his interest subjected to the payment of his debt. He had a right to do so without first reducing his debt to judgment. Section 2, c. 133 (sec. 4948) Code; *Murphy v. Fairweather*, 72 W. Va. 14, 77 S. E. 321; 6 *Encyc. Digest Va. & W. Va. Rep.* p. 640. Although the bank did not ask for the enforcement of its lien, the court nevertheless ascertained its amount to be \$2,425, that it was prior to plaintiff's lien upon Todd's interest in the lots, and decreed a sale of the interests of both Todd and Edgar therein if the aforesaid debts were not paid in 30 days. From that decree both the plaintiff and the defendants Edgar and the Farmers' & Miners' Bank have appealed.

[4] Plaintiff assigns as error the filing of the bank's answer and the amendment of Todd's answer, for the reasons stated in brief that they were tendered too late and were not signed by the defendants or by their counsel. The first reason is not sufficient, because the statute (section 53, c. 125

[sec. 4807] Code) allows a defendant to file his answer at any time before final decree. The answers were filed before the final decree was entered. Nor is the second ground of error tenable, for the reason that the omission to sign does not appear to have been called to the attention of the lower court. If this had been done, no doubt the omission could have been supplied before the decree was entered. It comes too late if made for the first time in this court. *Jones v. Shufflin*, 45 W. Va. 729, 31 S. E. 975, 72 Am. St. Rep. 848.

This court has held that a bill in chancery not signed by any one is demurrable, and should be stricken from the record, unless properly amended by leave of court. *Dever v. Willis*, 42 W. Va. 365, 26 S. E. 176. But it is also held that the omission of signature should be called to the attention of the court below, and, if not called to its attention, the objection will not be entertained if made for the first time in the appellate court. *Jones v. Shufflin*, supra. A fortiori should the rule apply in the case of an unsigned answer, because the rule is more rigid, if any difference, in respect to the signing of the bill by counsel. *Story's Eq. Pl.* (10th Ed.) § 47.

[3] Objection is also made to the filing of Todd's amended answer because sufficient cause for the amendment was not shown to the court below. The law does not allow the same liberality in the amendment of an answer as it does in the amendment of a bill, and the reasons therefor are obvious. The bill gives notice to a defendant of all the matters which he is required to answer, and it rarely happens that he can have any reasonable excuse for not therefore being fully advised of his defense at the time he is called upon to answer. *Ratliff v. Sommers*, 55 W. Va. 30, 46 S. E. 712, 1 Ann. Cas. 970; *Liggon v. Smith*, 4 Hen. & M. (Va.) 407. Defendant has not the right to amend his answer at his option, as the plaintiff has to amend his bill, and he should only be permitted to amend when substantial justice requires it. *Depue v. Sergeant*, 21 W. Va. 326. This strict rule grew out of the ancient equity practice which required the answer to be made under oath, unless waived by the plaintiff. Section 874, *Story Eq. Pl.* (10th Ed.). But the amendment in this case is immaterial, as it embraced only a denial of plaintiff's averment that the bank's debt had been paid either in whole or in part. The bank's answer put that averment in issue, and plaintiff had taken no proof to establish his averment, and, as to that issue, the case was submitted on bill and answer, and of course the denial in the answer had to be taken as true.

The case was submitted to this court, without oral argument, and on brief filed by Johnson's counsel only. The bank did not claim its debt was due and payable, and

did not seek to have it enforced, but simply denied that its debt or any part of it had been paid, and prayed to be dismissed from the suit. It was error to decree a sale of Edgar's interest in the lots. In view of the pleadings and proof, the only proper decree of sale the court could have entered was a sale of Todd's equity of redemption in his one-half interest in the two lots aforesaid. If the amount of the bank's debt was uncertain, the court should have ascertained and fixed the amount of it by its decree, and then directed a sale of Todd's interest only, subject to the bank's prior lien.

Counsel for plaintiff insist that he should not be held liable for the costs in this court for the reason that he did not induce the error; that the decree which his counsel prepared and moved to have entered at the time the cause was submitted is not the decree the court actually entered. But, looking to the decree so prepared by plaintiff, which is incorporated in the record, we see that, although it provided for a sale of Todd's interest alone, it nevertheless directed a sale of his interest free from the lien of the trust deed held by the bank, which would have been error if the decree had been entered as asked for.

The decree is reversed, and the cause remanded for further proceedings to be had in accordance with the principles herein stated, and further according to the rules and principles governing courts of equity, with costs to G. R. Edgar, one of the appellants, against A. R. Johnson, also an appellant.

Reversed and remanded.

(85 W. Va. 753)

**BROTHERTON v. ROBINSON et al.**  
(No. 3873.)

(Supreme Court of Appeals of West Virginia.  
March 16, 1920.)

*(Syllabus by the Court.)*

**1. APPEAL AND ERROR §20—JUSTICES OF THE PEACE §141(2)—JURISDICTION OF APPELLATE COURT IS DEPENDENT UPON JURISDICTION BELOW.**

If a justice or other inferior court or tribunal has no jurisdiction to hear and determine a cause, an appeal from a judgment rendered therein does not confer upon a court of superior rank a jurisdiction not possessed by the former, though it may have had authority in the first instance to adjudicate the matter in controversy in its entirety.

**2. JUSTICES OF THE PEACE §36(7)—NO JURISDICTION WHERE TITLE TO REALTY INVOLVED.**

If, in an action of unlawful entry and detainer instituted before a justice of the peace to recover possession of a house and lot, defendant files an affidavit stating that the title to

real estate will come in question, and plaintiff files a counter affidavit denying such fact, and upon the trial of the case it appears that the title to real property is properly in question between the parties, and that the relation of landlord and tenant does not exist between them, the justice has no jurisdiction to try the merits of the case, and should dismiss the action at the cost of the plaintiff.

**3. JUSTICES OF THE PEACE §36(7)—ISSUE AS TO CURTESY IN REAL ESTATE INVOLVES "TITLE TO REAL PROPERTY."**

Where the plaintiff in such an action is attempting to assert a right by the curtesy to the real estate of his deceased wife, and defendant by affidavit and evidence contests his right thereto on the ground of prolonged desertion and abandonment of his wife during her life, without just cause, the "title to real estate" is called in question within the meaning of paragraph 12, § 50 (sec. 2804), c. 50, of the Code.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Title to Real Estate.]

**4. JUSTICES OF THE PEACE §36(7)—WHEN RELATION OF "LANDLORD AND TENANT" INVOLVED STATED.**

The "relation of landlord and tenant" does not exist between the parties, within the meaning of the statute, where the existence of such relation is dependent upon the decision relating to the curtesy right asserted by the plaintiff, who is not in possession but sues to obtain possession of the property.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Landlord and Tenant.]

Error to Circuit Court, Kanawha County.

Action by George W. Brotherton against George Robinson and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Stewart & Ryan, of Charleston, for plaintiff in error.

D. W. Taylor, of Charleston, for defendants in error.

**LYNCH, J.** The wife of the plaintiff died intestate the owner of the fee-simple title to a house and lot located on Maryland avenue in the city of Charleston, January 13, 1919. Her husband and seven children survived her. The defendant was decedent's tenant of the house and lot, and the rental therefor he paid to her until she died, and thereafter to W. T. Brotherton, her son, for himself, brothers, and sisters. Plaintiff later demanded payment of the rental to him as tenant by the curtesy, or possession of the property in lieu of such payment if refused. Defendant having failed to comply with either alternative, plaintiff brought before a justice of the peace this action of unlawful entry and detainer to recover the possession so wrongfully withheld, as the right of a hus-



band to possess and enjoy during life the real estate of his deceased wife or its usufruct is guaranteed to him ordinarily by section 15 (sec. 3863), c. 65, Code, subject, however, to the qualification prescribed by section 16 (sec. 3864) of the same chapter. This qualification defendant, encouraged if not inspired by decedent's lawful heirs, invoked before the justice to defeat recovery in the action. To be more specific, defendant tendered and was permitted to file the affidavit authorized by paragraph 12, § 50 (sec. 2604), c. 50, Code, stating that the title to the property will come into question during the trial of the action; the purpose being to raise the issue whether or not plaintiff had lost his curtesy right by desertion or abandonment of his wife without cause within the meaning of section 16, c. 65, above referred to. This defendant did to take advantage of that provision of chapter 50 contained in paragraph 12, § 50, withholding from a justice jurisdiction of actions where the title to real estate is involved. Plaintiff tendered and the justice likewise permitted him to file a counter affidavit denying the involution of the title. The justice heard the evidence of the parties, as authorized by the statute in such cases and subject to its conditions, and, being of the opinion that the question did not arise, entered judgment for plaintiff. Upon appeal to the intermediate court of Kanawha county, the judge of that court, during the progress of the trial before a jury, being of a contrary opinion respecting the title, directed a verdict for defendant and entered judgment upon it in his favor. Plaintiff's petition for an appeal from this judgment, addressed to the circuit court of the county being refused, was allowed by a judge of this court in vacation.

[1, 2] If, because of a dispute as to title, a justice is without jurisdiction to hear and determine an action to recover possession of real estate unlawfully withheld and detained from the true owner, the same jurisdictional want of power inheres in the case throughout all its successive stages upon appeal, according to our interpretation of the provisions of chapter 50, §§ 1-239 (secs. 2555-2794), of the Code, the justice of the peace act. In other words, if an inferior court or tribunal has no jurisdiction to hear and determine a cause submitted to it, an appeal from a judgment therein does not confer upon a court of superior rank a jurisdiction not possessed by the former, though it may have been entitled in the first instance to adjudicate the matter in controversy in its entirety. 3 C. J. 366; *Hughes v. Mount*, 23 W. Va. 130; *Watson v. Watson*, 45 W. Va. 290, 31 S. E. 939; *Richmond v. Henderson*, 48 W. Va. 389, 37 S. E. 653; *Hamilton v. Canfield*, 70 W. Va. 629, 74 S. E. 878; *State v. Studebaker*, 80 W. Va. 673, 93 S. E. 755. Therefore, if to determine the right of the

plaintiff to have possession of the property, the rents, issues, and profits chargeable to its use and occupancy by another necessarily requires a judicial investigation of an actual controversy respecting the title underlying such claim of right, neither the justice nor any tribunal of a superior rank sitting as an appellate court can entertain the action.

A husband is tenant by the curtesy in the real estate of which his wife died seized, whether they had issue born alive or not. Section 15, c. 65, Code. Unqualified by any other act, this provision obviously without question would entitle the husband to the immediate use and enjoyment of the property of his wife after her death, to continue during his life. But this provision is qualified by the express provisions of section 16 of the same chapter, which reads:

"And if a husband of his own free will shall leave his wife, except for cause such as would entitle him to a divorce, he shall be barred of his curtesy in his wife's estate, unless she afterwards becomes reconciled to, and live with him as his wife."

Whether reliance upon this qualification to defeat recovery in this action does or does not raise such an issue as to the right and underlying title asserted by plaintiff as, when so presented, deprives a justice of a jurisdiction which he otherwise might have had, is the determining factor in this case.

[3] If the evidence should show, as it tended to do, that plaintiff had of his own free will deserted his wife during her life without such cause as would entitle him to a divorce, and there was no subsequent reconciliation, then under section 16 he would be barred of his curtesy title in her estate, and the heirs at law would have present title thereto without awaiting the termination of his curtesy right. *Shumate v. Shumate*, 78 W. Va. 576, 90 S. E. 824. See, also, *Stock v. Mitchell*, 252 Ill. 530, 96 N. E. 1076. But if the evidence should show the facts to be otherwise, plaintiff's curtesy right and title would be complete. Clearly, therefore, without expressing any opinion upon the weight of the testimony, the title to the real estate in dispute is drawn in question within the meaning of paragraph 12, § 50, c. 50, Code, and as a result the justice was without jurisdiction to proceed with the cause. The case of *Hughes v. Mount*, 23 W. Va. 130, is very similar to this. There, as here, defendant had filed an affidavit stating that the title to real estate would be drawn in question, and plaintiff had filed a counter affidavit denying such statement; but in that case the justice, after hearing the evidence, properly dismissed the action, which ruling this court sustained, while here he entered judgment for plaintiff. See, also, *Watson v. Watson*, 45 W. Va. 290, 31 S. E. 939.

[4] Nor can plaintiff escape the provisions of paragraph 12 by invoking in his favor the

apparent exception made in the statute in cases where the relation of landlord and tenant exists between the parties. The question whether plaintiff or the lawful heirs of his deceased wife stand in the relation of landlord to defendant is one whose determination depends upon the fundamental issue respecting plaintiff's right to an estate by the curtesy. If the conduct of the plaintiff has been such as to entitle him to his curtesy, he assumes the position of landlord, but not otherwise. Hence the question of landlord and tenant cannot be decided till the issue relating to curtesy is settled, and it is the latter which the justice has no jurisdiction to determine, for it involves the question of title. Any other construction of the statute would place an undue burden upon defendant, for if it is assumed, for the purpose of sustaining the jurisdiction of the justice, that plaintiff and defendant stand in the relation of landlord and tenant, a favorable or an adverse decision respecting the curtesy right will continue plaintiff or substitute the heirs of decedent as landlords from the date of the death of their mother, with the possibility of resultant loss of rentals, whether paid to plaintiff or to decedent's heirs. It is only in a court of general jurisdiction where the remedy by interpleader is available that full justice can be done to all the parties without injury or prejudice to the rights of any of them. To avoid the consequences that might arise, and have arisen in this case, doubtless was the primal purpose and intention of the wise provisions of these enactments.

From what has been said it is apparent that the justice had no jurisdiction to proceed with the action, nor did the intermediate court upon appeal have any broader right. Wherefore, that court having in our opinion rightly dismissed the action, we affirm the judgment of the circuit court refusing an appeal therefrom.

(86 W. Va. 10)

**SECURITY REALTY INV. CO. v. LEWIS, HUBBARD & CO. et al.** (No. 3878.)

(Supreme Court of Appeals of West Virginia.  
March 16, 1920.)

*(Syllabus by the Court.)*

1. CORPORATIONS §123(24) — IN SUIT OF PLEDGEE OF CORPORATE STOCK AGAINST A SUBSEQUENT PLEDGEE IN POSSESSION OF CERTIFICATE, EQUITY MAY ADJUDICATE THE RIGHTS OF THE PARTIES AND DECREE A SALE AND DISTRIBUTION.

There is jurisdiction in equity at the suit of a pledgee of the shares of stock in a corporation against a subsequent pledgee thereof in possession of the certificate therefor to settle and adjudicate the rights of the parties and to decree a sale and distribution of the proceeds thereof.

2. APPEAL AND ERROR §1011(1) — FINDING OF FACT ON CONFLICTING ORAL EVIDENCE PREPONDERATING IN FAVOR OF APPELLEE NOT DISTURBED.

This court will not disturb the decree of a circuit court and the findings of facts therein depending on conflicting oral evidence plainly preponderating in favor of appellee, not overcome by documentary evidence calling for reversal.

Appeal from Circuit Court, Kanawha County.

Bill by the Security Realty Investment Company against Lewis, Hubbard & Company and others. Decree for plaintiff, and Lewis, Hubbard & Company appeals. Affirmed.

Payne, Minor & Bouchelle, of Charleston, for appellant.

McClintic, Mathews & Campbell, of Charleston, and Dolle, Taylor, O'Donnell & Geisler, of Cincinnati, Ohio, for appellee.

MILLER, J. Upon a bill filed by the Security Realty Investment Company, assignee of the George Wiedemann Brewing Company, against the appellant Lewis, Hubbard & Company and others, and upon the issues made by the demurrers and answers thereto, and by the depositions and proofs taken and filed in the cause, the court below, by the decree complained of, adjudged in favor of the plaintiff company, that it had right and priority to the 202 shares of the capital stock of the West Virginia Clay Products Company, a corporation, represented by certificate No. 101, issued to and in the name of O. E. West, and of which certificate the appellant had acquired possession through the said West, it is claimed, but which West and the plaintiff company denied, as collateral security for a debt which West owed it.

There is no denial of the fact alleged, that in December 1908 West by endorsement on the certificates of stock with power of attorney to make transfer and by delivery assigned and transferred to the George Wiedemann Brewing Company his shares in the Mountain Park Land & Development Company as collateral security for a debt which he then owed and continues to owe that company or the plaintiff, its assignee, agreed between the parties at the time of the decree to amount to at least the sum of \$29,000.00; and it is shown that the receipt which West took from the brewing company upon delivery of these certificates of stock specifically stipulates that they should be held in trust and surrendered to said O. E. West, either upon the payment of their face value or the substitution therefor of the stock of a company then contemplated and being organized to succeed the Mountain Park Land & Development Company. The bill alleges furthermore

as a fact, not denied, that the West Virginia Clay Products Company was the company referred to in said stipulation, and that when organized it took over the property of the Mountain Park Land & Development Company, and that upon its organization, there was issued to said West 302 shares, representative of his holdings in the original company.

The present controversy as shown by pleadings and proofs originated with a transaction between the defendant West and the defendant C. C. Lewis, Jr., the latter representing the defendant Lewis, Hubbard & Company, on January 21, 1910. On that day Lewis, learning through West or otherwise, that West was entitled to the 302 shares of the stock of the West Virginia Clay Products Company, but with notice, as West swears, of the prior claim or right of the George Wiedemann Brewing Company, procured from West an order directed to Sam P. Jones, Esq., of Louisville, Ky., saying:

"Dear Sir: When my stock in the West Virginia Clay Products Company has been released, please send it to Mr. C. C. Lewis, Jr., Charleston, W. Va., for me and oblige."

Some time after procuring this order Lewis forwarded it to Jones, and about December 8, 1910, received from Jones or some representative of the West Virginia Clay Products Company certificate No. 23 for 302 shares of the stock of that company, issued in the name of West, and on December 8th, Lewis wrote West informing him of this fact and saying: "Kindly call and let us discuss the matter." Lewis is not certain, but gives it as his impression or recollection that shortly after the date of his letter of December 8th, West called and endorsed an assignment on the back of the certificate with power of attorney to transfer the stock on the books of the company. West denies this; he denies that he ever endorsed the stock to Lewis for the purpose of assigning it to him or his company as collateral security or any other purpose, except that when subsequently, about October 1912, when it became necessary to re-finance the company through one Caldwell and to return the shares to Caldwell or to the company for that purpose, he then endorsed the certificate, which for some time had been in the hands of Lewis, for the purpose of surrendering or exchanging it for a new certificate, No. 101 for 202 shares. This new certificate for 202 shares, the immediate subject of the present controversy, appears to have been sent by the company or by some officer or representative thereof to said Lewis, and to have been subsequently endorsed by West, and to have thereafter remained in the hands of Lewis or Lewis, Hubbard & Company until the filing of the present bill.

One of the principal points made upon the pleadings and proofs was whether or not

Lewis had notice through West or otherwise of the prior rights of the George Wiedemann Brewing Company before obtaining possession of the original certificate for 302 shares of stock, as stated. Upon this question Lewis was uncertain, although it was his impression or his best recollection that West had endorsed the certificate before notice to him of the brewing company's rights. West is positive in his statement that he notified Lewis of the rights of the brewing company when giving him said order; and the pleadings and proofs show that about February 11, 1911, a representative of the brewing company in company with West called upon Lewis and demanded of him the certificate for the 302 shares, and then notified him of the claim and right of the brewing company thereto; and as corroborating both of them, they rely on the language of the order given Lewis by West for the stock, in which there is no intimation that the stock had been assigned by West to Lewis, and also upon the letter of Lewis to West, of December 8, 1910, already referred to, in which Lewis makes no claim to the stock based upon the theory that it had been assigned to him or his company as security for a debt; and they moreover rely upon certain admissions which they swear Lewis made in February 1911, denied by him, to the effect that he had no doubt West thought all he had to do was to call at his (Lewis') office and get the certificate. Of this interview in February 1911, the representative of the brewing company kept a memorandum in writing, to which he referred to refresh his recollection as to what had taken place, and both he and West swear that at that time they saw the certificate and that it was not then endorsed or assigned by West. West swears in explanation of his order to Lewis that he was indebted to Lewis in a large sum of money, and Lewis desired to see the stock as a means of strengthening his faith in West's ability finally to pay his debts; and Lewis admits that West expected and therein expressed faith in his ability to pay Lewis out of the proceeds of the sale of some coal property which West then owned.

Upon this state of the pleadings and proofs the court decreed that plaintiff had a valid equitable lien to secure the indebtedness of West to it, on the 202 shares of the capital stock of the West Virginia Clay Products Company, valid in all respects and paramount to any right of Lewis, Hubbard & Company thereto; and thereon also found and adjudged as facts; first, that defendant West did not originally cause said stock to be deposited with Lewis, Hubbard & Company as a pledge to secure his indebtedness to that company; second, that at the time the original order was given to Lewis for said 302 shares and when later West endorsed the certificate for 202 shares, defendant Lewis, Hubbard & Company had notice of the prior

claim and equitable lien of George Wiedemann Brewing Company to said stock, and therefore was not a bona fide purchaser thereof without notice as against the plaintiff, but took said stock subject to and subordinate to the plaintiff's lien thereon; and the court decreed the rights of appellant in accordance with these findings of fact.

[1] Appellant and Lewis, by demurrers to the bill, challenged the right of plaintiff to relief in equity. We think there can be no question as to the sufficiency of the bill on demurrer. The earliest common-law rule seems to have required a bill for foreclosure in such cases, even when the pledgee was in possession. Jones on Collateral Securities (3d Ed.) § 640. That equity has jurisdiction to settle the controversy between the parties where the pledgee is not in possession, but the subject of the pledge is in the hands of some third person, or junior claimant or lienor, seems to be well settled by the authorities. Jones, *supra*, § 641. In the case at bar appellant is in possession of the pledged stock, claiming a superior right. On this state of facts right to relief in equity is sustained by many authorities. Page v. Boggess, 41 Misc. Rep. 46, 83 N. Y. Supp. 569; Michigan State Bank v. Gardner et al., 3 Gray (Mass.) 305; Scott v. Brame et al., 118 Va. 194, 86 S. E. 850; 31 Cyc. 841, 842, and cases cited in notes; 18 C. J. 1004, §§ 33, 34.

[2] The other three assignments of error involve alike and depend upon the question whether the findings of fact by the circuit court are supported by the evidence. As already observed, there is no controversy as to the fact that the shares of West in the Mountain Park Land & Development Company were regularly and properly assigned and pledged by him to the George Wiedemann Brewing Company; nor can there be any question that as between it and the pledgor, it was entitled to the 302 shares of stock issued to West by the West Virginia Clay Products Company and delivered to Lewis. But counsel for appellant contend that the pledgee thereof not having had the original shares of West in the Mountain Park Land

& Development Company transferred to it on the books, and the West Virginia Clay Products Company having issued directly to West a new certificate for 302 shares of the stock of that company, which West caused to be sent to Lewis as stated, Lewis took for appellant good and paramount title to these latter shares. Our statute, section 37 of chapter 53 of the Code (sec. 2870) in so far as the original shares in the development company are concerned, at least gave good title to the pledgee thereof upon the delivery to it of the certificate therefor with power of attorney authorizing transfer thereof on the books of the company, so far at least as it was necessary to effect a sale or pledge of said shares, in the language of the statute, "not only as between the parties themselves, but also as against the creditors of, and subsequent purchaser from the former." See also, 4 Thompson on Corporations, §§ 4202, 4203, and cases cited.

But respecting the 302 shares of West in the West Virginia Clay Products Company, it is contended that Lewis for appellant acquired superior title thereto as pledgee thereof for want of notice of the prior rights of the brewing company. This proposition is fully met by the decree and findings of the court below, that prior to his acquisition thereof Lewis had notice of the superior rights of the brewing company; that West had never in fact assigned or delivered the 302 shares to appellant or Lewis for it, as collateral for any debt which West owed to that company. As to the 202 shares immediately involved, the court found that at the time West may have endorsed said certificate No. 101 for the 202 shares, Lewis and appellant through him had actual notice of the claim and right of plaintiff or his predecessor in title. We have already indicated our opinion that the court was fully justified by the evidence in the findings of fact. And observing the general rule many times followed by this court, we must decline to disturb these findings of the circuit court. We can only reverse for errors apparent, which do not appear in the record presented.

Our conclusion is to affirm the decree.

(179 N. C. 744)

(102 S.E.)

## STATE v. SHOAF. (No. 345.)

(Supreme Court of North Carolina. April 7, 1920.)

**1. SUNDAY §5—PLACE SELLING "WIENERS" AND SANDWICHES A "RESTAURANT" OR "CAFÉ"; "HOT DOG."**

A place where wieners and sandwiches were sold, guests seating themselves on stools near a counter, there being no tables, was a "restaurant" or "café" within the meaning of Pub. Loc. Laws 1919, c. 320, excepting such places from the Sunday Law, the terms "restaurant" and "café" being substantially synonymous; a "restaurant" being a place where refreshments, food, and drink are served, being indiscriminately used as a name for all places where refreshments can be had, from a mere eating house and cookshop to any other place where tables are furnished, to be consumed on the premises, and a "wiener" being a small sausage of unknown content commonly called a "hot dog" (citing Words and Phrases, Restaurant).

**2. WORDS AND PHRASES.—"JOINT"; "OPIMUM JOINT."**

A "joint" is usually regarded as a place of meeting or resort for persons engaged in evil and secret practices of any kind, as a tramps' joint, such a place as is usually kept by Chinese for the accommodation of persons addicted to the habit of opium smoking, and where they are furnished with pipes, opium, etc., for that purpose, and called an "opium joint," or, generally speaking, a rendezvous for persons of evil habits and practices.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Joint; First Series, Opium Den or Joint.]

Appeal from Superior Court, Forsyth County; Ray, Judge.

Fred Shoaf was convicted of unlawfully selling goods on Sunday, and he appeals. Error.

Defendant was charged with the offense of "unlawfully and willfully exposing for sale his goods and keeping open his place of business on Sunday" in violation of Public Local Laws of 1919, c. 320, which reads as follows, omitting immaterial parts thereof:

"No person, firm or corporation in Forsyth county shall expose for sale, sell or offer for sale on Sunday, any goods, wares or merchandise within four miles of the corporate limits of any incorporated town or city; and no store, shop, or other place of business in which goods, wares or merchandise of any kind are kept for sale shall keep open doors from 12 o'clock Saturday night until 12 o'clock Sunday night: Provided, that this act shall not be construed to apply to hotels or boarding houses, or to restaurants or cafés furnishing meals to actual guests, where the same are not otherwise prohibited by law from keeping open on Sunday."

The only witness was E. E. Wooten, who testified:

"I know Fred Shoaf, the defendant. He runs what is called a 'wiener joint' at Hanestown, a village about three miles west of Winston-Salem. I have seen defendant selling lunches, wieners, and egg sandwiches on Friday night, Saturdays, and Sundays. I did not take the names of the people who bought from him. I saw him selling these things on two different Sundays within the last six months at Hanestown, in Forsyth county. He had no tables in his place, but had a counter with stools along in front of it, and his customers occupied those stools while eating."

The place at which defendant sold these meals, or lunches, was within two miles of the corporate limits of Winston-Salem. At the close of the evidence the defendant moved for judgment of nonsuit. Motion denied, and he excepted. He was convicted, and appealed from the judgment.

W. T. Wilson and J. B. Craver, both of Winston-Salem, for appellant.

James S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

WALKER, J. (after stating the facts as above). The facts in this case bring it directly within the purview of the exemption, and not within the prohibition of the statute, being excepted from it by the proviso.

[1] The terms "restaurant" and "café," in common parlance, and, we think, as used in the statute, are substantially synonymous. A restaurant is generally understood to be a place where refreshments, food, and drink are served. Whether they are served to guests seated at a table or on stools at a counter does not affect the definition; that being merely a detail in the operation of the restaurant. The evidence shows that the defendant had no tables in his place, but had a counter with stools arranged along in front of it, and to the guests seated on these stools he sold lunches, wieners, and egg sandwiches. This, it seems to us, was strictly a restaurant business within the approved definition as shown in the dictionaries and in 7 Words and Phrases, p. 6180. While the word "restaurant" has no strictly defined meaning, it seems to be used indiscriminately as a name for all places where refreshments can be had, from a mere eating house and cookshop to any other place where eatables are furnished to be consumed on the premises. *Richards v. W. Fire & M. Ins. Co.*, 60 Mich. 420, 27 N. W. 586; *Lewis v. Hitchcock* (D. C.) 10 Fed. 4. It has been defined as a place to which a person resorts for the temporary purpose of obtaining a meal or something to eat (*People v. Jones*, 54 Barb. [N. Y.] 311, 317), and a restaurant keeper as a caterer, who keeps a place for serving meals, and provides, prepares, and cooks raw materials to suit the taste of his patrons (*In re Ah Yow* [D. C.] 59 Fed. 561, 562; *Swift & Co. v. Tempelos*, 178 N. O. 487, 101 S. E. 8; 7 Words and

Phrases, pp. 6180 and 6181). The "wiener" of the witness is a small sausage of unknown content, and is here commonly called a "hot dog," as stated in the case. To a great many people it is a palatable and appetizing article of food, notwithstanding the implication attaching to one of its names. So far as the case shows, the defendant's place of business was conducted in an orderly manner, and he sold nothing but simple food to his customers. He was conducting a restaurant, and is fully protected by the words of the proviso exempting that class of business from the operation of the statute.

[2] The witness called the place a "wiener joint," but there is nothing in this case to show that to be a just or correct designation of it, if it was meant by the term to imply that the restaurant was not kept in a decent or orderly manner. A "joint" is usually regarded as a place of meeting or resort for persons engaged in evil and secret practices of any kind, as a tramps' joint, such a place as is usually kept by Chinese for the accommodation of persons addicted to the habit of opium smoking, and where they are furnished with pipes, opium, etc., for that purpose, and called an opium joint, or, generally speaking, a rendezvous for persons of evil habits and practices. If, in this sense, the words were intended as an opprobrious epithet, the evidence utterly fails to disclose that this place was not properly conducted in every way, or that there has been the slightest disturbance of the peace and quiet of the community by reason of any disorderly or improper conduct therein. So far as appears, there was absolutely nothing done that would mar in the least the proper and peaceful observance of the Sabbath, no more than there would be in a well-conducted hotel or in one's home. Food and drink are necessary to the sustenance of man, and the statute was not intended to prohibit the furnishing of them to patrons when there is in no other respect a violation of the law alleged or shown.

It was error to submit the case to the jury and to refuse the nonsuit. The verdict will be set aside, and judgment of nonsuit will be entered in the superior court, which shall have the force and effect, as provided by statute (Acts of 1913, c. 73; Gregory's Suppl. § 3265a), of a verdict of not guilty.

Error.

#### STATE v. WISEMAN.

(Supreme Court of North Carolina. Feb. 18, 1920.)

#### CRIMINAL LAW §1133—No REHEARING ON APPEAL.

A petition to rehear will not lie in a criminal case.

On petition for rehearing. Petition denied. For former opinion, see 101 S. E. 629.

WALKER and HOKE, JJ. This court has uniformly held, for many years, that a petition to rehear will not lie in a criminal case. *State v. Jones*, 69 N. C. 16; *State v. Starnes*, 94 N. C. 982; *Id.*, 97 N. C. 424, 2 S. E. 447; *State v. Council*, 129 N. C. 511, 39 S. E. 814; *State v. Lilliston*, 141 N. C. 864, 54 S. E. 427, 115 Am. St. Rep. 705; and *State v. Ice Co.*, 166 N. C. 403, 81 S. E. 956, 52 L. R. A. (N. S.) 219, Ann. Cas. 1916C, 728, where all the cases are collected. We must therefore refuse to order a rehearing.

But it is proper to say that we have most carefully and critically re-examined the case, in all its bearings (though the certificates of counsel only state two errors), and we have reached the conclusion, with full realization of its gravity and importance, that no error was committed in the trial below, and that our former decision was correct; and, if permitted, under our rule of practice, to formally consider and pass upon the petition and order a rehearing, we would not do so upon the showing now made and the reasons assigned in the petition and certificates.

Rehearing denied.

#### ROOM et ux. v. MURPHY. (No. 300.)

(179 N. C. 393)

(Supreme Court of North Carolina. March 31, 1920.)

#### DEATH §10, 31(3)—PARENTS' ACTION FOR MENTAL ANGUISH FROM CHILD'S INSTANTANEOUS DEATH HELD NOT MAINTAINABLE.

An action against a physician for mental anguish from negligent death of a child who died suddenly while on an operating table cannot be maintained by the parents in their individual capacity, and the only action that lies is for wrongful death, under Revisal 1905, § 59, by the administrator.

Appeal from Superior Court, New Hanover County; Allen, Judge.

Action by W. J. Croom and wife against J. G. Murphy. Judgment sustaining demurrer to complaint and dismissing action, and plaintiffs appeal. Affirmed.

This is an appeal from a judgment sustaining a demurrer to the complaint and dismissing the action.

The plaintiffs are parents of Mildred Croom, who, as alleged in the complaint, "died suddenly on an operating table" while undergoing an operation by the defendant, a physician and surgeon.

It is alleged that in performing the operation the defendant was assisted by a nurse, who administered ether, and the allegations of negligence and damages are as follows:

8. That the death of the said Mildred Croom was caused by the negligence of the defendant, or his agents, in that:

(1) That defendant failed to make the proper and necessary examination of the physical condition of the said Mildred Croom before said ether was to be administered to her.

(2) In permitting and allowing said nurse, who was incompetent for that purpose, to administer ether to the said Mildred Croom.

(3) The careless and negligent acts of said nurse, acting as the agent of and under the direction and control of defendant, in administering too much ether to the said Mildred Croom or in administering the same in a careless and unskilled manner.

(4) In the failure of the defendant and defendant's agents to observe the physical condition of the said Mildred Croom as indicated by her pulse and other symptoms while the said ether was being administered and while she was under the influence of the same, and that one or the other or all of the above acts of negligence was the proximate cause of the death of the said Mildred Croom.

(5) That by reason of the death of the said Mildred Croom through the negligence of the defendant as above alleged that these plaintiffs, the parents of the said Mildred Croom did suffer and do still suffer great mental anguish, all of which these plaintiffs have been damaged, to wit, in the sum of \$10,000.

The demurrer is chiefly on the ground that, the death of Mildred Croom being sudden and instantaneous, no action can be maintained by the plaintiffs or by any one else except by an administrator.

McClammy & Burgwin, of Wilmington, for appellants.

Wright & Stevens and Carr, Poisson & Dickson, all of Wilmington, for appellee.

ALLEN, J. The cause of action is the wrongful death of Mildred Croom, and the allegation of mental anguish is only important upon the issue of damages, and the authorities in this country and in England are practically uniform that the action cannot be maintained.

"At common law the right of action for an injury to the person abates upon the death of the party injured; the case falling within the familiar rule, '*Actio personalis moritur cum persona*.' Hence, where death results, whether instantaneously or not, from such an injury, no action can be maintained by the personal representative of the party injured to recover damages suffered by the decedent. In cases of injury to the person, however, in addition to the right of action of the party receiving the physical injury, causes of action may accrue to persons who stand to him or her in the relation of master, parent, or husband for the recovery of damages for the loss of service or society. To these persons the rule of '*Actio personalis moritur cum persona*' has no application. It might naturally be supposed, therefore, that damages could be recovered by persons of this description, not only for the loss of service or society before the death, but also for

the permanent loss of service or society caused by the death. It might perhaps be supposed that the law would even grant a remedy, as is done by the Scotch Law, to the children and to other members of the family of the deceased who might have suffered injury by his death, irrespective of any technical loss of service or of society; but to both classes alike the common law denies a remedy." Death by Wrongful Act, Tiffany (2d Ed.) c. 1, § 1.

"The scope of the rule being that no action can be maintained for causing death, the rule does not preclude an action to recover damages for loss of service of the injured party during the period between the injury and the death, although the death resulted directly from the injury. Thus in *Baker v. Bolton* Lord Ellenborough told the jury that they could take into consideration the loss of the wife's society and the distress of mind the plaintiff had suffered on her account from the time of the accident until the moment of her dissolution; and this distinction has been followed." Death by Wrongful Act, Tiffany (2d Ed.) c. 1, § 17.

"The authorities are so numerous and so uniform to the proposition that by the common law no civil action lies for an injury which results in death that it is impossible to speak of it as a proposition open to question. It has been decided in many cases in English courts and in many of the state courts, and no deliberate well-considered decision to the contrary is to be found." *Insurance Co. v. Brame*, 95 U. S. 756, 24 L. Ed. 580.

The same question has been decided many times in this state; two of the most important of these decisions in reference to the question now presented being *Killian v. Railroad*, 128 N. C. 261, 38 S. E. 873, in which it was held that the father could not maintain an action for the services of his son who was killed, and *Gurley v. Power Co.*, 172 N. C. 695, 90 S. E. 945, in which this doctrine was approved, and the court says:

"An action for the recovery of wages of a minor or for injury to him lies in favor of the parent; but if the child dies from the injury the action abates. The only action that lies in such case in this state is for wrongful death, as authorized by *Revisal*, § 59, and that embraces everything. In such action the value of the life before 21 as well as after 21 years of age is recoverable. No other action lies than this. *Killian v. Railroad*, 128 N. C. 262 [38 S. E. 873]. In *Davis v. Railroad*, 136 N. C. 115 [48 S. E. 591, 1 Ann. Cas. 214], the subject is again discussed, the court holding: 'An action may be maintained by an administrator for the death of an infant by the wrongful act of another.' This case was reviewed and reaffirmed in *Carter v. Railroad*, 138 N. C. 750 [52 S. E. 642]."

In *Bailey v. Long*, 172 N. C. 681, 90 S. E. 809, L. R. A. 1917B, 708, and *Bailey v. Long*, 175 N. C. 687, 94 S. E. 675, the cases relied on by the plaintiff, the death was not instantaneous, and this distinguishes them from the present case.

The judgment must be affirmed.  
Affirmed.

(179 N. C. 417)

**SPRY v. KISER et al. (No. 360.)**

(Supreme Court of North Carolina. April 7, 1920.)

**1. APPEAL AND ERROR ¶927(8)—EVIDENCE OF PLAINTIFF ON NONSUIT CONSIDERED AS PROVED.**

When there is a nonsuit on the evidence, plaintiff is entitled to have the evidence considered as true and construed most favorably for him, and he must also have the benefit of every inference that may reasonably be drawn therefrom.

**2. WORDS AND PHRASES—"RANCID."**

The word "rancid," when used in reference to sweet oil or other things, means having a rank smell or taste from chemical change or decomposition.

**3. DRUGGISTS ¶10—EVIDENCE THAT RANCID SWEET OIL KILLED BABY RENDERED DISMISSAL ERRONEOUS.**

In an action against a druggist for death of a baby, evidence that the defendant negligently sold rancid sweet oil to the plaintiff for the child, and that it caused its death, held to render a nonsuit upon the evidence erroneous.

**4. DRUGGISTS ¶8—NOT LIABLE FOR SELLING IMPROPER MEDICINE UNLESS NEGLIGENT.**

A druggist was not liable in damages for the death of a child brought about by rancid sweet oil sold to the child's parents, unless such oil was sold negligently.

**5. DRUGGISTS ¶9—CARE SHOULD BE PROPORTIONED TO DANGER.**

Ordinary care required of a druggist in the sale of medicine should be proportioned to the danger involved.

**6. DRUGGISTS ¶8—LIABLE ON WARRANTY OF QUALITY OF MEDICINE.**

Where druggist represented the contents of a bottle to be genuine sweet oil of standard purity and expressly warranted it to be of that kind and quality, the administrator of a child whose death resulted, the oil being rancid cotton seed oil, and not of standard purity, could sue on the contract for damages.

Appeal from Superior Court, Forsyth County; McElroy, Judge.

Action by D. W. Spry, Sr., administrator of D. W. Spry, Jr., against E. L. Kiser and others, trading as E. L. Kiser & Co. Judgment for defendants, and plaintiff appeals. Error.

Plaintiff alleged that his intestate's death was caused by the negligence of the defendants in selling him rancid and unwholesome oil to be administered to the intestate during his last illness.

J. W. Newsome testified substantially: He is the maternal grandfather of the child; had taken it into his household when it was but a few months old to be nursed and reared, its mother, who was plaintiff's daughter, having died at its birth. The child became ill,

and its physician prescribed the use of sweet oil in stated doses. This oil, which they had on hand, seemed to work well, and plaintiff went to the defendant's drug store to get more oil and called for sweet oil. He was handed a bottle for which he paid, and after it was given to the child the latter became suddenly very ill during the night, and continued so until morning, having had 26 evacuations of the bowels, and did not recover, but languished and died about 12 days afterwards. The child constantly retched and tried to vomit. He was quite sick the next morning, but was more quiet late in the evening, and the doctor advised that another dose of sweet oil be given, and plaintiff gave the child another dose from the same bottle. When the doctor came the second time, plaintiff asked him to smell the bottle, which he did, and said, "That is stale, rancid, and out of date; I know what to fight now; that is the cause of it." He asked for whisky, and brandy was brought to him, and he said, "That will not do in this case." Whisky was then given to the child. The doctor then told the witness to take the bottle of rancid oil back and tell Mr. Griffin "to send a bottle of pure sweet oil—that is, olive oil." "I told him I wanted olive oil. He then said to me that he knew that was cotton seed oil when I bought from him before." The witness replied, "The doctor says that is what is the cause of the child's sickness, and if that kills the baby Mr. Spry is going to law you." Griffin then said, "He can't hurt us, as we did not make it." Witness then said to him, "Mr. Griffin, suppose the state chemist comes around here and finds it, what would you say?" Griffin replied, "I would say we kept it to grease automobiles," and witness said, "Yes; and to kill babies." Dr. Flynt, the attending physician, stated that "the child was as well developed as any he had ever handled; his pulse never had varied one item." He said this about one hour before the child died. The witness J. W. Newsome testified further:

"He was taken sick on the night of the 18th of July, 1916. We had been giving him sweet oil twice a week up until this time; gave it to him Tuesday night and Friday night; that was simply to make him sleep well and keep his bowels open; he had shown no signs of sickness to this time. After the supply of sweet oil that they brought to the house with the baby gave out I bought sweet oil from E. L. Kiser; I bought five cents worth at the time so it would not get old. On the 18th of July I applied to E. L. Kiser & Co. for a bottle of sweet oil. I thought they were out of oil on the evening of July 18th, and I went to the store and asked Mr. Francis Kiger if he had any more of that sweet oil. Francis Kiger was a clerk in E. L. Kiser's store, and had been for something like a year. He said he had no more five-cent packages, but had plenty of ten-cent packages. I said, 'That's all right, if it is pure and all right.' He said, 'It is pure sweet oil;



(102 S.E.)

I will guarantee it.' I bought it. The bottle shown me is what I bought from him on that occasion. I carried it on home and gave the child not quite a teaspoonful like I had been giving him. That was 9 o'clock, and I took the little fellow and went to bed, and I always took a bottle of milk and my wife a bottle, and at 11 o'clock he had vomited all over the bed and was looking for the bottle. I nursed him to the bottle, and he went off to sleep again, and about 1 o'clock he woke me again hunting for his bottle. I nursed him again, and he had vomited again and discharged all over the bed, and I woke up my wife at 1 o'clock on the morning of the 19th, and from then to day he had 28 actions and vomited continually until the doctor got there. I didn't notice anything else in his condition at that time. His bowels kept moving all night as fast as we could attend to him until the doctor got there. In a day or two after that his mouth turned red like he had been eating pickled beets, and that lasted about a day and night, and then commenced coming a white scum in his mouth that lasted a day or two and that went away, but he never did stop his vomiting. \* \* \*

"The baby had full front teeth, four above and four below, at four months old, and the doctor said he never heard of that or read of that before. We had four different doctors with the child; I told them to spare no expense or money, because I wanted to save the baby. The baby grew worse all the time, heaving and trying to vomit, and discharging. His mouth had peeled off; about the fourth or fifth day his mouth peeled off that white scum, and then there was running water from his mouth all the time, like a child slobbering. That kept up steady until he died, and when he died he was perfectly black all around his abdomen and his lips. I went up to Rural Hall the evening after the child was buried. Mr. Kiser, a member of the firm of E. L. Kiser & Co., spoke to me and said, 'D. W. is dead?' I said 'Yes.' He said, 'Well, poor little sickly thing, he could never be raised no-how.' I said, 'Don't talk that; ask Dr. Flynt.' Dr. Flynt was present, and he cleared up his throat and said, 'You are mistaken, Mr. Kiser; that was the best-developed baby I ever handled, and I have handled quite a few'—something along that line. \* \* \*

"Dr. Spears came to my house one Sunday and asked me to let him go through the analysis of that oil. He read the analysis, and he said, 'God damn it, no wonder the baby died.' My wife heard him say that. I never told him I was going to bring suit; I might have told him Mr. Spry might bring suit."

Other physicians were called in to see the child, but failed to stop the progress of the illness which resulted in its death on August 1, 1916, when it was 6 months and 18 days old, having been born on January 13, 1916. There was evidence that the child had been nourished with Horlick's malted milk and perhaps other food, and had been stimulated with small doses of whisky. He had been in good health and was a vigorous child until given the rancid oil, which almost immediately made him sick in the manner described.

Mrs. Tesh testified as follows:

"I was living in Winston in 1916. I remember the death of Mrs. D. W. Spry, formerly Miss Nannie Newsome. I lived just about half a block from her. About three or four weeks after she died I took the baby. Mrs. Brewer had charge of the baby before I got it. He was nearly three months old when I carried him to his grandfather's, who lived at Rural Hall then. The baby was a little sick when I first took him. I thought he was hungry. I didn't have any doctor with him. I fed him little more than he had been getting, and he got along just fine. He never was sick at all while he was with me. He was a normal, healthy, good-sized child for his age at the time I turned him over to Mr. Newsome. I gave him sweet oil, castor oil, and little baby medicines I always used with my own children. I told Mr. Newsome when I carried the baby there what I had done for it. I gave it oil more as a preventative than a cure. I think I saw the child three times after I carried it to Mr. Newsome's; went to his house to see it. It showed improvement every time I saw it; looked better and larger, growing as well as any child could. I have five children."

There was evidence of the analysis of the rancid oil by the state chemist, which showed it to be cotton seed oil, and not sweet or olive oil. He states that sweet oil is made of olives exclusively, and not cotton seed oil. There has been an imitation made of cotton seed oil, but he knew of none being on the market recently. They have in the past made the cotton seed oil and labeled it sweet oil. There was much other evidence, but we have stated only what was necessary to an understanding of the question before us.

At the close of the testimony the court entered a nonsuit, and plaintiff appealed.

Sapp & McKaughan, Holton & Holton, and Dallas C. Kirby, all of Winston-Salem for appellant.

Jones & Clement, of Winston-Salem, S. P. Graves, of Mt. Airy, and Benbow, Hall & Benbow, of Winston-Salem, for appellees.

WALKER, J., after stating the facts as above: [1-6] When there is a nonsuit upon the evidence, the appellant, as we have so often said, is entitled to have it considered as true and construed most favorably for him, and he must also have the benefit of every inference that may reasonably be drawn therefrom. *Brittain v. Westhall*, 135 N. C. 492, 47 S. E. 616; *In re Will of Margaret Deyton*, 177 N. C. 503, 99 S. E. 424; *Angel v. Spruce Co.*, 178 N. C. 621, 101 S. E. 384. We do not pass upon the sufficiency of the evidence, but, as said in the *Margaret Deyton Case*, *supra*, in the case of "a nonsuit or dismissal under the statute, \* \* \* the court does not weigh the evidence, but assumes it to be true in favor of the defeated party." If the evidence in this case is tested by this rule, it will be found ample for the jury to consider. The witness J. W. Newsome stated that he applied to Francis Kiser, the clerk in the de-

fendant's store, for sweet oil, not cotton seed oil, and Kiger said he had no more five-cent packages, but had ten-cent packages. Thereupon the witness replied, "That will do, if it is pure and all right." Kiger then stated, "It is pure sweet oil; I will guarantee it," and Newsome purchased a bottle. When he returned home, he gave the child the usual quantity in a spoon, and very soon thereafter he was taken suddenly and seriously sick in the manner described by the witness, and died from this illness about two weeks afterwards. When he smelled the liquid in the bottle it was found to be "rancid," which word means having a rank smell or taste from chemical change or decomposition. There can be no doubt of there being evidence that the oil caused the sickness which resulted in the child's death without resorting to the doctor's expert opinion as a part of the evidence. But he was asked to smell the bottle and to state if the rancid oil did not cause the vomiting and other symptoms, the doctor answering, "That is stale, rancid, and out of date; I know what to fight now; that is the cause of it;" and Mr. Griffin, one of the defendants, stated, when asked by the witness if the state chemist should find him with such oil, "I would say we kept it to grease automobiles," and the witness added, "Yes; and to kill babies." When another doctor read the analysis of the oil as made by the state chemist, he remarked with profane emphasis, "No wonder the baby died." We conclude, therefore, that there is evidence that rancid oil was sold to the plaintiff for the child, and that it caused its death, but this would not be sufficient for a recovery unless it was sold negligently. It is not our purpose to enter upon an extensive discussion of the law in regard to the liability of apothecaries, druggists, and pharmacists in the conduct of their business. A few general principles will suffice in this appeal, where the facts may not all be before us. It is said in 19 Corpus Juris at pages 780 and 781:

"The law imposes upon a druggist the duty so to conduct his business as to avoid acts in their nature dangerous to the lives of others, and one who is negligent in the performance of such duty is liable for damages to any person injured thereby. Where a druggist's clerk, in the course of his employment, negligently supplies a harmful drug in lieu of a harmless one called for, either by prescription or otherwise, and injury results from taking it, the druggist will be liable in damages. \* \* \* A druggist who negligently delivers a deleterious drug when a harmless one is called for is responsible to the customer for the consequences, as being guilty of a breach of the duty which the law imposes on him to avoid acts in their nature dangerous to the lives of others. The liability of the druggist in such case is not affected by the fact that he may also be subject to criminal prosecution, nor by the facts that the one purchasing the drug does not disclose the person for whom he is making the purchase."

The principle is thus stated in 9 Ruling Case Law at pages 702 and 703:

"The public safety and security against the fatal consequences of negligence in keeping, handling, and disposing of dangerous drugs and medicines is a consideration to which no druggist can safely close his eyes. An imperative social duty requires of him such precautions as are liable to prevent death or serious injury to those who may, in the ordinary course of events, be exposed to the dangers incident to the traffic in which he is engaged, and it is therefore incumbent upon him to understand his business, to know the properties of his drugs, and to be able to distinguish them from each other. It is his duty so to qualify himself or to employ those who are so qualified to attend to the business of compounding and vending medicines and drugs, as that one drug may not be sold for another, and so that, when a prescription is presented to be made up, the proper medicines, and none others, be used in mixing and compounding it. \* \* \* A person engaged in the business of pharmacy holds himself out to the public as one having the peculiar learning and skill necessary to a safe and proper conducting of the business, while the general customer is not supposed to be skilled in the matter, and frequently does not know one drug from another, but relies on the druggist to furnish the article called for. \* \* \* He must use due care to see that he does not sell to a purchaser or send to a patient a poison in place of a harmless drug, or even one innocent drug, calculated to produce a certain effect, in place of another sent for and designed to produce a different effect, and it is well settled that he will be liable for any injury proximately resulting from his negligence. Where death is caused by the negligence of a druggist, the recovery of damages is governed by the usual rules relating to actions for wrongful death generally."

Speaking of the measure of care required of a druggist in selling drugs and medicines, it is said in 9 Ruling Case Law at page 704, § 11:

"The legal measure of the duty of druggists towards their patrons, as in all other relations of life, is properly expressed by the phrase 'ordinary care'; yet it must not be forgotten that it is 'ordinary care' with reference to that special and peculiar business, and in determining what degree of prudence, vigilance, and thoughtfulness will fill the requirements of 'ordinary care' in compounding medicines and filling prescriptions, it is necessary to consider the poisonous character of many of the drugs with which the apothecary deals and the grave and fatal consequence which may follow the want of due care. For the people trust not merely their health, but their lives, to the knowledge, care, and skill of druggists, and in many cases a slight want of care is liable to prove fatal to some one. It is therefore proper and reasonable that the care required shall be proportioned to the danger involved."

Another definition is that "'ordinary care' in reference to the business of a druggist must be held to signify the highest practicable degree of" care "consistent with the rea-

sonable conduct of the business." Willson v. Faxon, 208 N. Y. 108, 101 N. E. 799, 47 L. R. A. (N. S.) 693, and note, Ann. Cas. 1914D, 49; Peters v. Johnson, 50 W. Va. 644, 41 S. E. 190, 57 L. R. A. 428, 88 Am. St. Rep. 909.

[8] Plaintiff alleges that the defendants represented the contents of the bottle to be genuine sweet oil of standard purity, and also expressly warranted it to be of that kind and quality, and he offered evidence to prove the truth of the allegation. He sues both on tort for negligence and on contract because of the warranty. It is not required of us to lay down the rule of damages upon either cause of action, as, if he shows the actionable wrong, or the contract and its breach, he is entitled to some damages, even though they may be nominal, and this prevents a nonsuit.

The court erred in dismissing the action. Its judgment of nonsuit will be set aside, and a new trial ordered.

Error.

(179 N. C. 785)

STATE v. BURNETT et al. (No. 89.)

(Supreme Court of North Carolina. March 31, 1920.)

**1. INFANTS  $\S$  68—PROSECUTION OF CHILD 10 YEARS OLD FOR MURDER CANNOT BE MAINTAINED.**

In view of Juvenile Court Act, a prosecution in the superior court for murder committed by a child under 10 years of age is not maintainable, and under section 9 of the act such child will be remanded to the juvenile court.

**2. INFANTS  $\S$  68—UNDER JUVENILE COURT ACT CHILD OF 14 NOT PUNISHABLE FOR FELONY WHERE PUNISHMENT EXCEEDS 10 YEARS.**

In view of the Juvenile Court Act, § 9, providing that where child of 14 years is charged with a felony in which the punishment cannot exceed 10 years the judge of the juvenile court may bind such child over to the superior court, a child under 14 years of age is no longer indictable as a criminal, but is in such case committed for reformation, and primarily to the juvenile department of the juvenile court.

**3. INFANTS  $\S$  68—CASES WHEREIN CHILDREN UNDER 16 MAY BE BOUND OVER UNDER CRIMINAL LAW STATED.**

Under Juvenile Court Act, children 14 years and over to 16, and in case of felonies in which the punishment cannot exceed 10 years, will be committed to the investigation of the juvenile court, and may be bound over to be proceeded against under the criminal law appertaining to the case.

**4. INFANTS  $\S$  68—CASES WHEREIN CHILDREN OF 14 YEARS AND OVER MAY BE PROSECUTED FOR CRIME AS ADULTS ENUMERATED.**

Under Juvenile Court Act, children of 14 years and over, and in case of felonies in which the punishment may be more than 10 years, are

in all cases subject to prosecution for crime as in the case of adults.

**5. INFANTS  $\S$  12—JUVENILE COURT ACT CONSTITUTIONAL.**

Juvenile Court Act is not unconstitutional, the Constitution, investing the General Assembly with legislative authority, having conferred, and intended to confer, upon that body all the legislative powers of the English Parliament or other government of a free people, except where restrained by express constitutional provision or necessary implication therefrom.

Appeal from Superior Court, Bertie County; Bond, Judge.

Lonnie Burnett and Ernest Burnett were indicted for murder. On motion to quash the bill. Bill quashed, defendants remanded to juvenile court, and the state appeals. Affirmed.

The bill of indictment, charging defendants in formal terms with the murder of Ludelle Hyman, deceased, contained on its face the averment that both of defendants were under 10 years of age, and it being admitted on the hearing that said defendants were under the age of 10, the court gave judgment that the bill be quashed, and defendants remanded to the juvenile court to be dealt with pursuant to law, being of opinion that, under the act of the General Assembly establishing said courts, children of that age are exempt from prosecution as criminals. The state, having duly excepted, appealed.

The Attorney General and Frank Nash, Asst. Atty. Gen., for the State.

HOKE, J. The General Assembly of 1919 passed an act entitled "An act to create juvenile courts in North Carolina," (chapter 97, Laws 1919), designed and intended in behalf of the state to take over the guardianship of delinquent and dependent children under the age of 16 years when they come within the descriptive specifications of the law, and it is established that the care and control of the parents, or others having present charge of such children, is inadequate and harmful, and that the welfare of the child and the best interest of the state clearly require it. With this end in view, the statute in section 1 makes provision as follows:

"Section 1. The superior courts shall have exclusive original jurisdiction of any case of a child less than sixteen years of age residing in or being at this time within their respective districts—

"(a) Who is delinquent or who violates any municipal or state law or ordinance or who is truant, unruly, wayward, or misdirected or who is disobedient to parents or beyond their control, or who is in danger of becoming so; or

"(b) Who is neglected, or who engages in any

occupation, calling, or exhibition, or is found in any place where a child is forbidden by law to be and for permitting which an adult may be punished by law; or who is in such condition or surroundings or is under such improper or insufficient guardianship or control as to endanger the morals, health or general welfare of such child; or

"(c) Who is dependent upon public support or who is destitute, homeless or abandoned, or whose custody is subject to controversy.

"When jurisdiction has been obtained in the case of any child, unless a court order shall be issued to the contrary, or unless the child be committed to an institution supported and controlled by the state, it shall continue for the purposes of this act during the minority of the child. The duty shall be constant upon the court to give each child subject to its jurisdiction such oversight and control in the premises as will conduce to the welfare of such child and to the best interests of the state."

In section 2, and for the administration of the law in its principal features, juvenile courts, as a separate part of the superior court, are established in all the counties of the state, the office of judge of such court to be filled by the clerk of the superior court of their respective counties, and, in later sections, special provision is made for establishment of juvenile courts in cities of 10,000 inhabitants or more, and also in cities of 5,000, this last being in the discretion of the governing body of the town and where they are not county sites and have a recorder's court. In section 4 it is required that a full and complete record be kept of proceedings in each and every case, and this requirement and the effect of such proceedings and adjudications therein on the status of the child in reference to criminality, as well as the general purpose of the law and the spirit in which it is to be administered, are set forth as follows:

"The court shall maintain a full and complete record of all cases brought before it, to be known as the juvenile record. All records may be withheld from indiscriminate public inspection in the discretion of the judge of the court, but such record shall be open to inspection by the parents, guardians, or other authorized representatives of the child concerned. No adjudication under the provisions of this act shall operate as a disqualification of any child of any public office, and no child shall be denominated a criminal by reason of such adjudication nor shall such adjudication be denominated a conviction.

"This act shall be construed liberally and as remedial in character. The powers hereby conferred are intended to be general and for the purpose of effecting the beneficial purposes herein set forth. It is the intention of this act that in all proceedings under its provisions the court shall proceed upon the theory that a child under its jurisdiction is the ward of the state and is subject to the discipline and entitled to the protection which the court should give such child under the circumstances disclosed in the case."

Section 5 and the subsequent sections contain general regulations as to procedure and requiring notices to parents or guardians or others having present control of the child under investigation; and in section 9 the course and scope of the inquiry at the hearing, and the disposition that may be made of cases under investigation, are stated as follows:

"Sec. 9. Upon the return of the summons or other process, or after any child has been taken into custody, at the time set for the hearing, the court shall proceed to hear and determine the case in a summary manner. The court may adjourn the hearing from time to time and inquire into the habits, surroundings, conditions and tendencies of the child so as to enable the court to render such order or judgment as shall best conserve the welfare of the child and carry out the objects of this act. In all cases the nature of the proceedings shall be explained to the child and to the parents or the guardian or person having the custody or the supervision of the child. At any stage of the case, the court may, in its discretion, appoint any suitable person to be the guardian ad litem of the child for the purposes of the proceeding. The court if satisfied that the child is in need of the care, protection or discipline of the state may so adjudicate and may find the child to be delinquent, neglected, or in need of more suitable guardianship. Thereupon the court may

"(a) Place the child on probation subject to the conditions provided hereinafter; or

"(b) Commit the child to the custody of a relative or other fit person of good moral character, subject, in the discretion of the court, to the supervision of a probation officer and the further orders of the court; or

"(c) Commit the child to the custody of the State Board of Charities and Public Welfare, to be placed by such board in a suitable family home and supervise therein; or

"(d) Commit the child to a suitable institution maintained by the state or any subdivision thereof, or to any suitable private institution, society or association incorporated under the laws of the state and approved by the State Board of Charities and Public Welfare authorized to care for children or to place them in suitable family homes; or

"(e) Render such further judgment or make such further order of commitment as the court may be authorized by law to make in any given case.

"(f) If a child of fourteen years of age be charged with a felony for which the punishment as now fixed by law cannot be more than ten years in prison his case shall be investigated by the probation officer and the judge of the juvenile court as provided for in this act, unless it appears to the judge of the juvenile court that the case should be brought to the attention of the judge of the superior court, in which case the child shall be held in custody or bound to the next term of the superior court as now provided by law."

In section 10 reference is again made to the disposition of the child in reference to its treatment, and it is enacted, among other things, that—

"No child coming within the provisions of this act shall be placed in any penal institution, jail, lock-up, or other place where such child can come into contact at any time or in any manner with any adult convicted of crime and committed or under arrest and charged with crime."

Ample provision is made also for care and supervision of the child pending its wardship by the court, through its designated officers; and, further, when a child has been committed to the custody of an institution not controlled by the state or to any association, society, or person, on petition of the parent, guardian, or next friend of the child, the case may be investigated, and such further orders and decrees made therein as the good of the child and the circumstances of the case may require.

It may be well to note that the exceptions appearing here as to children committed to a state institution refer only to the action of the juvenile court in the premises, and for the reason, doubtless, that it was not considered feasible that the rules and discipline of a public institution of that character should be liable to obstruction or interference by any one of the 100 or more juvenile courts existent throughout the state. But the exemptions referred to create no limitations on the jurisdiction of the superior court in these cases which, under the first sections of the act and by virtue of its powers, as a court of general jurisdiction administering both law and equity, may always, on proper application and appropriate writs, make inquiry and investigations into the status and conditions of children disposed of under the statute, and make such orders and decrees therein as the right and justice of the case may require. And in section 20 it is provided that an appeal lies from any judgment of the juvenile court to the superior court, at the instance of the child's parents, or, if none, by the guardian, custodian, or next friend of the child, where this disposition made of the child can be reviewed by the judge, and such orders made therein as may be in accordance with law and the course and practice of the court.

[1] On this, a sufficient statement of the terms of the statute for a proper apprehension of the question presented, we are of opinion, and so hold, that the prosecution of these infant children, both under 10 years of age at the time of the alleged offense, cannot now be maintained. Recurring to the portions of the law more directly relevant to the inquiry, it appears that original and exclusive jurisdiction of all cases of delinquent and dependent children, as defined and specified in the act, is vested in the superior courts; that in causes investigated and determined by the juvenile court, constituted for such purpose a part of the superior court, no adjudication of such court shall operate

to disqualify the child for public office, nor shall it be denominated a criminal by reason of such adjudication, nor shall such adjudication be denominated a conviction; and, further, that no child dealt with under the provisions of the act shall be placed in any penal institution or other place where he may come in contact, at any time or manner, with adults convicted of crime or charged with it. And, in reference to the disposition of children charged as delinquents by reason of having violated a state or municipal law, and that alone, it is provided in section 9 that a child of 14 years, charged with a felony in which the punishment, as now fixed by law, cannot exceed 10 years, the judge of the juvenile court may, if the case be of a nature to require it, bind such child over to the next term of the superior court; it being the clear and necessary inference that, as to children of 14 and upwards, and in case of felonies, when the punishment may exceed 10 years, the juvenile department of the superior court is without jurisdiction of the offense.

[2] And from these provisions we conclude, as ruled by his honor in the court below, that children under 14 years of age are no longer indictable as criminals, but are, in the cases specified, committed for reformation and primarily to the juvenile department of the superior court.

[3] Second. That children 14 years and over to 16, and in case of felonies, in which the punishment cannot exceed the period of 10 years, are committed to the investigation of the juvenile court, and may be bound over to be proceeded against under the criminal law appertaining to the case.

[4] Third. As to children of 14 years and over, and in case of felonies in which the punishment may be more than 10 years, they shall in all instances be subject to prosecution for crime as in case of adults.

[5] It is the accepted position in this state that our Constitution, in vesting the General Assembly with legislative authority, conferred and intended to confer upon that body all the "legislative powers of the English Parliament or other government of a free people," except where restrained by express constitutional provision or necessary implication therefrom. *Thomas v. Sanderlin*, 173 N. C. 329-332, 91 S. E. 1028; *State v. Lewis*, 142 N. C. 626, 55 S. E. 600, 9 Ann. Cas. 361; *Black*, Constitutional Law (3d Ed.) § 351, erroneously printed in *Thomas' Case* as section 357. Considered in view of this principle, we find nothing in our Constitutions, state or federal, which inhibits legislation of this character. Article 11, after establishing the only punishments for crime that may be recognized by the laws of the state, in section 2 provides that "The object of punishments being not only to satisfy justice, but also to reform the offender, and thus pre-

vent crime, murder, arson, burglary and rape, and these only, may be punishable with death, if the General Assembly shall so enact." And section 14 of the Bill of Rights contains admonitions against "cruel and unusual punishments," both restrictive of the severity of punishment, and, with these limitations, the question of crime and its punishment, and whether to impose or withdraw it, is referred entirely to the legislative will. And the act concerning delinquent, dependent, and wayward children, who have always been regarded in a peculiar sense as within the care and wardship of the state, comes well within the right of classification referred to largely by state and federal law to the legislative discretion. *Smith v. Wilkins*, 164 N. C. 136, 80 S. E. 168; *Morris v. Ex. Co.*, 146 N. C. 167, 59 S. E. 667, 15 L. R. A. (N. S.) 983; *Efland v. R. R.*, 146 N. C. 135, 59 S. E. 355; *State v. Heitman*, 105 Kan. 139, 181 Pac. 630.

Statutes of this kind have been very generally upheld in the authoritative cases on the subject, and our own court has already expressed its approval of the general principles upon which they are made to rest. In *re Watson*, 157 N. C. 340, 72 S. E. 1049; *Van Walters v. Board and Guardians*, 132 Ind. 567, 32 N. E. 568, 18 L. R. A. 431; *Mill v. Brown*, 31 Utah, 473, 88 Pac. 609, 120 Am. St. Rep. 935; *Lindsay v. Lindsay*, 257 Ill. 328, 100 N. E. 892, 45 L. R. A. (N. S.) 908, Ann. Cas. 1914A, 1222; *Pugh v. Bowden*, 54 Fla. 302, 45 South. 499, 14 Ann. Cas. 816; *Hunt v. Wayne Co. Cir. Judges*, 142 Mich. 93, 105 N. W. 531, 3 L. R. A. (N. S.) 564, 7 Ann. Cas. 821; *Commonwealth v. Fisher*, 213 Pa. 48, 62 Atl. 198, 5 Ann. Cas. 92; *State, ex rel. v. Marmouget*, 111 La. 226, 35 South. 529; *Prescott v. State*, 19 Ohio St. 184, 2 Am. Rep. 388; *Ex parte Januszewski* (C. C.) 196 Fed. 123. To the objections frequently raised that these statutes ignore or unlawfully withhold the right to trial by jury, these and other authorities well make answer that such legislation deals, and purports to deal, with delinquent children not as criminals, but as wards, and undertakes rather to give them the control and environment that may lead to their reformation, and enable them to become law-abiding and useful citizens, a support and not a hindrance to the commonwealth. Speaking to this aspect of the matter in *Watson's Case*, Associate Justice Allen, delivering the opinion, said:

"The question as to the extent to which a child's constitutional rights are impaired by a restraint upon its freedom has arisen many times with reference to statutes authorizing the commitment of dependent, incorrigible, or delinquent children to the custody of some institution, and the decisions appear to warrant the statement, as a general rule, that where the investigation is into the status and needs of the child, and the institution to which he or she is committed is not of a penal character,

such investigation is not one to which the constitutional guaranty of a right to trial by jury extends, nor does the restraint put upon the child amount to a deprivation of liberty within the meaning of the Declaration of Rights, nor is it a punishment for crime."

And in *Ex parte Januszewski*, *supra*, *Sater, J.*, speaking to a similar statute, said:

"The purpose of the statute is to save minors under the age of 17 years from prosecution and conviction on charges of misdemeanors and crimes, and to relieve them from the consequent stigma attaching thereto; to guard and protect them against themselves and evil-minded persons surrounding them; to protect and train them physically, mentally, and morally. It seeks to benefit not only the child, but the community also, by surrounding the child with better and more elevating influences, and training it in all that counts for good citizenship and usefulness as a member of society. Under it the state, which, through its appropriate organs, is the guardian of the children within its borders (*Van Walters v. Board*, 132 Ind. 569, 32 N. E. 568, 18 L. R. A. 431), assumes the custody of the child, imposes wholesome restraints, and performs parental duties, and at a time when the child is not entitled, either by the laws of nature or of the state, to absolute freedom, but is subjected to the restraint and custody of a natural or legally constituted guardian to whom it owes obedience and subjection. \* \* \*

And further:

"The welfare of society requires and justifies such enactments. The statute is neither criminal nor penal in its nature, but an administrative police regulation."

And a perusal of this statute will disclose that the rights of parents have been throughout most carefully conserved.

In any proceedings under the law, they must be notified and given an opportunity to appear and be heard. If the judgment of the juvenile court is against them, they may appeal and have such judgment reviewed by the judge of the superior court. And if the guardianship of the child is taken over by the state, they are allowed, on proper application, at any time, to have their child brought before the court, its condition inquired into, and further orders made concerning it, except, as shown, when committed to a state institution, and then they may apply directly to the superior court. And in any sane and just administration of this measure, the family relationship and this parental right, which are at the very basis of our social order and among its chiefest bulwarks, must always be given full consideration. Speaking to this question in 20 R. C. L. pp. 601-602, quoted with approval in *Means Case*, 176 N. C. 311, 97 S. E. 41, the author says:

"The natural affection of parents is ordinarily the best assurance of the child's welfare, and the object to be sought for the child is not so much the luxury and social advantages, which more

wealthy guardians might be able to give it, as the wholesome intellectual and moral atmosphere likely to be found in its natural home."

But this right and relationship, important as it is, is not absolute and universal, and may be made to yield when it is established that the welfare of the child and the good of the community clearly require it. This has been held with us in numerous decisions concerning the disposition of children, under the general principles of the common law and equity prevailing in the state. In *re Warren*, 178 N. C. 43, 100 S. E. 76; In *re Means*, 176 N. C. 307, 97 S. E. 39; *Atkinson v. Downing*, 175 N. C. 244, 95 S. E. 487; In *re Mercer Fain*, 172 N. C. 790, 90 S. E. 928. And, undoubtedly, it may be so provided by an act of the Legislature in the well-ordered exercise of the police power. At common law there is a conclusive presumption that a child under 7 years of age is incapable of committing crime, and the same presumption exists to the age of 14 as to minor offenses. *State v. Pugh*, 52 N. C. 61. Between 7 and 14, and as to graver crimes, there was also a presumption against the ability to commit them, rebuttable, however, on clear and convincing proof that the child possessed the knowledge and discretion requisite for legal accountability. The statute in this respect only operates to extend the conclusive presumption, in all cases, to children under 14, and, as we have endeavored to show, is clearly within the legislative powers. It may have been better that, as to the higher crimes of murder, arson, and the like, the principles of the common law should continue to prevail; but, as suggested by an able, ardent advocate of the measure and a firm believer in it, there could not well be conceived, in this day and time, a case where the enlightened public sentiment of the state would approve the capital execution of a child under 14, and if this be true, and it comes to a question as to whether a child of that immature age should be degraded and punished as a criminal, or restrained and disciplined with a view to its reformation, the advocates of the latter course would seem to have the better of the argument. These considerations, however, are entirely for the Legislature, and that body having passed a valid statute, exempting children under 14 from prosecution for crime, it is ours only to observe its requirements and interpret it according to its true intent and meaning.

The case of *State v. Newell*, 172 N. C. 933, 90 S. E. 594, to which we were cited, was on a law having substantially different provisions, to wit, Laws 1915, c. 222, and which is expressly repealed by the present statute.

There is no error, and the judgment of the superior court is affirmed.

Affirmed.

(113 S. C. 416)

DENT et al. v. DENT et al. (No. 10393.)

(Supreme Court of South Carolina. March 30, 1920.)

1. WILLS §—439—OBJECT OF CONSTRUCTION IS TO ASCERTAIN TESTATOR'S INTENTION.

The object of construction of a will is to ascertain the intention of the testator, which, when ascertained, must be carried into effect, unless the intent violates some rule of law.

2. WILLS §—441, 470—INTENTION ASCERTAINED FROM WHOLE WILL; CIRCUMSTANCES CONSIDERED ONLY WHERE LANGUAGE DOUBTFUL.

In construing a will, the intention of the testator must be ascertained from the instrument as a whole, and, while circumstances may be considered if the language is doubtful, they cannot be resorted to to prove the testator's intention apart from his language.

3. WILLS §—456—COURTS PREFER CONSTRUCTION GIVING EFFECT TO INTENTION.

When the provisions of a will are doubtful or inconsistent, the courts prefer an interpretation that will give force and effect to the intention of the testator according to the ordinary meaning of the will, and which will render effective the express language thereof, rather than to a conjecture arising from a supposed omission.

4. WILLS §—449—CHILDREN OF BENEFICIARY WHO DIED DURING LIFE OF TESTATOR HELD ENTITLED TO TAKE.

Where testator directed that the residue of his estate, both real and personal, should be divided into three equal shares, and devised one share to each of his two brothers and the remaining share to the children of a deceased brother, *held* that, where testator by codicil after the death of one brother appointed a son of such brother executor in place of his father, it must be deemed that the children of such brother were entitled to take, for otherwise there would be another residue to be distributed according to the statutes of distribution.

Hydrick and Fraser, JJ., dissenting.

Appeal from Common Pleas Circuit Court of Richland County; Thomas S. Sease, Judge.

Action by E. H. Dent and others against Samuel H. Dent and others. From the judgment, defendants Helen A. Covington Quarterman and others appeal. Affirmed.

Edward L. Craig, of Columbia, and Williams, Williams & Stewart, of Lancaster, for appellants.

C. M. Eflord, of Lexington, for respondents.

GARY, C. J. This action involves the construction of a will and codicil. On the 26th of September, 1899, William H. Dent made his will. In the first clause he directed the payment of his debts. In the second clause he bequeathed certain legacies to two of his wife's relatives. The third and fourth clauses are as follows:

"The residue of my estate, both real and personal, which I may die possessed, I direct to be divided into three equal shares, one share I give, bequeath and devise to my brother, Benjamin T. Dent, one share I give, bequeath and devise to my brother Samuel H. Dent, and one share I give, bequeath and devise to the children of my deceased brother, James M. Dent, share and share alike.

"I appoint my brothers, Benjamin T. Dent and Samuel H. Dent, and my nephew, Eugene D. Dent, executors of this my last will and testament."

On the 23d of April, 1910, the testator made the following codicil to his will:

"As Benjamin T. Dent, one of the persons named as one of the executors of the above written will, has died, I do now, by this codicil to my above written will, appoint my nephew Samuel T. Dent, as one of the executors of my said will in the place of said Benjamin T. Dent, deceased."

The testator died in 1913, unmarried. His brother Benjamin T. Dent, died, after the making of the will, but before the testator executed the codicil, leaving several children, one of whom, Samuel T. Dent, was named in the codicil as an executor.

The main question in the case is whether the legacy to Benjamin T. Dent lapsed by reason of his death during the lifetime of the testator, but before the execution of the codicil.

[1, 2] The following rule of construction is announced in *Roundtree v. Roundtree*, 26 S. C. 450, 2 S. E. 474:

"The object of all construction is to ascertain the intention of the testator, and when that is ascertained it must be carried into effect, provided this can be done consistently with the settled rules of law. But how is the intention to be ascertained? Certainly not by a conjecture as to what the testator ought to have done, but by considering what is the plain meaning of the language which he has used, and by giving a careful consideration to words of the will as a whole, guided by such rules of law as experience has shown to be useful in seeking such intention. We are to read the will as a whole, and from its terms ascertain, if practicable, what was in the mind of the testator at the time he executed it. We may also, where the language used is obscure or doubtful, read such language in the light which may be reflected upon it by the circumstances surrounding the testator at the time he executed his will, but such circumstances cannot be resorted to to prove the testator's intention apart from his language."

To the same effect is the language of the court in *Lott v. Thompson*, 36 S. C. 38, 15 S. E. 278, to wit:

"A will is the formal declaration in writing, by which the maker provides for the distribution of his property after his death. This being the case, it necessarily follows that in its construction the first and great object should be to inquire what was the intention of testator. That intention must be gathered from the paper it-

self, the whole paper taken together, and read in the light of the circumstances surrounding the testator at the time he executed it. Sometimes from the inaccurate use of words, which have a technical, as distinguished from the ordinary, meaning, there may be difficulty in ascertaining the meaning."

The appellant's attorneys in their argument cite the following cases from this state: *Cureton v. Massey*, 13 Rich. Eq. 104, 94 Am. Dec. 151; *Pratt v. McGhee*, 17 S. C. 428; *Roundtree v. Roundtree*, 26 S. C. 450, 2 S. E. 474; *Howze v. Barber*, 29 S. C. 466, 7 S. E. 817; *Lott v. Thompson*, 36 S. C. 38, 15 S. E. 278; *Rivers v. Rivers*, 36 S. C. 302, 15 S. E. 137. To the same effect are the cases of *Pegues v. Pegues*, 11 Rich. Eq. 554; *Suber v. Nash*, 84 S. C. 12, 65 S. E. 947.

We do not question the principles announced in those cases, which, however, are not applicable to the main proposition involved in the case now under consideration, to wit, that the will and codicil must be construed together, and in the light of the facts and circumstances existing at the time the codicil is executed. *Logan v. Cassidy*, 71 S. C. 175, 50 S. E. 794.

[3, 4] It is important to ascertain the scheme of the will in order to determine the effect the codicil had upon it. The scheme was: (1) To dispose of all the testator's property; (2) that the residue of his estate should be divided into three equal shares among his two brothers then living and the children of his deceased brother; (3) that those who were to take part in the distribution of the residue of his estate were likewise to participate in its administration as executors—his nephew Eugene D. Dent, representing the class to which he belonged, viz. the children of his deceased father.

If the will is construed in accordance with its ordinary meaning, and without reference to technical rules, it shows clearly upon its face that it was the intention of the testator that the children of Benjamin T. Dent should take the one-third of the residue bequeathed to their father.

When the testator made a codicil to his will, after the death of Benjamin T. Dent, the only change which he made was the appointment of Samuel T. Dent as executor in the place of his father, thus ratifying the scheme of the will that those to whom he bequeathed the residue should also administer his estate. It will be observed that, although the testator then knew of Benjamin T. Dent's death, he did not change the provision of his will that the residue was to be divided into three equal shares. There was therefore an express provision that his brother Samuel H. Dent should receive one-third and the children of his deceased brother James M. Dent one-third. If the children of Benjamin T. Dent are not entitled to the other one-third, then Samuel H. Dent will receive more than one-third, and so will the children of



James M. Dent, in plain violation of the express language of the will.

The rules of construction hereinbefore quoted show that we are not allowed to resort to conjecture when it would have the effect of destroying the express provisions of the will.

It cannot be successfully contended that the residue may be divided into three equal shares, and that the share bequeathed to Benjamin T. Dent should be divided between his brother Samuel H. Dent and the children of his deceased brother James M. Dent, as this would enable them to take more than the one-third intended by the testator. *Roundtree v. Roundtree*, 26 S. C. 450, 2 S. E. 474.

Furthermore, if the children of Benjamin T. Dent are not allowed to take the share bequeathed to him, then there will be another residue to be divided under the statute of distribution, and not under the will, although the plain intention of the testator was to dispose of all his property by his will.

When the provisions of a will are doubtful or inconsistent, under the technical rules of construction, the courts prefer an interpretation that will give force and effect to the intention of the testator, according to the ordinary meaning of the will and that will render effective the express language thereof, rather than to a conjecture arising from a supposed omission.

Affirmed.

WATTS and GAGE, JJ., concur.

GAGE, J. There are no technical controlling words in the will to fix a constructive intent of the testator and to defeat the manifest real intent of the testator.

The circumstances of the case are so strong to fix the real intent that they leave no reasonable doubt in my mind about that intent. Therefore I concur with the CHIEF JUSTICE and vote for affirmance.

HYDRICK, J. (dissenting). However much we may regret the testator's ignorance of the law, or his lack of foresight in failing to express in his will the intention which we are asked to infer from the circumstances, we are not at liberty to violate the law and rules of construction, which are the landmarks of property, to give effect to a supposed intention, which the testator did not express and which cannot, according to the settled rules of construction, be gathered from the language of his will.

The statute requires that wills shall be in writing. Unless, therefore, the testator's intention is expressed in writing, or can fairly be inferred from what he has written, according to the settled rules of construction, effect cannot be given to it, without violating the statute. And, although the rules were adopted as aids to the discovery of the intention, nevertheless the intention, even when

so discovered, cannot have effect if it conflicts with any settled rule of law. Again, while resort may be had to the circumstances to enable the court to understand and declare the meaning of what the testator has written, the court is not at liberty to infer from the circumstances an intention which he has not expressed in the will. These principles are clearly stated in the cases cited and quoted from by the Chief Justice. See, also, *Jones v. Quattlebaum*, 31 S. C. 606, 9 S. E. 982.

That a bequest or devise to a dead man cannot be given effect is too plain to require more than statement; hence the rule that "unless the legatee survive the testator the legacy is extinguished." 2 *Williams on Executors*, 496; 1 *Jarman on Wills*, 617; *Dunlap v. Dunlap*, 4 *Desaus*, 814; *Perry v. Logan*, 5 *Rich. Eq.* 202; *Rivers v. Rivers*, 36 S. C. 302, 15 S. E. 137.

In *Dunlap v. Dunlap*, *supra* (decided in 1812), Mr. Dunlap executed his will, on September 9, 1804, and gave all his real and personal estate (except such parts as were otherwise disposed of) to his wife, and her heirs. But if she should die without issue, or marry again, then certain specified chattels were to go over to others named. Mrs. Dunlap died the next day, without issue, and testator immediately executed a codicil to his will in which, after reciting the dispositions of his will as to his real estate, and that his intention as to the same had been thwarted by the death of his wife, he made other dispositions of his real estate, and bequeathed several small legacies and then he died, on the same day, September 10th. The will and codicil had only two witnesses.

The court held that the will was valid as to the personal estate, but ineffective to dispose of the real estate, because it had only two witnesses; that the execution of the codicil was a republication of the will; and that, although such republication took place after the death of Mrs. Dunlap, the legacy to her and her heirs lapsed except as to the chattels included in the bequest to her which were limited over to others, upon her death without issue. It was said that when the legacy is given over to others after the death of the first legatee, who predeceases the testator, the legatee in remainder shall have it immediately; and upon this principle it was held in *Rivers v. Rivers*, 36 S. C. 302, 15 S. E. 137, that the bequest and devise to George Thomas Rivers did not lapse. But, recognizing the general rule, the court said:

"He [George Thomas Rivers] certainly died during the lifetime of testator. If this was all, the estate provided for him would lapse, even if he left a child"—citing *Cureton v. Massey*, 13 *Rich. Eq.* 104, 94 *Am. Dec.* 151.

In *Pegues v. Pegues*, 11 *Rich. Eq.* 554, William Pegues bequeathed to his son, Malachi

Pegues, by name, \$1,500, and, after other bequests and devises, he gave the residue of his estate to "all my children, to be equally divided amongst them, share and share alike." Malachi Pegues was dead when the will was executed. His children claimed the legacy of \$1,500, and the share of the residue to which their father would have been entitled had he survived the testator. But the court held that the bequest to Malachi was void, and that his children were not entitled to it, or to a share in the residue.

The children of Malachi Pegues presented a stronger case for relief than do the children of Benjamin Dent for two reasons: First, they were the grandchildren of the testator, while these claimants are only the nephews and nieces of testator; and, second, the children of Malachi Pegues contended that their case came within the remedial provisions of the act of 1789 (5 St. at Large, p. 107, § 9), "that if any child should die in the lifetime of the father or mother, leaving issue, any legacy given in the last will of such father or mother shall go to such issue, unless such deceased child was equally portioned with the other children, by the father or mother, when living."

But the court denied them relief, and held that the statute was intended to provide for the case of a lapse after the execution of the will, and did not apply where the child was dead when the will was executed. Chancellor Johnstone, speaking for the court, said:

"I can hardly suppose the Legislature contemplated the case of a man's giving a legacy to a dead child—or that it intended to remedy the effect of such an absurdity. It may be very well conceived that it intended to make good a legacy which had become void, without going the length of supposing it intended to give effect to one which was void *ab initio*."

There can be no doubt that William Pegues intended the gift to his son, Malachi, to be effective in some way, although he knew that he was dead; and there can hardly be a doubt that when he gave the residue of his estate to "all my children," he thought of Malachi as one of his children, and intended that his share should go either to his (Malachi's) children, or his personal representatives, or his heirs. But if that was the intention of the testator, effect could not be given to it, because he failed to express it in his will; and the court had no power to do so, as that would have been making rather than construing his will. Besides, how could the court have known what disposition testator would have made if he had known that the disposition which he did make was void, and could not take effect?

And how can we say what disposition William Dent would have made of the share which he intended for his brother Benjamin if he had known that the disposition which he did make was void, and could not have

effect? It is probable that he thought it would go to Benjamin's heirs, in which case Benjamin's wife would have taken one-third of it. How can we say he intended it to go to Benjamin's children? The fact that he gave one share to the children of another deceased brother may afford some ground for an inference that such might have been his intention, but it is not enough to warrant the court in holding that it was; for it is not unusual to find in the same will different provisions as to the portions given to children, and other beneficiaries of the same class. We are admonished by the decision of this court, in *Bell v. Towell*, 18 S. C. 94, and numerous others, that, in construing wills, it is not safe to take a provision made for one state of facts and interpolate it into another provision, made for a different state of facts; and that, while a will should be construed as a whole, the intention of testator cannot be declared to be the same in all its parts, unless it is so expressed.

Much stress is laid upon the fact, and the inference sought to be drawn from it, that the codicil was executed after the death of Benjamin, and refers to his death, and appoints one of his sons as an executor in his place. Can it in reason be said from these facts that the intention was expressed that the share which was originally intended for Benjamin should go to his children, and only to his children? Such a conclusion is based upon conjecture pure and simple. It is not to be found in the words of the will, or to be reasonably implied from them, and it violates the rule that we cannot resort to extraneous circumstances to gather an intention which cannot be made out from the language of the will.

Moreover, the execution of the codicil was but a republication of the will as it then stood, and the circumstances cannot make the case stronger than it would have been if the will had been written in its present form for the first time, when the codicil was executed. Upon that state of facts, the case cannot be differentiated from the cases of *Dunlap v. Dunlap* and *Pegues v. Pegues*, both of which have been repeatedly reaffirmed. See *Key v. Weathersbee*, 43 S. C. 414, 424, 21 S. E. 324, 328 (49 Am. St. Rep. 846), where both cases are cited with approval, and it is said, citing *Pegues v. Pegues* as authority, that "a devise or bequest to a person deceased at the time is void *ab initio*, \* \* \* except in the case specially provided for by the act of 1789," and also the case of *Suber v. Nash*, 84 S. C. 12, 65 S. E. 947, where the principle decided in *Pegues v. Pegues* was applied, and the case was cited as authority. The devise to Benjamin having become void, by reason of his death before that of the testator, and, giving the execution of the codicil the effect of a re-execution of the will, the devise then made, being to a person then dead, was ab-

solutely void, and the court has no power to give it validity.

The facts that testator did not intend to die intestate as to any part of his estate, that he directed that it be divided into three equal shares, and that, if Benjamin's share is not disposed of according to the scheme of the will, but descends as intestate property, some of the beneficiaries will get more than testator intended them to receive, cannot, singly or collectively, affect the decision of the question; for, if so, they would prevent a lapse in every case, as they are the invariable and inevitable consequences of a lapse. Yet they have not hitherto been deemed sufficient to warrant the courts departing from the established rules of law and construction.

Precisely the same circumstances and all of them occurred in the case of *Cureton v. Massey*, 13 Rich. Eq. 104, 94 Am. Dec. 151, and were adverted to by the court. In that case, the testator declared that the great purpose of making his will was to include in the distribution of his estate some of his grand nephews and nieces, who would be excluded if he should die intestate; and the scheme of the will was that his will was that his estate was to be divided into equal shares, and that "the children of a deceased nephew and niece herein named will count one, and take among them the shares of their deceased parents, if they had been living"; and he gave to "the children and descendants" of his deceased sister, Mary, thus: "To Mrs. Matheson, one share; to Elizabeth Knox, one share." Each of these nieces died after the execution of the will and before the testator, leaving children. The court held that it was manifest from the manner in which the testator had repeatedly expressed himself in his will, and from the fact that, in every instance he made provision therein for the children of every deceased nephew and niece who would, if living, have been a participant of his bounty, that, if he had anticipated, or if it had been brought to his mind at the time, that any nephew or niece to whom he gave a share might die, leaving issue, before his will should take effect, he would have made the bequest so as to meet such contingency, and have given the parents' share to the issue as a substitute. But the court said:

"The question is one of construction purely, and can be answered only by declaring what intention, if any, the testator has expressed. \* \* \* If he has wholly failed to provide for the contingency which has happened, the court may deplore his want of forethought, but cannot supply the omission resulting therefrom"

—and it was held that the shares of Mrs. Matheson and Mrs. Knox lapsed and descended as intestate property. Though the court had no doubt of the testator's intention, it had not the power to write into his

will, by construction, an intention which through ignorance or inadvertence he failed to express.

*Roundtree v. Roundtree*, 28 S. C. 450, 2 S. E. 474, was a case involving a great hardship. Testator gave his wife certain property for life, which at her death was to be divided equally between his "surviving children." After some dispositions, he devised that, immediately after his death, the residue of his estate should be equally divided between his "surviving children." James W. Roundtree, a son of testator, died only a few days before his father, leaving eight children. Testator was then too ill to change his will. It was held that the children of James were not entitled to the share which their father would have taken, if he had survived the testator and the life tenant. It was held that they could not take by substitution, notwithstanding the provision "that if any of my children should die leaving no issue, the property they receive from my estate shall revert back and be equally divided between my surviving children," because, although the clause quoted provided for the case of a child dying leaving no issue, there was no express provision that, in case a child should die (before testator, or afterwards and before the period of distribution) leaving issue, such issue should take by substitution, and that such intention could not be implied from the express provision for the case of a child dying leaving no issue. This court adopted the view taken by the circuit court that—

"Unless the parties so claiming (by substitution) can show their right to substitution by the terms of the will itself, to let them in would be in effect to make a new will for the testator."

In disposing of the contention that the children of James should have relief on the ground of mistake, after showing that it was not a case of mistake, but rather one of "misfortune or omission," the court said:

"Can any one venture to say what the testator desired to do with the interest which he had intended for his dead son, and which he could not take by reason of his death? If the court should undertake to do so, would not that be a clear case of undertaking to make, instead of construing, the will of a testator? It may be possible, and perhaps not altogether unlikely, that the testator supposed, after he was informed of the death of his son, James, that under the provisions of the act of 1789 his children would take what was given to him by the will, and therefore that it was unnecessary to make any alteration in his will. But even if this were so, this, clearly, was not such a mistake of law as the court would relieve from (if, indeed, there is now any case in which relief would be granted upon that ground [*Cunningham v. Cunningham*, 20 S. C. 317]); for it was nothing more than an erroneous construction of a statute (*Pratt v. McGhee*, 17 S. C. 428), which certainly affords no ground of relief."

Can there be a doubt that, if the testator had anticipated the contingency which did occur, he would have made provision for the substitution of the children of James? Yet the court was powerless to supply the omission by construction. How can that case be distinguished on principle from this?

In *Pratt v. McGhee*, 17 S. C. 428, testator devised all his land and bequeathed all his personal property, with insignificant exceptions, to his favorite son, who predeceased him; and it was held that the devise lapsed, and the property descended to the heirs as intestate property, although the son left issue. The statute of 1789 (above quoted) was held inapplicable to devises. The statute was afterwards amended to include devises.

And this gives room for another remark, that the Legislature, having made provision to prevent lapses of legacies and devises only in case the gifts to a child who should predecease his father or mother, leaving issue, intended that the existing law and rules of construction as declared by the courts with respect to lapses in all other cases, should remain of full force and effect. *Logan v. Brunson*, 56 S. C. 7, 33 S. E. 737.

For the reasons above stated, and upon the authority of the cases above cited, I think the inevitable conclusion is, however regrettable, that the devise to Benjamin Dent was void, and that it lapsed, and, as there was no provision in the will for the substitution of his children, they cannot take the devise, but it descends as intestate property.

FRASER, J., concurs.

(113 S. C. 294)

MERCHANTS' & PLANTERS' NAT. BANK  
OF UNION v. HUNTER et al.  
(No. 10373.)

(Supreme Court of South Carolina. Feb. 23, 1920.)

1. LIMITATION OF ACTIONS §159—ENTRY OF RECORD OF MERE EX PARTE CREDIT DOES NOT EXTEND PERIOD OF LIEN.

Where bond and mortgage were executed in 1895, act of assignee in entering on record of mortgage, in 1915, receipt in 1911 of payment of \$5, did not extend lien of mortgage to 20 years from record, under Civ. Code 1912, § 3535, since note must be of payment, and not of ex parte credit which does not affect presumption of payment after 20 years.

2. EVIDENCE §271(12)—SELF-SERVING DECLARATION OF PAYMENT ON MORTGAGE BY HOLDER NOT COMPETENT AGAINST MORTGAGOR.

Self-serving declaration of payment on mortgage by a holder, made at time of record entry of claimed credit, even if sworn to, would not have been competent evidence; the mortgagor being dead at time.

Appeal from Common Pleas Circuit Court of Union County; T. J. Mauldin, Judge.

Action by the Merchants' & Planters' National Bank of Union, S. C., against James E. Hunter and others. From judgment for plaintiff, the defendant Norman Murphy Company appeals. Reversed.

John K. Hamblin, of Union, for appellant.  
J. G. Hughes, J. A. Sawyer, and P. D. Barron, all of Union, for respondents.

FRASER, J. The plaintiff brought this action to foreclose a mortgage. On the 22d of May, 1895, J. C. Hunter executed his bond and mortgage to J. D. Smith for the sum of \$1,000. Mrs. Smith assigned the bond and mortgage to Mrs. F. Elmira Hunter, and Mrs. Hunter to the plaintiff. J. C. Hunter died on the 22d day of November, 1915. The record in this court shows the following entry on the record of the mortgage:

"Received on April 22, 1911, of J. C. Hunter, five dollars on within bond and mortgage.

"[Signed] Mrs. F. E. Hunter, Assignee."

"Receipt entered on record May 22, 1915.

"[Signed] I. Frank Peake, Clerk of Court."

Norman-Murphy Company, one of the defendants, a creditor of J. C. Hunter, set up the statute of limitations and claimed among other things that the lien of the mortgage has expired.

[1, 2] There are twenty-five exceptions; but, in the view that this court takes of the case, only one question need be considered, and that is: Has the lien of the mortgage expired?

Section 3535, Code of Laws 1912, vol. 1, provides:

"No mortgage \* \* \* shall constitute a lien upon any real estate after the lapse of twenty years from the date of the creation of the same: Provided, that if the holder of any such lien \* \* \* cause to be recorded upon the record of such mortgage \* \* \* a note of some payment on account, or some written acknowledgment of the debt secured thereby, with the date of such payment or acknowledgment, such mortgage \* \* \* shall be, and continue to be, a lien for twenty years from the date of the record of any such payment on account or acknowledgment."

The question is: Has the lien of this mortgage expired? The note must be of a payment, and not of an ex parte credit.

A payment on a bond or note is an acknowledgment of the existence of the debt. There is a presumption of payment after the lapse of 20 years. In order to prevent the operation of this presumption, there must be an acknowledgment of the existence of the debt. In order to keep alive the lien of a mortgage, the mortgagor must do an act which keeps alive the lien or it expires. He may do that by a written acknowledgment

or by a payment which is in law an acknowledgment of the existence of the debt. It is not in the power of the holder of a mortgage to continue it in force for another 20 years by making a mere formal entry on the record. There is no competent evidence here that there has been any payment. The credit was nominal only. The only evidence of the payment is a self-serving declaration by the holder of the mortgage, made at the time of the entry on the record of the credit and that declaration not sworn to, and, even if it had been sworn to, would not have been competent evidence in any court, because the mortgagor was at that time dead. There is no evidence to connect the mortgagor with the payment except the incompetent statement of the assignee, and no additional force is given to the statement from the fact that it is in writing. The lien of the mortgage has expired, and the exceptions that raise this question are sustained.

The appellant complains that the master and circuit judge have given the lien of J. E. Hunter a preference over the creditors of J. C. Hunter. The respondents, in argument, repudiate this construction of the report and decree, and it need not be considered. No other question arises in the case.

The judgment appealed from is reversed.

GARY, C. J., and HYDRICK, WATTS, and GAGE, JJ., concur.

(113 S. C. 430)

DILLINGHAM et al. v. NATIONAL COUNCIL, JUNIOR ORDER OF UNITED AMERICAN MECHANICS. (No. 10376.)

(Supreme Court of South Carolina. Feb. 23, 1920.)

INSURANCE §755(3)—FRATERNAL ORGANIZATION ESTOPPED BY RECEIPT OF PREMIUMS TO DENY GOOD STANDING OF MEMBER.

Where a local council of a fraternal benefit organization failed in the performance of its duty to pay taxes for the support of the state council for five consecutive years, and until the failure became habitual, and the state council knew it and made no complaint about it until December, 1915, and a member of the local council continued to pay his assessments up to his death in February, 1916, with no knowledge of the default of the local council, the state council for itself and the national council of the organization were estopped to set up the breach to defeat an action by the beneficiaries of the deceased member to recover benefits; Civ. Code 1912, §§ 2755, 2770, not applying.

Appeal from Common Pleas Circuit Court of York County; Ernest Moore, Judge.

Action by Minnie Dillingham and others against the National Council, Junior Order

of United American Mechanics. Judgment for plaintiffs, and defendant appeals. Affirmed.

Butler & Hall, of Gaffney, for appellant. J. S. Brice and John R. Hart, both of York, for respondents.

GAGE, J. The appeal is by the defendant fraternal order from a judgment for the plaintiff entered upon a directed verdict.

The controversy arises out of these circumstances: The fraternal order is made up of three organizations; starting at the top, one called the National Council, whose situs is Pittsburgh, Pa.; one called the state council, whose situs is not revealed; and one called the local council, whose situs is the town of York in this state.

Dillingham in his lifetime was a member of the local council called No. 48, and from his entrance into the order in March, 1907, until his death on February 8, 1916, he paid to the local council all the dues which he owed to the National Council.

At Dillingham's death the National Council refused to pay the benefit of \$500 to his "legal dependents," the wife and infant child. The ground of refusal is that Dillingham's connection with the National Council was broken off, because local council No. 48 had not paid to the state council certain per capita taxes due to the state council by the local council. If the fact of nonpayment be true, the inquiry is, Has such fact, under the other circumstances of the case, operated to defeat the plaintiffs' right? That is the matter to be decided.

The condition of the certificate which was issued to Dillingham and on which the action is based in essential matters is:

"That Dillingham \* \* \* shall be at the time of his death (1) a beneficial member in good standing of a subordinate council of said order, and affiliating with the National Council of said order, (2) and also a member in good standing of the funeral benefit department of said National Council. \* \* \*" The numerals are supplied.

Has Dillingham performed these conditions? That marked (1) is the determinative condition, for that marked (2) depends on that marked (1). The testimony is plain that at the instant of his death Dillingham was in good standing with local council No. 48. The secretary, Sandifer, testified:

"Mr. Dillingham was a member in 1910 when I joined, and continued to be a member in regular standing as long as I was a member"

—and Sandifer was a member at Dillingham's death. So much is not denied, but the contention is that the local council, called in the certificate subordinate council, was not affiliated with the National Council, and that because of its failure of duty towards

the state council. Such duty is fixed by the laws of the state council thus:

"Each council shall pay to the state council the per capita tax as enacted by the National Council, together with such additional per capita tax as may be agreed upon for the state council purposes; and any council neglecting or refusing to pay the same in full shall be deprived of the privileges of the order, and be debarred of the right of representation on the floor of the state council; and section 13 provides that any council failing to forward the quarterly per capita tax by the first day of February, May, August and November of each year shall be marked 'suspended,' and can be reinstated only by paying a fine of \$10.00."

The National Council has also a law which declares the legal consequences to a member in the event his local council shall lose membership in the state council, thus:

"Should any council lose its membership with its state council or with the National Council its connection with the funeral benefit department shall thereby cease, and any council which is not in good standing with its state council and with the National Council cannot remain in good standing or be entitled to receive from the funeral benefit department the funeral benefits provided for in these laws."

The National Council has, too, a law which defines what "good standing" means, thus:

Chapter V defines good standing:

"A member of the order shall be in good standing, (a) if in good standing with the council of which he is a member, (b) if his council be in good standing with the state council having jurisdiction thereof, (c) and his council shall be in good standing with the order if in good standing with its state council."

So that the crux of the matter lies in the alleged nonperformance of a duty owing by the local council to the state council, to wit, in the failure to pay to the state council "such additional per capita tax as may be agreed upon for the state council purposes." It nowhere appears in the record how much that per capita tax is, nor does it appear that Dillingham failed to pay it to the local council.

It does appear from Sandifer's testimony that, from his entrance into the order in 1910 up to Dillingham's death, with perhaps one exception, local council No. 48 never remitted to the state council any per capita tax, and that, so far as the witness recollected, the state council "never made any demands or threatened expulsion because we did not pay them," and further "never had any complaint from state council that the dues were not promptly paid." As a consequence of all this, Mr. Sandifer, the secretary of the local council, was first advised by letter dated December 7, 1915, from Collins, the Secretary-Manager of the National Council, that Collins had been advised by the secretary of the state council that the local coun-

cil was not in good standing with the state council. The letter did not suggest in what act or omission the lack of good standing consisted. And on February 22, 1916, by letter the National Council refused to pay the benefit, because Dillingham did not die in good standing with the state council, and was therefore not in good standing with the National Council. The language of the letter is:

"We notified you on December 7th that your council was not in good standing with your state council, upon information received from your state secretary, Brother J. S. Wilson, and you were also notified at that time unless you placed yourself in good standing with your state council you would not be in good standing here nor could we accept any more assessments from your council."

We revert now, the facts being established, to the inquiry before made upon the hypothesis of their truth, whether they operate to defeat the plaintiff's right. It was admitted at the bar by counsel for the fraternal order that, had Dillingham died on or before December 7, 1915, his certificate would have been intact, and his legal dependents, the plaintiffs, would be entitled to payment. If so much be true, then there is nothing to differentiate the present right of the legal dependents from the right which existed on December 7th. For all that the letter of December 7th undertook to do was to advise the local council of the then bad standing of the local council. If so much was then true, and if such bad standing operated to defeat the right thereafter, then it operated to defeat the right theretofore; for the alleged bad standing had been existent for five years next before December 7th. But we are of the settled opinion that the plaintiff's right was intact on December 7th and is now.

Much has been said in the argument about two apparently conflicting statutes, sections 2755 and 2770 of the Code of Laws. The former is a section of a comprehensive act to "regulate and control fraternal benefit associations," such as the defendant is; and the section in question very properly declares that the subordinate lodges of a supreme governing association shall not have the power to waive the laws of the latter. See section 7 of the act (26 St. at Large, 555). Section 2770 is an independent statute, enacted the same day as the statute just referred to; and it properly declares that when members of orders like the defendant come to make their initial payment of dues to a person designated by the laws of the order to receive them, in such a case the recipient of the dues shall be deemed the agent of the general order. Both of these statutes are but declaratory of well-established principles of law, and the Legislature need hardly to have enacted them. But the facts of the instant case do not fetch it within the words of either of the statutes. With reference to the

last discussed statute there is no denial that Sandifer was the agent of the National Order to receive dues, so that the statute is out of view. With reference to the first discussed statute there is no testimony tending to show that either the local council or the state council intended to waive the operation of any law of the National Order.

The law which the defendant has invoked to defeat the plaintiff's right is one of the state council before quoted. The duty, therefore, which Dillingham's local council failed to perform was owing to the state council, and consisted in a failure to remit to the state council for its maintenance a per capita tax for the members of the local council. So, the case comes to this: The local council failed in the performance of its duty to the state council for five consecutive years, and until the failure became habitual; and the state council knew it, and made no complaint about it until December, 1915; and Dillingham continued to pay his assessments up to his death in February, 1916, with no knowledge of the default of the local council. Upon that state of facts the state council for itself and the National Council through the state council are plainly estopped to set up the breach of law of the state council to defeat the plaintiff's action.

We have not deemed it to be helpful to discuss allied causes cited by counsel, and running from 95 S. C. to 110 S. C. Reports.

The facts of the instant case are not analogous to any of them, except *Fox v. Junior Order*, 110 S. C. 337, 96 S. E. 542, L. R. A. 1918F, 778. But in that case *Fox* was confessedly out, and was trying to get back; in the instant case *Dillingham* is (ideally) in, and the order is trying to put him out.

The judgment is affirmed.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

(113 S. C. 412)

ELLISON et al. v. MATTISON et al.  
(No. 10380.)

(Supreme Court of South Carolina. Feb. 23, 1920.)

WILLS §=734(2)—GRANDSON CLAIMING RESIDUARY ESTATE NOT ENTITLED TO INTEREST ON SHARE.

Where will gave residuary estate to testator's widow for life or widowhood, to be sold and equally divided among children on her death or remarriage, grandson entitled to his mother's one-fifth interest, which could not be ascertained until after sale directed by will, and further uncertain in that accounting for advancements was required, held not entitled to interest on share as against owner of a three-fifths interest, despite long delay.

Watts, J., dissenting.

Appeal from Common Pleas Circuit Court of Anderson County; S. W. G. Shipp, Judge.

Action by Jane E. Ellison against W. E. Mattison, individually and as administrator de bonis non cum testamento annexo of Peter Johnson, deceased, and J. D. Stone. From the judgment, defendant Stone appeals. Reversed.

J. M. Paget, of Anderson, and Carey & Carey, of Pickens, for appellant.

Leon L. Rice, Bonham, Wakins & Allen, A. H. Dagnall, and Sullivan & Cooley, all of Anderson, for respondents.

FRASER, J. The purpose of this action is to require the sale of a tract of land to pay legacies. The history of the litigation will be found in *Mattison v. Stone*, 90 S. C. 146, 72 S. E. 991; *Id.*, 99 S. C. 151, 82 S. E. 1046, and in 98 S. E. 840.

A short statement will now be sufficient to determine the question raised by this appeal:

Peter Johnson dies, leaving a will, in which he provided as follows:

"The residue of my estate real and personal I give and bequeath to my beloved wife, Nancy A. Johnson, to be hers during her natural life or widowhood, and at her death or marriage then the said realty and personalty to be sold and equally divided among my children, and having an eye in such division and settlement to the advances I have already made to them, which advances are hereinafter stated to date. As well shall an eye be had to advances after the date hereof in said division and settlement.

"Furthermore I desire that the portion of my estate that may fall to my daughters N. Caroline Mattison and Mary A. E. Ellison to be theirs during their lifetime and then to their children respectively forever."

The widow and four of the children conveyed to the fifth child, and attempted to convey the whole land in fee, and it has come by successive conveyances to the appellant Stone. It has been held that the Mrs. Mattison and Mrs. Ellison took only life estates, and that their children took the remainder. The respondent W. E. Mattison takes the one-fifth devised to Mrs. Mattison. The rights of W. E. Mattison were passed upon by an order that reads:

"This case was heard by Judge Peurifoy at Anderson, S. C., October term, 1918, and resulted in a decree by which it was decided inter alia that W. E. Mattison was not entitled to participate in the distribution of the proceeds of the land in dispute, because he was barred by the statute of limitation. The decree directed the sale of the land and the payment to the plaintiffs of their one-fifth interest therein. The case went to the Supreme Court, which had filed its opinion holding and deciding that Mattison is not barred by the statute of limitation, and that he is entitled to one-fifth of the proceeds of the land; in other words, the Supreme

Court modified the decision of Judge Peurifoy to the extent of holding that W. E. Mattison is entitled to one-fifth ( $\frac{1}{5}$ ) of the proceeds of the sale of the land of Peter Johnson. Inasmuch as the order made by Judge Peurifoy did not provide for the payment to Mattison of his interest, it is ordered, adjudged, and decreed that, when the judge of probate as special referee had made the sale ordered by the decree, he pay to W. E. Mattison, or his attorneys, one-fifth of the proceeds of the said sale, with interest thereon from the 29th day of April, 1901. This cause was heard by me during the April term of court, and taken under advisement."

The appellant Stone is the owner of three-fifths interests, and appeals from so much of this order as allows to Mattison interest on his share.

No interest can be collected at law under the statute because the amount was not ascertained and could not have been ascertained until after the sale directed by the will. Not only was there uncertainty as to the amount of the proceeds of sale, but there was to be an accounting for advancements, which rendered the amount still further uncertain.

It is supposed, however, that a court of equity with its great power can, in the cause of justice, compensate Mr. Mattison for his long delay in receiving his money under his grandfather's will. This will directed, and it is the law of the case, an equal division of the proceeds of sale. The allowance of interest to Mattison for all these years would give to him more than two-fifths interest. The result of the allowance of interest to Mattison can be clearly seen if we suppose that Stone had bought only one interest instead of three and the others had retained their interests. That would have required one fund, to wit, the proceeds of sale, to be divided into eight-fifths, and this manifestly impossible. Stone not only did not know the amount to pay, but he had no right to pay anything. It may be said that, inasmuch as every one is presumed to know the law, Stone is presumed to have known that a sale was necessary, and that it was his duty to have procured the order of sale, and by proper legal proceedings have ascertained the amount and paid it, and for this failure of duty he must pay the penalty, and this penalty is called interest, which is merely a name, and is the means of doing complete justice. If there were such a presumption (there is no such presumption, as is demonstrated in this and every other case; "Ignorance of the law excuses no one" is the correct statement), then the presumption applies to Mattison as well as to Stone. The law fixes a statute of limitations, and even equity looks with disfavor on stale claims.

Mattison's laches would have destroyed his claim but for the fact that those in like position with him have kept it alive. Matti-

son's claim does not appeal to a court of equity for special favor.

The will is the law of the case, and equity is bound by law of the case. Mattison is entitled to one-fifth of the proceeds of sale. It is said that the Ellisons have received interest. If that be true (it does not appear in this case), one wrong is enough.

The judgment is reversed.

GARY, C. J., and HYDRICK and GAGE, JJ., concur.

WATTS, J. I think the judgment should be affirmed. It is neither justice nor equity to keep persons out of their rights, and then practically penalize them for being deprived of their rights, as is done in the case at bar.

(126 Va. 603)

#### MARTIN'S EX'RS v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. March 30, 1920.)

#### STATUTES §64(4) — INVALIDITY OF EXCEPTION DOES NOT INVALIDATE ACT.

If the provisions of the West fee bill as amended by Acts 1916, c. 472, excepting from the act present incumbents in the city of Richmond, and exempting a county from the act until January 1, 1918, violate Const. art. 4, § 64, prohibiting suspension of a general law for the benefit of any private corporation, association, or individual, the only effect of such violation would be to render the suspension inoperative, and the other provisions of the act would remain in force.

On petition for rehearing. Rehearing refused.

For original opinion, see 102 S. E. 77.

KELLY, P. The petition for rehearing presents no points which have not been fully considered and disposed of, either expressly or by clear implication, in the foregoing opinion, with the exception of the contention, made now for the first time, that the West fee bill (Acts 1914, c. 852) violates article 4, § 64, of the Constitution, providing that no general law shall be suspended in its operation "for the benefit of any private corporation, association or individual." In support of this contention it is pointed out that section 10 of the act provides, that—

"The provisions of this act limiting the compensation of said officers shall not be effective until the expiration of the terms of office of the present incumbents in the city of Richmond."

There is also in an amendment to the act (Acts 1916, p. 792) a provision that the same should not apply to Prince George county until January 1, 1918.



If it be conceded that the act violates article 4, § 64, in the particulars referred to, the only effect of such violation would be to render the suspension inoperative, and the act in all other respects would remain in full force and effect. The provision containing the suspension would simply be treated as a nullity. *Black v. Trower*, 79 Va. 123, 127; *Trimble v. Commonwealth*, 96 Va. 819, 821, 32 S. E. 786; *Robertson v. Preston*, 97 Va. 296, 300, 301, 33 S. E. 618.

The rehearing is refused.

(86 W. Va. 30)

**MORRIS v. RISK.** (No. 3864.)

(Supreme Court of Appeals of West Virginia.  
March 16, 1920.)

(*Syllabus by the Court.*)

1. **VENDOR AND PURCHASER** ⇨16(3)—**WRITING CONSTRUED AS OFFER BINDING ON ACCEPTANCE WITHIN TIME STATED AND BEFORE WITHDRAWAL.**

A writing signed by defendant and delivered to plaintiff, giving him the "exclusive right to purchase or sell," for the period of 30 days, four city lots, describing them and stating the price of each lot and the terms of sale, and allowing plaintiff a commission of \$200 on each of two of the lots on which are located dwelling houses, even though not binding as an option, for want of consideration, is nevertheless a written offer which becomes binding on defendant as a contract of sale on notice of acceptance thereof within the time and before withdrawal thereof.

2. **VENDOR AND PURCHASER** ⇨16(1) — **ACCEPTANCE OF OFFER TO SELL NEED NOT BE IN WRITING.**

Acceptance of such offer need not be in writing in order to convert it into a contract binding on the proponent.

3. **VENDOR AND PURCHASER** ⇨16(1)—**ACCEPTANCE OF WRITTEN OFFER TO SELL HELD ACCOMPLISHED BY NOTIFYING OWNER.**

Under such writing the agent has a right to purchase any or all the lots, and may bind his principal by notifying him, within the time specified and before withdrawal of the offer, that he elects to purchase all the lots at the aggregate price stipulated, less his commission, and pay therefor either in cash or according to the terms of the offer.

4. **VENDOR AND PURCHASER** ⇨183, 153 — **AGREEMENT TO "MAKE TITLE PERFECT AND WARRANT GENERAL" IMPORTS TITLE CLEAR OF INCUMBRANCES WITH GENERAL WARRANTY.**

An agreement "to make title perfect and warrant general," properly construed, is an agreement to convey the property clear of incumbrances and warrant generally the title thereto.

5. **APPEAL AND ERROR** ⇨1068(4) — **WHERE PLAINTIFF WAS ENTITLED TO VERDICT RENDERED ERROR IN INSTRUCTIONS IS NOT PREJUDICIAL.**

Where the uncontroverted evidence shows that plaintiff is entitled to a verdict for at least the amount the jury has found in his favor, this court will not review the instructions to ascertain whether the trial court committed error in respect thereto; for such error, if any, could not have prejudiced defendant.

Error to Circuit Court, Kanawha County.

Action of assumpsit by W. G. Morris against R. E. Risk. Judgment for plaintiff, and defendant brings error. Affirmed.

F. C. Pifer and Morton & Mohler, all of Charleston, for plaintiff in error.

A. M. Belcher and Ben Moore, both of Charleston, for defendant in error.

**WILLIAMS, P.** In this action of assumpsit to recover damages for the alleged breach of a contract for the purchase of four town lots in the city of Charleston plaintiff recovered a judgment for \$700, and the defendant has brought the case here on writ of error.

[1-4] On the 16th of April, 1917, the defendant signed and delivered to plaintiff the following writing:

"For and in consideration of \$1, the receipt whereof is hereby acknowledged, W. G. Morris is hereby given the exclusive right to purchase or sell the following property, at prices and terms below specified, less a commission of \$200 on each house. This agreement to be in force for a period of 30 days from above date. "I agree to make title perfect and warrant general.

"Description and location: No. 216, brick house, 10 room, slate roof, hardwood finish dwelling, 40x130 on Truslow street, east side, \$4,250. No. 218 Truslow, frame, basement in both, slate roof, 10-room house; 2 toilets in each house, 40x130, \$3,900, rent for \$34.

"Price and terms: \$8,000, one-third cash, balance 1 and 2 years.

"2 lots, 40x130 feet each, beside of frame house, being 80 feet, at \$1,200 each, or \$2,400.

"[Signed] R. E. Risk.

"Address: Richwood, W. Va.

"\$10,400."

Within the 30 days plaintiff notified defendant he would purchase the two lots on which were located the dwelling houses at the price of \$7,600, and would pay cash, and defendant refused to execute a deed therefor, claiming he was not bound to sell any lot unless all four of the lots were sold. Plaintiff then informed defendant he would take all four of the lots at \$10,030, and would pay one-third cash, and the balance as called for in the written option or offer, as soon as a deed therefor was executed. In the meantime plaintiff had contracted to sell the two houses, one at the price of \$4,000 to his broth-

er, W. H. Morris, and the other to L. H. Harrison at the price of \$5,000. While there is a great deal of conflict in the testimony, defendant does not deny that plaintiff offered to take the two houses at the price of \$7,600, or all four of the lots at \$10,030. Defendant refused to execute a deed, because the form thereof which plaintiff had had prepared was not satisfactory, and he declined to make a deed either for the two houses and lots or for all four of the lots; and hence this suit to recover damages for the breach of contract. It will be noted that the writing above quoted gave plaintiff the exclusive right either to purchase or sell the lots at prices and on terms stated as to each lot, less a commission of \$200 on the sale of each house, but no commission was provided for in case of the purchase or sale of the vacant lots. It is proven that plaintiff first notified defendant he had sold the two houses, and the contention is made that, having elected to sell, he could not thereafter exercise the option to buy. That depends upon a proper construction of the so-called option. But first it is insisted that because no consideration was paid for the option it was not binding on defendant. But whether it was binding as an option or unilateral contract is not material. It was at least a written offer by the owner to sell at a designated price and on certain terms, and, not having been withdrawn, became a binding contract, enforceable against the vendor, when he was notified of the acceptance thereof by the plaintiff within the time allowed. A written acceptance was not necessary. 6 R. C. L. p. 605. Under the so-called option plaintiff had a right to buy or sell any one or all of the lots, or the right to buy some of them and sell the others, at the price and on the terms stated therein, provided he did so and notified defendant thereof before the offer was withdrawn or before the time expired. Upon such notice it became a contract binding on defendant, and it was his duty to execute a deed for the lot or lots, with covenants of general warranty of title and against incumbrances. This is what the following terms of the writing, "I agree to make title perfect and warrant general," really mean. It was immaterial to defendant whether plaintiff bought the lots himself or sold them to others. Defendant had fixed the price and terms and plaintiff's compensation, and, plaintiff having elected to purchase, he had a right to deduct his compensation, or "commission" as it is called in the writing, from the price which he should pay. Hence his offer to pay defendant \$10,030 for the four lots was an acceptance of defendant's written offer according to its terms, for he had a right to deduct his compensation from the price of the whole, which was \$10,400, including his commissions.

The price and terms being fixed by defendant, plaintiff had no discretion as agent, and it was therefore no breach of his duty as such to sell the lots at a greater price than defendant asked for them, even before he had accepted the offer. All defendant had a right to insist on was the price he had agreed to take. He could not object to receiving all the money in cash, for the option does not provide for interest on the deferred payments and, presumably, they were not to bear interest. Therefore the cash offer was even better for defendant than if made according to the terms of the writing. No tender of the money was made, but an actual tender was not necessary to bind defendant. The acceptance of his written offer bound him. He did not demand the money, but refused to execute a deed for other and insufficient reasons.

The evidence shows that the jury were justified in assessing the amount of damages which they found, and could very properly have found more; but neither party complains of the amount of damages. Although plaintiff moved to set aside the verdict for insufficiency in amount, he later withdrew the motion.

[5] In view of the undisputed facts showing plaintiff's right to recover, the court very properly could have directed a verdict for him. It is therefore unnecessary to consider the alleged errors relating to the giving of certain instructions for plaintiff and the refusal to give certain others for defendant; for such errors, if any were committed, could not have prejudiced defendant.

We find no prejudicial error, and therefore affirm the judgment.

Affirmed.

(85 W. Va. 129)

BANNER WINDOW GLASS CO. v. BARRIAT et al. (No. 3921.)

(Supreme Court of Appeals of West Virginia. March 16, 1920.)

(Syllabus by the Court.)

1. GIFTS §18(1)—AGREEMENT TO MAKE GIFT IN FUTURE IS WITHOUT BINDING EFFECT UNTIL SUBJECT HAS BEEN DELIVERED TO DONEE.

A promise by the holder of stock in a corporation to pay all the dividends thereafter earned thereon to a certain party, for which promise there is no consideration, cannot be enforced. It is simply an agreement to make a gift in the future, and has no binding force or effect until the subject of such gift has been delivered to the donee.

2. CONTRACTS §76—PROMISE OF PARTY TO CONTRACT IS NOT GOOD CONSIDERATION FOR UNDERTAKING OF OTHER PARTY THERETO UNLESS IT IMPOSES LEGAL LIABILITY.

The promise of a party to a contract, in order to be a good consideration for the under-

taking of the other party thereto, must be such as to impose a legal liability. Where the promise relied upon as constituting the consideration for the contract does not impose any legal liability upon the promisor, it will not ordinarily be held to be a sufficient consideration for the undertaking on the part of the other party.

Appeal from Circuit Court, Kanawha County.

Interpleader suit by the Banner Window Glass Company against Leonie H. Barriat, Henry Barriat, and another. Decree for defendant Henry Barriat, and defendant Leonie H. Barriat appeals. Affirmed.

Horan & Pettigrew, of Charleston, for appellant.

A. M. Belcher, of Charleston, for appellee.

RITZ, J. On the 24th of February, 1914, Fernand Barriat and Henry Q. Barriat, brothers, each being the owner of eight shares of the stock of Banner Window Glass Company, executed a writing by which they mutually agreed to pay to their father and mother, or the survivor, all dividends thereafter declared upon said shares of stock. This paper was delivered to the father and by him turned over to the Banner Window Glass Company, and thereafter all the dividends were regularly paid to the father until his death, after which time they were paid to the mother until the controversy here involved arose in the month of May, 1918. Early in 1918 the Banner Window Glass Company sold its plant and properties, and it was ascertained that it had on hand assets, which had been derived from earnings during the time it had been in business, amounting to the sum of \$65,000. It also received \$65,000 in cash for its plant and properties. The \$65,000 which was on hand and which had been earned by the company was declared in a dividend to the stockholders, and it was determined as soon as matters were adjusted to declare the remaining \$65,000 which had been received for the sale of its properties in a like dividend. At this time the defendant Henry Barriat notified the window glass company not to pay any dividends declared on his eight shares of stock in accordance with the writing above referred to, and demanded that such dividends be paid to him; his mother likewise demanding that the dividends be paid to her in accordance with the writing entered into. His brother, Fernand Barriat, also joined with his mother in this demand. This interpleader suit was then brought by the glass company for the purpose of determining to whom the dividends should be paid upon the eight shares of stock held by Henry Barriat, as well as the eight shares held by Fernand Barriat. Pending the suit Fernand assigned and transferred his eight shares of stock to his mother, so that there is no controversy in

regard thereto. Henry filed his answer to the bill, claiming that he was entitled to receive the dividends upon the eight shares of stock owned by him; that the writing entered into between him and his brother was simply an executory contract by which they each agreed to give to their father and mother the dividends upon this stock; and that so far as the same remained unexecuted it could be withdrawn at any time. His mother and his brother contest this right, and insist that the mother is entitled to the dividends. The case was submitted upon an agreed statement of facts, of which the foregoing is a resumé.

[1, 2] It will be observed that there was no consideration passing from the father and mother, the beneficiaries of the paper writing, to either of the sons. It does not appear that either of the sons were under any obligation to support their father and mother, nor is any contention of that sort made in the case; the only contention of the appellants being that Henry Barriat was obliged to carry out his promise made in the writing because it was based on a similar promise made by his brother, while Henry Barriat contends that the promise made in the writing by him is nothing in the world but a declaration of purpose to give the dividends declared on this stock to his parents, and this declaration of purpose to make a gift could be revoked and recalled at any time before the subject of the gift was actually delivered to the donee. That a promise of one may be a valid consideration for the promise of another is well settled. It is equally as well settled, however, that, in order for such a promise to be a good consideration for the promise of the other party, it must be such as legally binds the promisor, so that an action for the breach thereof might be maintained against him. 6 R. C. L. Title "Contracts," § 84; Page on Contracts, §§ 515, 537, 565; Elliott on Contracts, § 231. It therefore ineluctably follows that, in order for the promise of Fernand Barriat to pay these dividends to his father and mother to constitute a valid consideration for the promise of Henry to do likewise, it must be such a promise as that an action could be maintained against him in case of his refusal. There is nothing in the case which shows any consideration passing from any one to either of the brothers for the promise. It was no more than an executory promise to make a gift, and it is well settled that a promise to make a gift in the future is of no effect, and until the subject-matter of the gift has actually been delivered to the donee the donor may withhold performance of his promise. 12 R. C. L. Title "Gifts," § 9. It would seem quite clear, therefore, that if Fernand Barriat had refused to turn over to his mother these dividends declared in the future she could not maintain a suit against him to collect the same, or to enforce the

gift in her favor. This being so, his promise is not such a one as constitutes a valuable consideration for the promise of his brother to do the same thing. It follows, therefore, that inasmuch as there is no valid consideration for the promise upon the part of Henry Barriat he might withhold the gift from the declared object of his bounty at any time before its delivery.

The decree of the circuit court, therefore, holding that Henry Barriat is entitled to receive the dividends in controversy, is plainly right; and the same is affirmed.

(36 W. Va. 71)

YOST v. WILLS et al. (No. 3839.)

(Supreme Court of Appeals of West Virginia.  
March 23, 1920.)

(Syllabus by the Court.)

**1. DAMAGES §80(3)—DEPOSIT BY PURCHASER OF LAND CONSTRUED AS LIQUIDATED DAMAGES FOR BREACH.**

A sum of money deposited in a bank by the vendees in a conditional contract of sale of land, subject to the order of their attorneys, to be credited upon the cash installment of purchase money, in case the vendees should consummate the contract, upon compliance by the vendor with all conditions to be performed by him, and to be forfeited to him in the event of wrongful failure of the vendees to take and pay for the land, is presumptively a sum agreed upon by the parties, as liquidated damages, to be paid to the vendor, in case of breach of the contract by the vendees, unless it appears to be disproportionate to the probable damages resulting from such breach, and, in the absence of proof showing it to be so, it will be deemed and held to have been so agreed upon.

**2. EQUITY §48—SUIT FOR LIQUIDATED DAMAGES IS COGNIZABLE IN EQUITY.**

As the right conferred by such a stipulation does not accrue by forfeiture, and the sum so agreed upon is not a penalty, and the remedy at law is inadequate, a demand for payment of such sum is cognizable in equity.

**3. VENDOR AND PURCHASER §137—CONTRACT CONSTRUED TO LIMIT PURCHASER'S RIGHT TO REFUSE TO TAKE LAND AFTER AN EXTENSION OF TIME FOR PERFECTION OF TITLE.**

A contract of sale of land, so drawn as to give the vendee a right of election to take or refuse to take the land, on failure of the vendor to tender perfect title within a specified period, and on failure of the vendee's attorneys to approve the title on or before a named date, and then to extend the option of the vendee, on his election to take it, after default by the vendor, and the time for perfection of the title, with right in the vendee again to refuse to take it, and closing with a clause forfeiting a deposit made by him, on his failure to take the land, after approval of the title, so construed as to give effect to all of its provisions and terms, limits the right of the vendee to refuse

to take the land, after having elected to take it and thus extend the time for perfection of the title, to a refusal to take, in the manner prescribed by the extension clause, before the title has been perfected and approved by his attorneys, and binds him, in the event of his failure to terminate the agreement before perfection and approval of the title.

Appeal from Circuit Court, Raleigh County.

Bill by Jacob Yost against John Wills and others. From a decree of dismissal, plaintiff appeals. Reversed, and decree entered for plaintiff.

Bumgardner & Preston, of Beckley, and Rudolph Bumgardner, of Staunton, Va., for appellant.

J. W. Maxwell, of Beckley, for appellees.

POFFENBARGER, J. The bill dismissed by the decree appealed from in this cause sought a decree for payment to the plaintiff of a sum of money deposited in a bank, under a contract of sale of real estate, upon the theory that it was a sum agreed upon by the parties to the contract, as liquidated damages, to be paid to the vendor, in the event of a breach of the contract by the vendees. Alleging tender of full and complete performance of the contract, on the part of the defendants, the bill prays for a decree adjudicating title to the fund, \$13,800, and the accumulated interest thereon, in the plaintiff, and requiring the bank to make payment thereof to him.

The contract was for the sale of several tracts of land, having an aggregate area of 6,895.26 acres, in 3,781.17 acres of which the surface and minerals were both included, and in the balance of which only the minerals were included. The price agreed upon was \$40 per acre, making a total of \$275,810.40, of which \$75,810.40, including the deposit of \$13,800, was to be paid July 1, 1917, and the balance in four annual installments of \$50,000 each. The contract was dated April 7, 1917, and the provisions thereof upon which the solution of the problem presented here largely depends read as follows:

"And the parties of the second part have this day deposited in the Bank of Raleigh the sum of \$13,800, to be held by the said Bank of Raleigh, subject to the order of McGinnis & Hatcher, attorneys, until the conditions hereinafter mentioned shall be complied with; that is to say: The said Yost promises and binds himself to be ready to tender within a period of thirty (30) days from this date, to the firm of McGinnis & Hatcher, attorneys of the parties of the second part, a good and sufficient title, which shall be approved by them, and upon the approval of such title by the said attorneys the \$13,800, deposited in the Bank of Raleigh as aforesaid, shall be paid over to the said Yost by the said McGinnis & Hatcher, to be credited by Yost on the payments for the said property hereby agreed to be sold and conveyed

as hereinafter set forth; and the said parties of the second part shall have until the 1st day of July, 1917, to complete the first payment on said property, the said land and minerals this day purchased to be paid for as follows:

"The sum of \$75,810.40, including the \$13,800 above mentioned, to be paid on the 1st day of July, 1917, and the residue of said payments to be made in four (4) annual payments of \$50,000 each, dated July 1, 1917, with interest thereon at 6 per cent., payable semiannually on the 1st days of January and July; said deferred payments to be evidenced by bonds signed by the purchasers of said property and secured by deed of trust on the property above mentioned."

"It is nevertheless understood and agreed that, if the title to the said property is not approved by the attorneys for the said parties of the second part on or before the said 1st day of July, 1917, then this contract is to be null and void, and the said money so deposited in the Bank of Raleigh shall be paid over to the said parties of the second part."

"It is further distinctly understood that, if the party of the first part fails to tender to the attorneys for the said parties of the second part a good and sufficient title to the property, free from all incumbrances, within the thirty (30) days hereinabove referred to, then the said parties of the second part shall have the right to elect whether they take the said property hereinabove described upon the terms herein set forth, or refuse to take it, and if the said parties of the second part refuse to take said property under this clause of this agreement, then the deposit hereinabove referred to shall be repaid to them upon said refusal, and this contract shall be at an end. If, however, the said party of the first part fails to secure the necessary signatures, corrections, and other things necessary to perfect the said title within the said thirty (30) days, and the said parties of the second part elect to take the said property after the expiration of said thirty (30) days, then any number of days after the expiration of said thirty (30) days which the said Yost may require to perfect said title, as aforesaid, shall be added to the time and the final day of purchase, and consummation of this sale shall be extended correspondingly for the same number of days, subject, however, to the following understanding between the parties; that is to say: Any time after the expiration of the said thirty (30) days the said parties of the second part may refuse to take the said property and collect from the said bank the money deposited with it as aforesaid, by giving to the said party of the first part ten (10) days' written notice of their intention so to do, said notice to be mailed to the said party of the first part at his address at Staunton, Virginia, by registered mail."

"It is further understood that, should title be tendered by the party of the first part and approved by the attorneys of the parties of the second part, and the parties of the second part thereafter fail to comply with the other terms of this agreement by the purchase property, under the conditions heretofore set forth, that the \$13,800, to be delivered to the party of the first part upon the approval of title, shall be forfeited to the said party of the first part, and this contract shall be at an end."

[1, 2] In the resistance of the effort to reverse the decree, and as ground for its support, lack of jurisdiction in equity is urged. Since the bill treats the money in question as a sum deposited under an agreement that it should stand and be treated as liquidated damages, in case of a breach of the contract by the vendees and depositors, and be paid over to the vendor, as such, in such case, the bill does not seek enforcement of a forfeiture. Its purpose is procurement of a decree for payment of a fund which, by contract, belongs to the plaintiff. Hence the authorities denying jurisdiction in equity to enforce forfeitures are not applicable. Equity jurisdiction in cases of the kind alleged in the bill was acknowledged and exercised in *Bucklen v. Hasterlick*, 155 Ill. 423, 40 N. E. 561. It was held in that case that the demand asserted by the vendor was not predicated upon the theory of forfeiture and that his title to the fund did not accrue by forfeiture. In this view of the nature of the demand, the court was fully sustained by *Depree v. Bedborough*, 4 Giff. 479, and by the text in *Fry on Specific Performance* (3d Ed.) 1460. In all decisions dealing with stipulations for payment of liquidated damages, such demands are held not to be penalties nor forfeitures. They are treated as demands for money agreed upon as compensation for injuries. Such compensation is in no sense a forfeiture or penalty, when it makes good a property or pecuniary loss.

The remedy at law is not adequate, nor appropriate. If the vendor's claim is well founded he has right to a specific fund not in the hands of the real defendants. He cannot obtain it by suing them at law, though he might obtain an equivalent sum. The alternative, however, is not the measure of his right. He is entitled to the particular fund deposited conditionally for his benefit. If the bank in which it is deposited were holding it as a stakeholder, he might be able to sue the bank alone for it at law; but the bank, not holding it under any agreement between the vendor and vendees to which it is a party, is not, for that reason, a stakeholder. It is a mere depository of the money, holding it under no special agreement. To reach the fund, and obtain possession of it, only the flexible processes of a court of equity are available and efficacious.

[3] The bill admits default on the part of the plaintiff. He was not ready "to tender within a period of thirty (30) days" from the date of the contract, "to the firm of McGinnis & Hatcher, attorneys of the parties of the second part, a good and sufficient title," which they should approve. The consequence of such failure is not left to surmise, speculation, or interpretation of the contract. It is plainly stated in the clause providing for a qualified extension, a contract upon altered conditions, or an option in the ven-

dees. It gave the vendees right of election thereafter to take the property or not. Hence it put it in their power wholly to release the \$13,800 deposited. It expressly provided that, on their election to refuse the property, the money deposited should be paid to them, and the contract wholly terminated. If the election to take, after default on the part of the vendor, provided for in this clause, had been made absolute or left unqualified, the status of the deposit would have been the same after such election as it was before. But in the provision so made the election to take was limited or qualified, so as to make it, in legal effect, a mere option in the vendees to take it or not, as they should see fit; for it stipulated that, in the event of such election, there should be an extension of time for perfection of the title, subject to right in the vendees, "any time after the expiration of the said thirty (30) days," to "refuse to take the said property and collect from the said bank the money deposited with it," by giving 10 days' notice in writing of their intention so to do. The provision for an election to take after default, read in connection with this limitation or qualification, conferred upon the vendees right to refuse the property and take down the deposit, after having elected to take it. It is impossible to read it and interpret it in any other way, if the 30-day period therein referred to is the 30-day period next succeeding the date of the contract; and it must be, because no other such period is anywhere mentioned in the contract. The right to elect to take, and then to refuse, so conferred, made it optional with the vendees whether they would ultimately take and pay for the property. The default gave them such an option for immediate exercise, and the purpose of the latter portion of the clause, providing for election to take and an extension of time, seems to have been indefinite continuation of the option; for that is its manifest effect, if its terms are to govern its interpretation, as they must, unless the words of limitation can be given a restricted function or scope of operation.

They are limited by the last clause, if it is to have effect according to its terms. It necessarily put an additional element or factor into the extension or option clause, by fair and reasonable, if not necessary, implication arising from its terms. It provided that, if title should be tendered by the vendor and approved by the attorneys of the vendees, not within 30 days, nor any other specific period, and the vendees should thereafter fail to comply with the other terms of the agreement, "under the conditions" thereinbefore set forth the deposit should go to the vendor. The conditions thereinbefore set out included those dealt with or made by the option clause, as well as the contract clause. The option clause contemplated, and had for one of its

salient purposes, perfection of the title, perfection thereof for approval, and for a contemplated contract, though that clause is silent as to approval and obligation on the part of the vendees to consummate the contract, from which they might be and were released by the vendor's default. Being so, it is incomplete and indefinite. What was to happen in case the vendor should tender a title approved by the attorneys of the vendees, at any time within their option and before termination thereof by notice? Could they reject it, and still hold their option? If so, what was the purpose of perfection of the title? The clause nowhere countermands the authority of the attorneys to approve a perfect title, which had previously been conferred, nor did it break their hold upon the deposit. The last clause assumes their right to approve title at any time. It imposes no time limit. That limit is found in the option clause, by implication. They could approve until the vendees should elect to terminate their option by 10 days' written notice. If, before such termination, perfect title should be tendered and approved, the contract terminated by the vendor's default was restored. The last clause necessarily means this, if its words are to have full and unrestricted operation. So interpreted, they fit in with all of the conditions previously written. If the vendor should comply with the requirement to furnish good title within 30 days from the date of the contract, and the vendees should fail to perform, the former was to have the deposit. If, through the vendor's fault, the original contract of purchase should fail, and he should subsequently furnish good title, and it should be approved, before termination of the option, and the vendees should fail, then the deposit should go to him. Omission of a time limit on approval in the last clause is highly significant. That is the only clause in the contract that purports to make an award of the deposit to the vendor, as and for his damages for breach of the contract by the vendees, and it makes his right thereto depend upon approval without a time limit, but, of course, within the life of the agreement. The understanding limiting the effect of an election to take after default is itself so limited by the last clause that the right of subsequent election not to take had to be exercised before approval of the title, by termination of the option.

This construction is based upon all of the terms and provisions of the contract and gives every portion of it reasonable and intelligent effect, scope, and operation, agreeably to two well-settled rules of interpretation, and accomplishes the end and purpose of all interpretation of contracts, ascertainment and effectuation of the intent and purposes of the parties. The defendants took the benefit of the option provision of the con-

tract, by a notice dated June 30, 1917, reciting the vendor's default and electing nevertheless to take the property. Their attorneys approved the title not later than July 2, 1917, and, notwithstanding such approval, they refused to accept a deed tendered by the vendor, and also to make the cash payment of purchase money and obligate themselves to pay the deferred installments thereof. Hence the plaintiff's right to a decree is clear, if the fund in question was deposited upon an agreement that it should be paid and accepted as the damages for the breach of the contract.

In amount, the deposit is about 5 per cent. of the contract price of the land; wherefore it cannot be reasonably regarded as disproportionate in amount, in the absence of evidence disclosing or indicating the actual amount of the damages, and there is none. If there had been no deposit, and this amount had been agreed upon as a sum to be paid as liquidated damages, there might be some uncertainty as to the intention of the parties. But the deposit of the agreed amount, placing it beyond the dominion and control of the vendees to whom it had belonged, taken in connection with the stipulation for payment thereof to the vendor, is decisive of the question. *Beury v. Fay*, 73 W. Va. 460, 80 S. E. 777; *Pinkney v. Weaver*, 216 Ill. 185, 74 N. E. 714; *Sedgwick, Damages* (9th Ed.) § 414; 19 Am. & Eng. Ency. L. 413.

Upon the principles and conclusions here stated, the decree complained of will be reversed, a decree entered here requiring the Bank of Raleigh to pay to Jacob Yost, the plaintiff in this cause, the said sum of \$13,800, with the interest accumulated thereon, if any, and the defendants John H. Hatcher and W. H. McGinnis, partners as McGinnis & Hatcher, to give their authority for such payment, by a sufficient order signed by them, or one of them, if required by said bank, and the cause remanded. Costs in the court below, as well as in this court, will be decreed to said Yost.

(86 W. Va. 40)

RYAN et al. v. MONONGALIA COUNTY COURT. (No. 4006.)

(Supreme Court of Appeals of West Virginia. March 23, 1920.)

(Syllabus by the Court.)

1. HIGHWAYS §62—RECORD SHOWING COUNTY COURT'S REFUSAL OF PETITION TO RELOCATE ROAD HELD CONCLUSIVE.

Where the only record evidence of any action taken by the county court upon a petition praying the relocation by that body of a portion of a county road within its jurisdiction shows its consideration of the proposal, refusal to undertake the work, and dismissal of the pro-

ceeding, such evidence generally is conclusive where the alteration or relocation of such road is brought in question.

2. MANDAMUS §31—LIES TO COMPEL JUDICIAL ACTION, BUT NOT TO DETERMINE RESULT.

While ordinarily mandamus lies to compel an inferior tribunal to act upon matters presented for adjudication, if within its jurisdiction, it is not available to require the exercise of judicial discretion or judgment in any particular manner. Its office is to compel the exercise of judicial action, but not to determine what the result of the adjudication shall be.

3. JURY §19(3)—MANDAMUS §28—JURY TRIAL UNNECESSARY IN MANDAMUS INVOLVING NO ISSUE OF FACT.

In a proceeding in mandamus involving no issue of fact, trial by jury is unnecessary. Quere: Whether trial by jury may ever properly be demanded as a matter of right in mandamus proceedings.

4. MANDAMUS §10—REMEDIES PROVIDED FOR ACQUIRING LAND FOR PUBLIC ROAD PRECLUDES MANDAMUS.

Generally there are but three methods by which the public may acquire a valid right to use land owned by another as and for a public road or highway: (1) By condemnation proceeding, with compensation to the property owner for the damage resulting from such forceful taking; (2) by continuous and adverse user by the public during the statutory period, accompanied by some official recognition thereof as a public road by the county court, as by work done on it by a supervisor acting by appointment of that tribunal; (3) by the owner's dedication of the land to the public use, or by his consent to such use given in writing, and acceptance of the dedication by the proper authorities.

Error to Circuit Court, Monongalia County.

Action for mandamus by James Ryan and another against the County Court of Monongalia County. From a final order awarding the writ, defendant brings error. Reversed, and proceeding dismissed.

Stanley R. Cox, of Morgantown, for plaintiff in error.

Lazzelle & Stewart, of Morgantown, for defendants in error.

LYNCH, J. James Ryan, owner of 225 acres of land in Union district, Monongalia county, and his brother, Charles N. Ryan, owner of 200 acres in Preston county, the two tracts being contiguous, by petition applied to the judge of the circuit court of Monongalia county, in the vacation of the court, for a writ of mandamus directed to the county court of that county and its several members to command them "to open or cause to be opened for the use of your petitioners and the public generally as a public county road the said new and relocated Sand Spring road heretofore relocated and opened under the order and direction of said the county court of

Monongalia county on the 2d day of January, 1919, and thereafter used as and for a public road, instead of the old Sand Spring road, by the traveling public generally and by the carrier of the United States mail, until the same was closed by the order, direction, or permission of one of the members of said county court in February, 1919, or shew cause, if any it, the said the county court of Monongalia county, can, why it should not do so." After the defendant county court had filed its answer and return the parties took testimony in vacation before the court in lieu of a jury, and upon the pleadings and proof adduced the latter entered a final order in term time awarding the writ. To review that action this writ of error was granted.

There are upon or within the lands of the Ryans, according to the allegations of their petition for the writ, valuable limestone deposits, and, in order to obtain a better grade than the old road afforded for hauling from the lands stone quarried or crushed thereon, they petitioned the defendant county court during the summer of 1918 to relocate part of the old road, a distance of about 300 yards along and parallel with it, and thereby materially improve the road grade along such portion. The relocation necessitated a change of the road to land owned by others. No formal order authorizing the removal was entered by the court, but one of its members, being assured that the consent of such property owners had been obtained, directed the road supervisor, or patrolman, as he is called by the Good Roads Law, hereafter referred to, to make, and not to exceed \$60 in making, the necessary change. This was done at an expense of \$20 and the relocated road opened to travel on or about January 2, 1919, but was closed a few weeks later by order of another member of the court upon receipt of the protest of the owners whose land was affected by the relocation. To compel the county court to reopen the road is the purpose of this proceeding.

[1] No record evidence of any action taken by the county court upon the original petition of the plaintiffs shows an intention or design on its part to relocate the road as prayed for therein. There is no order authorizing the relief sought, or anything in that regard except the direction given by one of its members to the road patrolman, to which we already have referred. The absence of such record evidence generally is of itself conclusive in such matters where the establishment of a road is brought in question. *Williams v. Main Island Creek Coal Co.*, 83 W. Va. 464, 98 S. E. 511. What the court did and all it did in response to the prayer of the petition, speaking from the record, was to enter an order June 16, 1919, constituting its members a committee "to go upon the ground and view the same and report in writing the advantages and disadvantages which in their opin-

ion will result as well to individuals as to the public from the proposed work, and the grades and bearings of the proposed road, and the facts and circumstances that may be useful to enable the county court to determine whether such work ought to be undertaken by the county," and later to enter a second order July 9, 1919, which contains these recitals:

"And the commissioners of the county court, as a committee of their own body, having been appointed and authorized to view the ground, now here report on the record that they did view the proposed location of the alterations in the public road known as the Sand Spring road in Union district, together with the county road engineer, and that no advantage will result to any individual from the proposed alteration, and the commissioners recommend that the alterations so proposed to the said road be not undertaken by the county court. It is thereupon ordered by the county court that the county court refuse to undertake the proposed work, and that this proceeding be, and the same is hereby, dismissed."

These orders declare in no uncertain terms the entire absence of an intention on the part of the court to commit itself to the establishment of changes or alterations in the Sand Spring road.

[2] Nor is the coercive remedy sought by plaintiffs against the county court proper or available in such a case. By often repeated decisions this court has refused to interfere by mandamus with the exercise by county courts or other inferior tribunals of the discretionary power conferred upon them, such as that bestowed by sections 74, 75, 76, and 78, c. 43, Barnes' Code 1918 (Code Supp. 1918, §§ 1940—73 to 1940—75, 1940—77), being sections of the Good Roads Law passed by the Legislature at its January, 1917, session, respecting the right of such courts to control the location, establishment, alteration, and changes of the public roads and bridges in their counties. The exercise of such power to control is in its nature judicial, and not subject to regulation or direction by mandamus, especially as to the performance in any particular manner of the duties assigned to them by these provisions. The most that a superior court may cause or direct by the writ to be done is to require such courts to act upon the facts presented by petitions as therein prescribed, but not to do or leave undone any act within the scope of their legitimate and discretionary powers. Here the respondent has exercised the right sought to be enforced, and has by its order expressly declined to grant the relief prayed by relators in their petition and refused its consent to the proposed alteration of the road. As authority for these propositions, see *State v. County Court*, 33 W. Va. 589, 11 S. E. 72; *Miller v. County Court*, 34 W. Va. 285, 12 S. E. 702; *Marcum v. Ballot Commissioners*, 42 W. Va. 263, 28 S. E. 281, 36 L. R. A. 296; *Poling v. Board of Education*, 50 W. Va. 374, 40 S. E.



357; *Rose v. O'Brien*, 80 W. Va. 280, 92 S. E. 343.

[3] For the first time in the history of judicial proceedings in this state, so far as we are able to discover, respondents assign as erroneous the failure to submit to trial by jury the questions raised upon the application for the peremptory writ. Whether entitled to it or not, they did not demand such a trial, but appeared and participated in the examination of witnesses without protest or objection on their part; and, further, the decision as to the advisability of relocating the road in question was solely within the sound discretion of the county court and involved no question of fact which could be submitted properly to a jury. Where there is no issue of fact to be decided, a jury is unnecessary. *State v. Anding*, 132 Minn. 36, 155 N. W. 1048; *Lyman v. Martin*, 2 Utah, 136, 149; *People v. Town Board*, 33 Mich. 335; 19 Standard Enc. of Procedure, p. 273. Nothing said in this opinion, however, is to be understood as intended, directly or indirectly, to recognize under any circumstances the existence in this state of a right to trial by jury in mandamus proceedings, whatever may be the rule in other jurisdictions.

[4] But there is another and more fundamental ground upon which plaintiffs' claim to the relief sought must be denied. Omitting from consideration the question of ways of necessity, which is not involved here, there are but three methods by which the public may obtain a valid right to use land owned by another as and for a public road or highway. The first is by condemnation, with compensation to the property owner for the damage resulting from such forceful taking. The second is by continuous and adverse user by the public during the statutory period, accompanied by some official recognition thereof as a public road by the county court, as by work done on it by a supervisor acting by appointment of that tribunal. *Williams v. Main Island Creek Coal Co.*, supra. The third is by the owner's dedication of the land to the public use, or by his consent to such use given in writing, and acceptance of the dedication by the proper authorities. None of these methods was followed in this instance. As to the first, there can be no question; for there is no claim whatsoever that a right of way across the land has been obtained by condemnation. With regard to the second, it suffices to say that the user, even if adverse, continued no longer at most than a month and a half, and the evidence tends to show that only nine days elapsed between the opening and closing of the road. The proof is equally clear with respect to the third. The original and unofficial instruction given by one member of the county court to the road patrolman to relocate the road and expend for that purpose not to exceed the sum named was based ap-

parently upon plaintiffs' assurance that the owners of the land would offer no objection to its use for that purpose. But the evidence shows that they did object, and as soon as the court was informed of their objection it properly acquiesced, and, again unofficially, directed the opened way to be closed.

Upon what ground plaintiffs base the claim of right to compel the county court to reopen such road over the objection of the owners of the land is not clear. The lack of authority thus to pre-empt property owned by others against their will without resort to the formal procedure of condemnation is so palpably apparent that we are unable to see how a different conclusion could have been reached. There is no shadow of foundation upon which plaintiffs' claim can rest.

Other questions presented and briefly discussed upon this motion to reverse made pursuant to and in accordance with the provisions and requirements of section 26, c. 135, Code 1918 (Code Supp. 1918, § 5006), concern the action of the judge in awarding the alternative writ in vacation, and likewise presiding during the examination of witnesses whose testimony was to be read in the form of depositions upon final hearing of the case, and in awarding the peremptory writ, require only brief notice. That a circuit judge may in vacation award an alternative writ is settled affirmatively by the concluding provision of section 3, c. 123, Code (Code 1913, § 4736). That he did not in vacation award the peremptory writ seems obvious from the bills of exceptions. And that he did the other things alleged is immaterial now: First, because respondents did not object, but acquiesced and participated therein; and, second, because apparently no prejudicial or harmful results thereby ensued to them.

But for other sufficient reasons heretofore discussed our order will sustain the motion to reverse and vacate the judgment and dismiss the proceeding.

(86 W. Va. 57)

# WYSONG v. BOARD OF EDUCATION OF TOWN DIST. (No. 3336.)

(Supreme Court of Appeals of West Virginia. March 23, 1920.)

(Syllabus by the Court.)

1. SCHOOLS AND SCHOOL DISTRICTS §90— CONTRACT WITHOUT FUNDS NOT VOID, IF TAX LEVY PROVIDED FOR; PLEA NOT NEGATING SUCH PROVISION BAD.

A contract by a board of education is not, by virtue of section 25 of chapter 45 of the Code (sec. 2062), void and unenforceable because such board may not have the money actually in the treasury with which to perform the contract on its part, if provision therefor has been made by levy of taxes, or bonds authorized though not actually sold, and a plea which does not negative such provision is bad and should be rejected.

**2. SCHOOLS AND SCHOOL DISTRICTS ¶90—  
WHEN CONTRACT BY BOARD OF EDUCATION  
EMPLOYING ARCHITECT IS NOT WHOLLY VOID.**

A contract with such board of education employing an architect to make plans and specifications for a school building, and after the construction thereof is let to contract, to superintend the construction thereof, is not wholly void, though that part of the contract providing for supervision of construction may involve the expenditure of money not so provided for, unless it appears that such board did not at the time of entering into such contract have the funds in hand or provided for to pay the architect for the value of his services for making the plans, and a plea not negating such provision is bad and should be rejected.

**3. SCHOOLS AND SCHOOL DISTRICTS ¶80(1)—  
FAILURE TO GIVE NOTICE OF MEETING OF  
BOARD DOES NOT INVALIDATE CONTRACT, IF  
ALL MEMBERS PRESENT.**

The fact that notice to the members of the meeting of the board at which such contract was entered into was not given, will not affect the validity of such contract if all the members were actually present and participated in the meeting, and a plea of such want of notice which does not allege that at least one of the members of the board was not present should be rejected.

**4. EVIDENCE ¶461(1)—ORAL TESTIMONY AS  
TO UNDERSTANDING OF MEMBERS OF SCHOOL  
BOARD NOT ADMISSIBLE TO VARY WRITTEN  
CONTRACT.**

The fact that some or all of the members of the board may have understood among themselves that the contract with such architect for plans and specifications was to be contingent on the actual sale of bonds authorized, not covered by the contract, will not affect the contract as written or shown by the minutes of the board awarding the contract. The written evidence of such contract can not be changed or varied by oral testimony of such members of their understanding of the contract.

**5. SCHOOLS AND SCHOOL DISTRICTS ¶86(2)—  
RIGHT TO RECOVER FOR PART PERFORMANCE  
WHEN FULL PERFORMANCE PREVENTED BY  
CAUSES BEYOND PARTIES' CONTROL.**

But where such contract is lawful at the time it is entered into, but the full performance thereof by the parties is rendered impossible by some supervening act beyond their control, and the architect has performed the services of making the plans and specifications and is prevented, because of such intervening cause, from performing the whole contract, he will be entitled, in an action for a breach thereof, to recover the value of his services for the part of the contract actually performed by him, upon the principles enunciated in *Atlantic Bitulithic Company v. Town of Edgewood*, 78 W. Va. 630, 87 S. E. 183, and *Bell v. Kanawha Traction & Electric Company*, 83 W. Va. 640, 98 S. E. 885.

Error to Circuit Court, Raleigh County.

Action by A. F. Wysong against the Board of Education of Town District. Directed verdict for defendant, motion for new trial denied, and judgment nil capiat on the verdict,

and plaintiff brings error. Reversed, verdict set aside, and plaintiff awarded a new trial.

Jno. Q. Hutchinson and C. O. Dunn, both of Beckley, and Hartley Sanders, of Princeton, for plaintiff in error.

M. L. Painter, J. W. Maxwell, and Ashworth & Ashworth, all of Beckley, for defendant in error.

MILLER, J. The contract sued on, as averred in the special count relied on, was that in consideration of the undertaking, promise and agreement of the plaintiff with defendant to prepare the architect's plans, drawings and specifications for a high school building to be erected by the defendant in the city of Beckley, and to supervise the erection and construction of said building for the defendant, the defendant on its part undertook, promised and agreed to and with the plaintiff that it, the said defendant, would pay as compensation for the plans, drawings and specifications when prepared by him as the architect, and for the supervision by him of the erection of the said building, a sum equal to five per centum of the estimated contract price of said building, which the declaration averred was the sum of \$30,000.00.

And it is averred that pursuant to the contract plaintiff began and prosecuted the making of the plans, drawings and specifications for said building so to be erected by defendant, but that defendant not regarding its said promise, undertaking and agreement, would not and did not accept the plans, drawings and specifications for said building made and prepared by plaintiff, and would not and did not allow him to supervise the erection and construction thereof, but on the contrary and without the knowledge or consent of plaintiff entered into a new contract with another architect therefor, to the damage of plaintiff \$2,000.00, wherefore he sues, etc.

The declaration contains the usual common counts in assumpsit also, but plaintiff relied on the special count. The defendant in addition to its general plea was allowed to file two special pleas, number 1 and number 2, which were objected to, and exceptions to the rulings of the court thereon saved to plaintiff.

On the trial, after both parties had introduced their evidence, the court on defendant's motion instructed the jury to return a verdict for defendant, which was done. Plaintiff moved for a new trial, which was denied him, and the judgment on the verdict was nil capiat.

The questions first presented by the assignments of error relate to the sufficiency of defendant's special pleas. The first averred that defendant had no authority to make or execute the supposed contract sued on, because defendant was advised and alleged the fact to be that the same would have involved the expenditure of money in excess of the funds

then and there legally at the disposal of defendant. The second averred that defendant at the time of entering into the supposed contract with plaintiff was not convened after due and lawful notice or in regular meeting as prescribed by law, wherefore the contract was void.

[1] The first plea is predicated on section 25 of chapter 45 of the Code (sec. 2062), which makes it unlawful for such board to make any contract, express or implied, the performance of which, in whole or in part, would involve the expenditure of money in excess of funds legally at the disposal of such tribunal, and imposes a penalty upon any officer violating said act. But the statute nowhere says that such contract shall be void and unenforceable. Under and by the very terms of the act officers violating the statute are rendered liable jointly and severally to the state, county or municipality and to any person injured thereby. The plea enlarges on the statute. The statute says, "legally at the disposal of such tribunal;" the plea says, "then and there legally at the disposal of this defendant." The plea implies, if it does not specifically say, that the money must be already in hand. In *Atlantic Bitulithic Company v. Town of Edgewood*, 76 W. Va. 630, 87 S. E. 183, construing this statute, it was held that a contract depending on funds to be derived from the sale of bonds would not be inhibited or rendered void because the bonds authorized therefor have not at the date of the contract been actually sold and the proceeds thereof deposited in the treasury. So we think this plea is defective in the particular that it contains no averment showing that the funds necessary had not been provided for by bonds or otherwise to enable defendant to fulfill the contract.

[2] Another ground which we think renders the plea defective in law is that as the contract pleaded provides for the making of plans and specifications, which would necessarily have to be provided before the letting of the contract for the building, it is not averred that defendant did not have at its disposal when making the contract funds with which to pay plaintiff for these plans, nor in fact is it averred that it did not have sufficient funds to pay plaintiff for superintending the construction of the building. To this objection it is replied that the contract is one of entirety, and the price not apportionable, wherefor the contract is void and unenforceable. But is the plaintiff on this account to be denied the value of his services for the part of the contract performed and which the defendant had the right and authority to make, so far as anything is averred in the plea, because of lack of funds or provision therefor to let the contract for the building? In *Atlantic Bitulithic Company v. Edgewood*, supra, we decided on the facts there presented that plaintiff might recover on the contract the price stipulated not in excess of the

funds provided for. On the principle of that case if plaintiff can establish the value of his services for the work done, why is he not entitled to recover pro tanto? We think he may do so, unless it is impracticable under the rules governing such contracts to measure his damages. He is not suing for his services for the whole contract but for damages for its breach by the defendant. As the contract imposed two obligations on the plaintiff, one the making of plans and specifications, the other for superintending the construction of the building, as to the first of which, for anything averred in the plea, defendant might lawfully have contracted, but for the second of which it may have been prohibited by the statute, the plea should have averred want of funds sufficient to discharge that part of the contract, which it had the right to make. 2 Page on Contracts, § 1036; 1 Elliott on Contracts, § 249.

[3] The second plea, we think, is bad and should have been rejected. The fact that defendant was not convened after due and lawful notice or in regular meeting as provided by law, is not material, if as a matter of fact all the members were actually present and participated in the meeting, a fact not negatived in the plea. *Capehart v. Board of Education*, 82 W. Va. 217, 95 S. E. 838; *Ward v. Board of Education*, 80 W. Va. 541, 92 S. E. 741; *City of Benwood v. Wheeling Railway Company*, 53 W. Va. 465, 44 S. E. 271.

[4] On the trial plaintiff undertook to prove his contract by the record of the resolution of the board of education employing him to furnish the draft of the plans, inspect the materials, and to superintend the erection and construction of said building, for the consideration of five percent of the contract price as might be thereafter awarded by defendant. This in substance was the full record and constituted the only written evidence of the contract. The court over the objection of plaintiff permitted defendant to prove by Martin and others, members of the board of education, that there was some understanding among them, not that plaintiff agreed thereto, that his employment and pay for his services were contingent on the final sale of the bonds of said district, the issuance of which had been submitted to the people of the district and ratified, and which had been offered for sale and a bid therefor accepted, but which the bidder had refused to take because of some supposed defect in the record. We think this evidence to vary the terms of the contract was inadmissible and should have been excluded on the familiar principle that oral testimony is not admissible to contradict or vary the terms of a written contract.

[5] The last point of error assigned which we need to consider, is that the court erred in directing a verdict for defendant. This action of the court was evidently based on the supposed invalidity of the contract because of the matter set up in the pleas, or the supposed

inclusion in the contract that the plaintiff's employment should be contingent on the actual sale of the bonds. The fact that the members of the board of education may have understood that plaintiff's contract was to be contingent on the sale of the bonds, the plaintiff being in no way involved therein and ignorant thereof, being a unilateral mistake, can not be interposed as a defense to the contract. 6 R. C. L. 620-623.

Can the ruling of the court in directing a verdict be justified on the ground that the contract price was not apportionable? The evidence shows that at the time of the contract the bonds authorized had been offered and the bid of a purchaser accepted, and no doubt both parties believed the money would soon be in hand to cover the contract price. In *Atlantic Bitulithic Company v. Edgewood*, supra, as already noted, we decided that a contract made by a municipal corporation in anticipation of funds from the sale of bonds under such conditions is not void simply because the money is not actually in the treasury at the time of the contract. In *Bell v. Kanawha Traction & Electric Company*, 83 W. Va. 640, 98 S. E. 885, we decided that where a contract is lawful at the time it is entered into but before performance is rendered impossible by legislative act or some other supervening cause over which the parties have no control, they will be excused from further performance; but that where one party has paid the full consideration for the contract, in accordance with its terms, and the other party has not performed, or only partly performed, the party who paid the consideration in full is entitled to recover back the consideration paid by him, or its value, in toto or pro tanto, as the failure to perform by the other party is total or only partial.

The contract there involved was a deed for a right of way in consideration of free passes for the grantor and his family during their lives. State and federal statutes subsequently passed rendered performance by the grantee impossible. The question presented was whether the railroad company, from whom the right of way granted could not be recovered, was liable to the grantor in damages. The holding was that the plaintiff was entitled to recover from defendant the value of the unperformed services. In 2 Page on Contracts, § 1035, it is said:

"If A makes a promise to B, consisting of two or more covenants upon valuable and legal consideration, and one of the covenants made by A is void by reason of its subject-matter, but not illegal, then the legal covenant can be enforced whether the contract is severable or inseverable."

The principles upon which the decisions in *Atlantic Bitulithic Company v. Edgewood* and *Bell v. Traction Company* were made to turn, we think, are applicable and controlling here and justify a recovery by plaintiff of the value of his services, for the part of the contract performed, in the nature of a quantum meruit, unless defendant was without funds in hand or provided for by levy or otherwise sufficient to pay therefor. There is not a particle of evidence in the record showing such lack of funds as would render the contract unenforceable. Such being the state of the record it was error on the part of the court to take the case from the jury by directing a verdict.

For the errors committed on the trial, pointed out herein, the judgment will be reversed, the verdict set aside and the plaintiff awarded a new trial.

(179 N. C. 696)

In re FINCH'S WILL (No. 391.)

(Supreme Court of North Carolina. April 14, 1920.)

**APPEAL AND ERROR §1046(5)—COMMENDATION OF COUNSEL WHO DREW WILL HELD NOT PREJUDICIAL.**

Commendation by the trial judge of the high character of counsel who drew the contested will, which might have been prejudicial error on a debatable question, does not require reversal of a judgment sustaining the will, where the only issue on which the comments could have had significance was undue influence, and there were no facts in evidence tending to show undue influence.

Appeal from Superior Court, Davidson County; Bryson, Judge.

Contest of the will of E. J. Finch, deceased, by J. Q. Finch, as caveator, against P. D. Finch and another, propounders. From a judgment for propounders, the caveator appeals. No error.

Issue of devisavit vel non as to the due execution of the will of E. J. Finch, deceased. The jury rendered the following verdict:

(1) Was the paper writing propounded dated April 23, 1918, executed by the testatrix, E. J. Finch, according to the formalities of law required to make a valid last will and testament? Answer: Yes.

(2) At the time of the signing and execution of said paper writing, did the said E. J. Finch have sufficient mental capacity to make and execute a valid last will and testament? Answer: Yes.

(3) Was the execution of the said paper writing propounded in this case procured by undue influence as alleged? Answer: No.

(4) Is the paper writing bearing date April 23, 1918, propounded July 2, 1918, and each and every part thereof, the last will and testament of E. J. Finch? Answer: Yes.

Judgment on the verdict for the propounders, and the caveator excepted and appealed.

A. E. Holton, of Winston-Salem, and Walser & Walser and J. R. McCrary, all of Lexington, for appellant.

Brooks, Sapp & Kelly, of Greensboro, and Phillips & Bower and Raper & Raper, all of Lexington, for appellees.

**PER CURIAM.** Under a full and comprehensive charge the jury have rendered their verdict in favor of the propounders, finding on separate issues that the testatrix had the requisite mental capacity and that there had been no undue influence exerted, and on careful examination we are of opinion that the exceptions of appellant present no substantial objection to the validity of the trial and judgment.

The remarks of his honor in approval of the high character of counsel who drew

the will, however just in themselves, might have become the source of prejudicial error on a debatable question; but, in the way they are presented in the record, these comments could only have had significance on the issue as to undue influence, and there are no facts in evidence which show or tend to show the exertion or effect of such influence by the propounders or any other. This exception, therefore, is immaterial, and must be disallowed.

A perusal of the record will show that the verdict of the jury is fully justified on all the issues, that no reversible error has been made to appear, and the judgment upholding the will should be affirmed.

No error.

(179 N. C. 413)

**CAMPBELL v. CAMPBELL (No. 356.)**

(Supreme Court of North Carolina. April 7, 1920.)

**1. PLEADING §85(5)—DEFENDANT SERVED BY PUBLICATION ENTITLED TO TWENTY DAYS FROM DATE OF LAST PUBLICATION IN WHICH TO ANSWER.**

Where service is by publication, defendant is entitled to 20 days from last day of publication in which to answer, under Laws 1919, c. 304, § 1, providing that summons shall be made returnable before the clerk at a date named therein, not less than 10 nor more than 20 days from the issuance of writ, notwithstanding the 20-day period from issuance of writ expired before last day of publication.

**2. DIVORCE §161—DEFAULT JUDGMENT RENDERED PREMATURELY WILL BE SET ASIDE.**

In divorce action, where service was by publication, and where last day of publication was August 23d, a default judgment rendered a the August term will be set aside for irregularity, since defendant was entitled to 20 days from August 23d in which to answer or demur.

**3. PLEADING §85(1) — DEFENDANT'S RIGHT TO 20 DAYS TO PLEAD NOT RESTRICTED BY STATUTE AS TO PRESUMED DENIAL.**

Defendant's right to "20 days in which to answer or demur" is not taken away by Revisal 1905, § 1564, providing that material facts in divorce complaint shall be deemed denied by defendant.

**4. JUDGMENT §379(1)—SHOWING OF MERITORIOUS DEFENSE BEFORE SETTING ASIDE.**

In a proceeding to set aside a judgment either for irregularity or excusable neglect, the mover must show that it has a meritorious defense.

**5. DIVORCE §161 — MERITORIOUS DEFENSE NOT NECESSARY TO SETTING ASIDE DIVORCE JUDGMENT.**

The rule that a meritorious defense must be shown in order to have judgment set aside for irregularity or excusable neglect does not apply to an action for divorce, since in such

action it is presumed as a matter of law that there is a meritorious defense, and the facts must be found by a jury under proceedings that are regular on their face.

Appeal from Superior Court, Surry County; McElroy, Judge.

Action by J. S. Campbell against Mary J. Campbell. On motion to set aside judgment for plaintiff on ground of surprise and irregularity. Motion allowed, and plaintiff appeals. Affirmed.

J. H. Folger, of Mt. Airy, R. C. Freeman, of Dobson, and Carter & Carter, of Mt. Airy, for appellant.

Graves & Graves, and W. L. Reece, of Dobson, for appellee.

CLARK, C. J. The summons was issued July 21, returnable August 8 before the clerk, under the provisions of Laws 1919, c. 304:

"To restore the provisions of the Code of Civil Procedure in regard to process and pleadings, and to expedite, and reduce the cost of litigation."

The defendant being out of the state, service was ordered to be made by publication. The time required for publication terminated August 23, 1919.

[1] As section 1 of said act provides that the summons shall be made returnable before the clerk "at a date named therein, not less than 10 days, nor more than 20 days from the issuance of said writ," and service by publication not having been completed on August 8, the time was necessarily extended by operation of law till the expiration of the four successive publications required by statute to perfect service. The complaint was filed July 21, and publication being completed by August 23, the defendant was entitled to 20 days thereafter to answer or demur.

This is the clear meaning and intent of this statute, and was so held at this term by Walker, J., in *Lumber Co. v. Arnold*, 179 N. C. —, 102 S. E. 409. We repeat it, as the profession is desirous of a construction of the statute, wherever there is any possibility of a doubt.

The defendant being entitled to 20 days from August 23 in which to answer or demur, the case could not stand for trial at the term of court beginning August 25, unless the defendant had waived it by an appearance, or by filing a demurrer or answer.

[2] This was an irregularity upon the face of the record, and the judgment was properly set aside on that ground. We may say that exactly the same proceeding should be followed where there is an attachment issued, and publication there as the basis of service. Such publication requiring a longer time than the 20 days specified for the return of the summons before the clerk, as a matter in due course the cause stands over until the publi-

cation is completed, after which date the defendant is entitled to 20 days, if he so elect, in which to file his answer or demurrer, unless he shall raise an issue by filing a demurrer or answer within less time.

[3] The plaintiff in this case insists that, this being an action for divorce, the law puts in a denial, and therefore the defendant was not entitled to "20 days in which to answer or demur." We do not so understand the law. Rev. § 1564, provides:

"The material facts in every complaint asking for a divorce shall be deemed to be denied by the defendant, whether the same shall be actually denied by pleading or not, and no judgment shall be given in favor of the plaintiff on any such complaint until such facts have been found by a jury."

The object of this statute was to prevent judgment being taken by default, or by collusion, and to require the facts to be found by a jury. It certainly was not intended thereby to deprive the defendant of the right given to every other defendant of 20 days in which to file complaint or answer. If at the end of such 20 days no answer or demurrer is on file the plaintiff is entitled to judgment by default final, or by default and inquiry, as the case may be, in all other actions, but in divorce cases if no answer or demurrer is filed within 20 days the law provides that the complaint is nevertheless deemed denied, and its material allegation must be proven to the satisfaction of the jury.

Within the 20 days the defendant may file an answer, going beyond the bare legal denial presumed by law, for she may set up affirmative defenses, such as invalidity of marriage, justification, condonation, connivance, recrimination, and statute of limitations. 14 Cyc. 671.

Under the original Code of Procedure adopted in 1868, the intention was to simplify and expedite the trial of causes and to reduce the expense of legal proceedings. The most marked features of this new procedure probably were:

(1) The abolition of the distinction between law and equity, and between forms of actions and to provide that there should be only one form of action. Const. art. 4, § 1.

(2) The other striking feature of the new procedure was that all summonses should be returnable before the clerk, and that all pleadings should be made up and perfected before him; that when an issue of law is raised an appeal should lie to the judge at chambers, and to be promptly acted on by him and returned, and, further, that when an issue of fact arose upon the pleadings and in such case only, the cause should be transferred to be tried before the judge at term. This eliminated very much delay and expense in legal proceedings, for no cases could be on the docket before the judge at term for trial except those in which issues

of fact had been formulated before the clerk by the pleadings.

This system has been continued in all the states, unchanged, in which the new procedure had been adopted, it is believed, except in this state. In this state, at that time, our people were much embarrassed by the results of the war, and, instead of desiring expedition in the determination of actions, there was a desire to put off as long as possible the rendition of judgments for debt. Accordingly what was commonly known as the "Batchelor Act" entitled "An act suspending the Code of Civil Procedure in certain cases," chapter 76, Laws 1868-69, ratified March 22, 1869, was enacted, which provided that summonses should be made returnable to the term instead of before the clerk. This act provided, section 13, that the suspending act should be temporary and in force only "until the first day of January, 1871." But owing to the financial conditions of the time it was later continued indefinitely and then by oversight, though contradictory to the concept and intent of the Code of Civil Procedure (which required all process to be issued returnable before the clerk) it has endured to this time, though such anomaly has not obtained, it is believed, in any other state.

The Suspending Act was discussed in *McAdoo v. Benbow*, 68 N. C. 461; there being a dissent upon the ground that the act was unconstitutional. The statute of 1919 (chapter 304), known as the "Crisp Act," was intended, as expressed in its title, simply "to restore the provisions of the Code of Civil Procedure in regard to process and pleadings, and to expedite and reduce the cost of litigation." The Suspending Act was an anomaly, grafted upon the simple and expeditious system of the Code of Civil Procedure, as it was originally adopted here, and as it has continued to prevail in all the other states that adopted it. Such suspension was intended, as stated in the act, to be temporary.

The motion to set aside the judgment was made upon the ground of surprise and also for irregularity. But the latter ground being sufficient, the other defect need not be discussed, and indeed seems not to have been considered by the judge.

[4, 5] It is true that in a proceeding to set aside a judgment either for irregularity or excusable neglect the mover must show that it has a meritorious defense. *Miller v. Curl*, 162 N. C. 4, 77 S. E. 952; *Currie v. Mining Co.*, 157 N. C. 209, 72 S. E. 980; *Scott v. Life Asso.*, 137 N. C. 516, 50 S. E. 221. But that does not apply as to an action for divorce, for it is presumed as a matter of law that there is a meritorious defense, and the facts must be found by a jury under proceedings that are regular on their face.

Affirmed.

BROWN et al v. JACKSON, Sheriff, et al.  
(No. 289.)

(Supreme Court of North Carolina. March 31, 1920.)

1. TAXATION  $\S$  122—CORPORATION MUST PAY TAX ON CAPITAL STOCK FOR STOCKHOLDER TO BE EXEMPT.

Under Machinery Act 1917, § 4, for a stockholder to claim the exemption in case of a domestic corporation, it must appear that the corporation itself pays a tax on the capital stock, and, where that does not appear, the stockholder is not entitled to the exemption.

2. TAXATION  $\S$  169—CORPORATION HELD SUBSIDIARY OF FOREIGN CORPORATION SO THAT HOLDER OF STOCK CANNOT ESCAPE TAXATION.

The Atlantic Coast Line Railroad Company of Virginia, which was incorporated in North Carolina as a corporation of that state by Pub. Laws 1899, c. 77, is a subsidiary of the Atlantic Coast Line Railroad Company of Virginia, and as such issued no capital stock, so a holder of stock of the Virginia company cannot escape taxation on such stock by reason of the incorporation in North Carolina.

3. TAXATION  $\S$  169—HOLDER OF STOCK OF FOREIGN CORPORATION NOT ENTITLED TO EXEMPTION WHERE CORPORATION DOES NOT PAY FRANCHISE TAX.

The holder of capital stock issued by the Atlantic Coast Line Railroad Company, a foreign corporation, cannot escape taxation under Machinery Act 1917, § 4, declaring that no individual stockholder of any foreign corporation is required to pay taxes on its capital stock, if two-thirds of its entire property is situated and taxed in the state and the corporation pays a franchise tax on its entire capital stock; the two requirements fixed not being met.

Allen, J., dissenting.

Appeal from Superior Court, New Hanover County; Stacy, Judge.

Suit by John H. Brown and others against George C. Jackson, Sheriff of New Hanover County, and others. From a judgment dissolving an injunction, plaintiffs appeal. Affirmed.

An injunction was issued in this case restraining the defendant from collecting taxes assessed and levied upon certain shares of stock issued by the Atlantic Coast Line Railroad Company of Virginia and belonging to the plaintiff and his associates. The injunction was returnable before Stacy, judge, in the county of New Hanover, on the 29th day of July, 1919. His honor dissolved the injunction, and the plaintiffs appealed to the Supreme Court.

J. O. Carr, of Wilmington, and Tillett & Guthrie, of Charlotte, for appellants.

Jas. S. Manning, Atty. Gen., Frank Nash, Asst. Atty. Gen., and Marsden Bellamy, for City of Wilmington.

Robert Ruark, of Wilmington, for New Hanover County.

**BROWN, J.** This action is brought to enjoin the sheriff of New Hanover county from collecting taxes upon the shares of stock issued by a corporation called the Atlantic Coast Line Railroad Company of Virginia, owned by the plaintiffs, all of whom are residents and citizens of the state of North Carolina. It is contended that the plaintiffs are not required to list or pay the taxes upon said stock under the Machinery Act of 1917, chapter 231, latter part of section 4, which reads as follows:

"Individual stockholders in any corporation, joint-stock association, limited partnership or company paying a tax on its capital stock shall not be required to pay any tax on said stock or list the same, nor shall corporations legally holding capital stock in other corporations upon which the tax has been paid by the corporation issuing the same be required to pay any tax on said stock or list the same.

"Nor shall any individual stockholder of any foreign corporation be required to list or pay taxes on any share of its capital stock, if two-thirds in value of its entire property is situated and taxed in the state of North Carolina, and the said corporation pays a franchise tax on its entire issued and outstanding capital stock at the same rate as paid by domestic corporations."

The General Assembly for a long number of years has required domestic corporations to pay the tax upon the corporate stock, and when so done the shareholder is not required to list the stock for taxation. It is not necessary for us to discuss the reasons which have prompted the General Assembly to subsequently re-enact the above quoted statute for so many years.

[1] In order that the stockholder shall get the benefit of the statute, it must appear not only that the corporation is a domestic corporation, but that the corporation itself pays a tax on the capital stock. In the answer of the Tax Commission in this case, it is expressly denied that—

"The said corporation has paid taxes upon any valuation of its property which included the value of the capital stock of the Atlantic Coast Line Railroad Company, or that the said Company pays a tax on its capital stock in this state."

There is no evidence whatever in this record nor any finding of fact to justify the conclusion that the Atlantic Coast Line Railroad Company pays taxes upon its capital stock to the state of North Carolina.

[2] We agree with the learned counsel that the Atlantic Coast Line Railroad Company of Virginia is a corporation of the state of North Carolina, and that it was so decided in *Staton v. R. R.*, 144 N. C. 145, 56 S. E. 794, and affirmed in *R. R. v. Spencer*, 166 N. C. 522, 82 S. E. 851.

While this is true, there is another corporation known as the Atlantic Coast Line Railroad Company of Virginia which was incorporated by the Legislature of Virginia and is a foreign corporation.

The Atlantic Coast Line Railroad Company referred to in the *Staton* Case is a domestic corporation created by the General Assembly of North Carolina on the 13th day of February, 1899, chapter 77, Acts 1899, the title of the act being as follows:

"An act to ratify the consolidation of the Petersburg Railroad Company with the Richmond and Petersburg Railroad Company, under the name of the Atlantic Coast Line Railroad Company of Virginia, and to incorporate the said Atlantic Coast Line Railroad Company of Virginia in North Carolina."

This is the only statute enacted by any General Assembly of North Carolina relating to this matter. It creates a North Carolina corporation by the same title as the Virginia corporation and enables it to own and operate certain railroads, etc., upon condition that the property of the said Atlantic Coast Line Railroad Company of Virginia, in this state, shall always be liable to taxation under the Constitution and laws of this state, and that the said corporation shall be subject to the tariffs, rules, and regulations prescribed by the Board of Railroad Commissioners.

It is a well-known fact that, prior to that act, the Wilmington & Weldon Railroad Company, a part of the Atlantic Coast Line system, claimed entire exemption from taxation on its property under the terms of its original charter. This act of 1899 contains no special provisions fixing the amount of the capital stock, the number of shares, or the conditions under which it may be issued. It is perfectly apparent that there was no purpose to issue any stock certificates under the authority of that act, and it is not claimed that any were ever issued by its authority.

It seems to us too plain for argument that there are two corporations called by the name of Atlantic Coast Line Railroad Company of Virginia, one created by the Legislature of North Carolina, a domestic corporation, hereinbefore referred to, and one created by the Legislature of Virginia, which is a foreign corporation.

The North Carolina corporation is simply an ancillary corporation of the Atlantic Coast Line system, which is empowered to own property and may sue and be sued, but has never issued any stock. All of the stock



of the Atlantic Coast Line was issued by the parent corporation chartered by the Legislature of Virginia, which is plainly a foreign corporation. The stock certificates, themselves, show on their face that they were issued by a corporation "incorporated under the laws of the state of Virginia." Thus it is manifest that the plaintiff's stock was not issued by a domestic corporation and by authority of the state of North Carolina, but by a foreign corporation and by authority of the state of Virginia.

[3] In order that the plaintiffs may avail themselves of the latter clause of the act of 1917, hereinbefore quoted, the statute is peremptory that it must appear that two-thirds in value of the entire property of the Atlantic Coast Line Railroad Company of Virginia (the foreign corporation) is situated and taxed in the state of North Carolina, and that the said corporation pays franchise tax on its entire issued and outstanding capital stock at the same rate as paid by domestic corporations. Nothing of that sort appears in this record, and we do not understand that it is claimed that it does.

It is said that this stock has not been listed for taxation by its owners under the generally accepted belief that it was not required and that this interpretation of the law has been heretofore acquiesced in by the state taxing officials. This may be true, as the matter has never been brought to this court before. While the writer sincerely regrets the misunderstanding and consequent disappointment to owners of the stock growing out of such misunderstanding, yet each judge must interpret the legislative will as he finds it written according to his sincere convictions, and to the majority of this court the conclusion seems to be irresistible that the plaintiffs' stock was issued by a foreign corporation, and, being owned by citizens of North Carolina, it is subject to the tax levied by the General Assembly, inasmuch as it does not come within the exception contained in the statute.

The Southern Railway is a Virginia corporation, chartered by the Legislature of that state. Its stock is issued, just as the Atlantic Coast Line stock is issued, by authority of the Legislature of Virginia. The stock of the Southern Railway owned by citizens of North Carolina has always been required to be listed for taxation.

In conclusion, we do not question the validity of the statute hereinbefore quoted, which has been the legislative tax policy of this state for so many years. Acting within its constitutional powers, it is for the Legislature to determine the subjects of taxation, and it is not ours to declare what it shall include and what it shall omit.

Affirmed.

WALKER, J., not sitting.

CLARK, C. J. I concur fully in the opinion of Mr. Justice Brown for the court in this case, who makes it entirely clear that the Atlantic Coast Line of Virginia as chartered by the state of Virginia is alone authorized to issue the stock, and that the North Carolina incorporation of the same is an ancillary, or subsidiary corporation, without authority to issue stock, and which in fact has issued none. It was incorporated in this state for the purpose of making it a domestic corporation, that our courts might have jurisdiction of its operations here. This was done at a time when it was necessary to procure a recharter of that part of its line which lay between Weldon and the Virginia state line, which this state refused to do except upon the condition that it should become a North Carolina corporation for the purpose of jurisdiction and of control by the state of its operations in this state. Chapter 544, Laws 1891; Allen, J., in *Cox v. R. R.*, 166 N. C. 656, 82 S. E. 979; chapters 100 and 284, Pr. Laws 1893. In the same manner this state has required the domestication here of insurance and other companies before authorizing them to do business in this state, but did not authorize this company nor the other companies thus incorporated here to issue stock. Rev. §§ 1194, 3900-3902, 4747.

In *Cox v. Railroad*, 166 N. C. 654, 82 S. E. 980, Allen, J., says that it had been held in the *Staton Case*:

"From an examination and consideration of the acts of the General Assembly of this state, the defendant was a domestic corporation, at least in so far as it was necessary to give the courts of this state jurisdiction over causes of action arising in this state."

I also concur in the ruling that if this were a domestic corporation, even then under the terms of the statute the stock would not be exempt from taxation, though that matter is purely hypothetical and obiter dictum in view of the holding that this is stock in a foreign corporation.

However, as this matter has been dwelt upon in the dissenting opinion, it is not improper for me to say that in my opinion, even if this stock had been issued by a domestic corporation, the Legislature has no power to exempt it from taxation, and therefore the court should be very slow to assume that the Legislature passed an act that is unconstitutional.

The Constitution of North Carolina, art. 5, § 3, provides:

"Taxation shall be by uniform rule and ad valorem. Laws shall be passed taxing, by uniform rule, all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise; and also, all real and personal property, according to its true value in money."

There is such a thing as "collecting taxes at the source," which originated probably in the National Banking Act, and the Legislature might direct that the taxes upon the stock in any corporation should be deducted from the dividends, if any, declared in favor of each stockholder, and that the companies shall pay the same direct to the state treasurer and to the sheriff of the county where each stockholder resides, and upon certificate thereof each stockholder should be exempted from further tax thereon; but that is not what is asserted here, which is merely that, if the company pays taxes on its capital stock, a very small tax upon the company itself, that the stockholders shall be exempt from payment of all taxes upon their individual property, i. e., the stock which they hold.

John H. Brown is the sole plaintiff in this case, and George C. Jackson, sheriff of New Hanover, and T. D. Meares, clerk and treasurer of Wilmington, are the only defendants. The Atlantic Coast Line Railroad Company has no possible interest in this controversy and hence is not a party.

The plaintiff not only admits but alleges in his complaint as the basis of his action that he is the *owner* of the 50 shares of stock which he asks us to declare exempt from taxation and that other *owners* of such stock will be benefited by the exemption if we accord it to him.

Shares in a corporation are the individual property of each stockholder and are not the property of the corporation. The shares of stock are not assets of corporations, but are always charged up in their reports as a "liability." The certificate of shares is a receipt or due bill for the money paid in, or supposed to be paid in, by the holder, and on which he expects to receive dividends in lieu of interest. Consequently, each stockholder is liable for the tax upon his own property and cannot be exempted from taxation by any statute on the ground that the company pays taxes upon its own property.

In *Commissioners v. Tobacco Co.*, 116 N. C. 446, 21 S. E. 424, this court held, in accordance with the decision rendered by Chief Justice Smith in *Belo v. Com'rs*, 82 N. C. 415, 33 Am. Rep. 688, and of Ashe, J., in *Worth v. Railroad*, 89 N. C. 305, and indeed in accordance with all legal authorities and textbooks, as follows:

"As to corporations, by all the authorities, it is in the power of the Legislature to lay the following taxes, two or more of them in its discretion at the same time: (1) To tax the franchise (including in this the power to tax also the corporate dividends). 2. The capital stock. 3. The real and personal property of the corporation. This tax is *imperative* and not discretionary under the ad valorem feature of the Constitution. 4. The shares of stock *in the hands of the stockholder*. This is also *imperative* and not *discretionary*."

This last, of course, is due by the owner thereof, the stockholder.

It is further said in the same case on the identical point presented here as follows:

"Originally the tax upon the shares of stock was collected of the individual shareholders at their several places of residence. *Buie v. Com'rs*, 79 N. C. 267. But under that method many shares failed to be listed for taxation. Besides, the shares of nonresident owners, except those of national banks, escaped taxation in this state under the ruling in *Railroad v. Com'rs*, 91 N. C. 454. To remedy this, the provision was passed which is section 14 of chapter 296, Laws 1893 [which has been substantially re-enacted at every session of the Legislature since], and which requires the list of shares to be given in by the proper officer of the corporation which shall pay the same in behalf of the shareholders. This does not affect the liability of the shares to tax as the property of the shareholders, but is simply for the convenience of the state in collecting the tax. The effect is merely to change the situs of the shares for taxation from the residence of the owner to the locality where the chief office of the corporation is situated, as was held in *Wiley v. Com'rs*, 111 N. C. 397 [16 S. E. 542]. It simply extends to the collection of taxes due by shareholders in other corporations the mode of collection already in force as to shareholders in National banks. \* \* \*

"The capital stock belongs to the corporation. The shares or certificates of stock are entirely a different matter. They belong to the shareholders individually, and under the Constitution must be taxed ad valorem like other 'property' belonging to the holder, independently of the taxation upon the corporation, its franchises, etc."

This case has been cited with approval. *Com'rs v. S. S. Co.*, 128 N. C. 559, 39 S. E. 18; *Lacy v. Packing Co.*, 134 N. C. 571, 47 S. E. 53; *State v. Wheeler*, 141 N. C. 775, 53 S. E. 358; *Land Co. v. Smith*, 151 N. C. 72, 65 S. E. 641; *Pullen v. Corporation Commission*, 152 N. C. 554, 68 S. E. 155, 58 L. R. A. 590, 594, 601, note, 60 L. R. A. 367, note.

To the same effect are the decisions throughout the country which can be found grouped in the elaborate notes to *State Board v. Goggin* (Ill.) 58 L. R. A. 513-618, which cite the above case at pages 590, 594, 601. On page 594 it quotes from Chief Justice Waite in *Tenn. v. Whitworth*, 117 U. S. 129, 6 Sup. Ct. 645, 29 L. Ed. 830, as follows:

"In corporations four elements of taxable value \* \* \* are sometimes found: (1) Franchises; (2) capital stock in the hands of the corporation; (3) corporate property; and (4) shares of the capital stock *in the hands of the individual stockholders*."

In *Pullen v. Corporation Commission*, 152 N. C. 553, 68 S. E. 157, Manning, J., for the court says:

"It is likewise well settled by the language of our state Constitution, by many decisions of

this court, and of the Supreme Court of the United States, and now generally accepted law, that the property of a shareholder of a corporation in its shares of stock is a separate and distinct species of property from the property, whether real, personal, or mixed, held and owned by the corporation itself as a legal entity. It would be useless to cite authority to support a proposition so well established and generally accepted."

Brown, J., in the same case, concurring, says at page 582 (68 S. E. 162):

"I agree, also, that it is well settled that the shares of stock in any corporation, when owned by individuals, are separate and distinct property from the assets of the corporation and may be taxed as such."

In the same case Hoke, J., at page 582 of 152 N. C., at page 171 of 68 S. E., says, quoting from *Bank v. Tenn.*, 161 U. S. 146, 16 Sup. Ct. 456, 40 L. Ed. 645:

"The capital stock of a corporation and the shares into which such stock may be divided and held by individual shareholders are two distinct pieces of property. The capital stock and the shares of stock in the hands of the shareholders may both be taxed, and it is not double taxation. *Van Allen v. Assessors*, 3 Wall. 573 [18 L. Ed. 229]; *People v. Commissioners*, 4 Wall. 244 [18 L. Ed. 344], cited in *Farrington v. Tennessee*, 95 U. S. 687 [24 L. Ed. 558].

"This statement has been reiterated many times in various decisions by this court, and is not now disputed by any one."

The stock held by each shareholder in a corporation is the individual property of the shareholder to be sold, devised, or disposed of at his will alone. It is in no sense the property of the corporation, or in any wise subject to its control, and the General Assembly under the Constitution must tax it as the property of the owner by uniform rule. It cannot be exempted from taxation in the hands of the owner because the corporation is required to pay tax upon its own property or privileges.

This action seeks to secure by judicial construction the exemption from taxation of, it is estimated, \$4,000,000 of Atlantic Coast Line stock owned by residents of this state, and thus make it a "nontaxable 7 per cent. stock." This would throw upon those not able to own such stock—upon the laborers, farmers, and others who create the wealth of the state, in addition to their own taxes already sufficiently high—the payment of this tax which should be paid (under the Constitution and in justice) by those who are able to invest their surplus in the stocks of this corporation.

By Ordinance 34, Convention of 1866, those in control of the Wilmington & Weldon Railroad Company (the predecessor to this corporation) which had been largely built by the issuance of state bonds, procured the privilege under which every holder of \$1,000 of

any valid state bonds (which a few years later were refunded by the state at 40 cents, i. e., \$400, in new 4 per cent. bonds) could present it to the state treasurer and would receive in exchange ten shares of the state's \$1,500,000 stock in the then Wilmington & Weldon Railroad. This stock by the process of watering its shares and distributing bonds as bonuses to its stockholders is now worth \$40 or more for every \$1 so invested. See *Allen, J., Cox v. R. R.*, 166 N. C. at page 655, 82 S. E. 979. This should be sufficient without now exempting this stock from all burdens of the state, county, and city governments, on the alleged ground that the corporation pays taxes upon its own property, for which it is liable like all property holders.

There was a time when this corporation and also the Seaboard Air Line Railway (and the predecessors of both) claimed and obtained for many years an exemption from taxation on their property. This exemption from all taxation by the corporation itself continued down till 1892, when, in *R. R. v. Alsbrook*, 110 N. C. 137, 14 S. E. 652, it was declared that such exemption was contrary to the state Constitution which required a uniform taxation on all property and the exemption was held invalid. On a writ of error to the United States Supreme Court, this decision was, in every respect, affirmed (*R. R. v. Alsbrook*, 146 U. S. 279, 13 Sup. Ct. 72, 36 L. Ed. 972), and it has often since been cited as authority. See citations in *Anno. Ed.*

It would be sardonic to restore this exemption from taxation which was taken from the company itself by transferring the exemption to the stock in the hands of the stockholders. Indeed, if the stock of one corporation can be exempted from taxation because the corporation pays tax on its own property, then the stock of every corporation in the state can be thus exempted, and there will be a gross partiality in exempting "stocks" which are named in the Constitution as liable for taxation *ad valorem*, while all others must pay taxes on their property of every description. There is no reason why those rich enough to invest in stocks shall be exempted from taxation which will thus be thrown upon those who have no surplus to invest in that manner. If stockholders can be exempted from taxation on their stocks because the corporation pays tax on its own property, with equal reason the mortgage bonds issued by such corporations should be exempt because the corporation pays taxes on the property covered by the mortgage.

Of all times, when high taxation causes complaint, there should be equality, and no special privileges by reason of the exemption of the property of those who are best able to bear it.

The Constitution of this state, art. 5, § 3,

specifies the only property which may be exempted from taxation, and in it there is no authority to the Legislature to exempt the *owners* of the "stocks" and "bonds" of any corporation from payment of taxes upon the true value thereof because the corporation has paid taxes (as it rightly should do) upon its own property nor for any other reason. In that same article, § 5, there is authority to exempt "wearing apparel, arms for muster, household and kitchen furniture, the mechanical and agricultural implements of mechanics and farmers, libraries and scientific instruments, or any other personal property, to a value not exceeding \$300." But the state has felt so poor that every farmer and mechanic for more than 50 years has been required to pay taxes on his clothing for his family, his household and kitchen furniture, his blacksmith's and farming tools and plows "above \$25," until, the matter being called to the attention of the Legislature (see concurring opinion in this court, *Wagstaff v. Highway Commission*, 177 N. C. at bottom of page 360, 99 S. E. 1), this exemption was raised to \$300 for the first time by the Legislature of 1919.

Those who labor and toil have been required to pay taxes on everything above \$25—on their pots and pans, the washing tub of the washerwoman, the farmer on his plows, the blacksmith on his tools, and every one on everything above \$25. This has been the policy of this state as declared by the Legislature. We are now asked to say that the Legislature, contrary to the equality of taxation required alike by the Constitution and by justice, had power to exempt, and has exempted, the owners of more than a million dollars of the best property in the state, the stock of its most prosperous corporation, from paying any share of the burden of maintaining the government under which they live, and thus make it nontaxable, though this court and the United States Supreme Court have held that the property of the corporation itself could not be exempted from taxation by the act of the Legislature.

It is a maxim of the law, as well as of political economy, that the "power to tax is the power to destroy," and there is no power more deadly to the prosperity of a people than to increase taxation on those of small means, and who by their labor and their efforts earn a bare living, by exempting the wealthy, and powerful aggregations of wealth, whose just share of taxation must thus be paid by the class that is less wealthy and influential.

The Constitution provides that the taxation laid upon the poll "shall never exceed \$2" for state and county purposes, and that this shall be applied solely to "education and the support of the poor." And this court so held in 3 cases in 148 N. C., i. e.: *R. R. v.*

*Com'rs*, 148 N. C. 220, 245, 61 S. E. 690, 699, Judge Connor saying, "This question cannot arise again;" *R. R. v. Com'rs*, 148 N. C. 248, 61 S. E. 700; and *Hoke, J., in Perry v. Com'rs*, 148 N. C. 521, 62 S. E. 608. This limit has been constantly exceeded since, and poll taxes as high as \$7 and \$8 per capita have not been infrequent, and the proceeds have been often used, not solely "for education and the support of the poor," but to relieve the property of the wealthy from taxation.

A poll tax was levied once in England when it caused Wat Tyler's Rebellion, and was repealed. For long centuries it has been unknown there. It survives in this country in very few states (named by Connor, J., in *R. R. v. Com'rs*, 148 N. C. 244, 61 S. E. 690), and in them it is appropriated to "education and the poor." The poll tax is essentially unjust because exacted regardless of ability to pay, and is condemned by all writers on political economy. It is further unjust here because those unable to pay it are disfranchised, which penalty is not inflicted upon those failing to pay taxes on their property, though this last discrimination is to be removed by a constitutional amendment which is to be voted on this year. But if the state has been so pressed that it has been unable to dispense with a tax on the poll so universally condemned as unjustly discriminatory, certainly it is a violation of the spirit as well as the letter of the Constitution if the Legislature had attempted to exempt the *owners* of stock in all corporations, or in this corporation, from payment of their just dues thereon for the maintenance of the government.

The constant attempt to procure from Congress and state Legislatures an exemption of the property of corporations and of the wealthy, or to procure from courts a construction of statutes to that effect is a great and just cause of public dissatisfaction.

After a hundred years' ruling that Congress could levy an income tax, the United States Supreme Court, after reaffirming that ruling, by a change of the vote of one judge reversed it, which caused the adoption of the Sixteenth Amendment over the power of aggregated wealth, and, without the income tax and the excess profits tax thus authorized, it would have been impossible for this country to have carried to a successful conclusion the great "World War." But in the interval between the action of the changeable judge, and the enactment of the sixteenth amendment, many billions of taxes were taken off of the great corporations and the wealthy upon whom Congress had placed an income tax, and the burden was transferred to the backs of the tolling millions who were already overtaxed.

The time was when—

"Rome veiled earth with its haughty shadow,  
And filled it, till the o'er canopied horizon failed,  
With the rushing of her wings."

By the power of taxation which exempted or favored the wealthy and transferred the burden to the masses, its fairest and most fertile provinces became a desert. As Pliny said: "*Latifundia perdidere Italiam*"—that is, "The accumulation of wealth by the few destroyed Italy."

In France, the same discrimination exempting property in the hands of the wealthy from just taxation and passing the burden on to those who created the wealth of the country resulted in the French Revolution, which took from the hands of the nobility and the church their accumulated property in its entirety and placed it in the hands of the people. The same cause has brought about the confiscation of the vast wealth of the Czar and the nobility in Russia and has divided it among the people. In this country we have built our Constitution upon the foundation of "equal rights to all and special privileges to none." And as long as that is observed by lawmaking bodies and the courts our troubles will be but light.

When a proposition is presented to this court that the Legislature has enacted, or can enact, that the owners of surplus wealth which happens to be invested in the stocks and bonds of corporations are exempt from taxation whenever the corporation has paid taxes on its own property, it is within my duty as a member of this bench to plainly state that the Constitution of this country and the safety of its institutions will not permit, and that the Legislature has not in fact enacted, so dangerous a measure against which all history is a warning.

The State Tax Commission held that the plaintiff was not entitled to have his stock exempted from taxation, and in the superior court Judge Stacy dissolved the restraining order and filed an opinion giving his reasons. There was no appeal from this order and judgment, but the plaintiff undertook to have Judge Stacy reconsider and reopen the matter for argument and rehear it upon the same state of facts. This was a most irregular proceeding and was condemned in *Bonner v. Rodman*, 163 N. C. 1, 79 S. E. 271. At this rehearing, however, Judge Stacy again affirmed his ruling that the plaintiff was not entitled to have his stock exempted from taxation and filed a very conclusive opinion.

In *Blake v. Askew*, 76 N. C. 326, Reade, J., said: "This is manifestly a feigned issue" and "not fit to be entertained." It cannot be said that this is manifestly "a stock speculation action," but it may be shrewdly suspected to be intended to procure a ruling by the court that, though the plaintiff's stock has not been exempted from taxation by the Legislature, the Legislature has power to do so hereafter. If this were so held, it might boost the stock as being potentially "nontaxable" with great profit to those who may have arranged the proceeding. The holding of the

State Tax Commission and the twice repeated opinion of Judge Stacy should be affirmed.

ALLEN, J. (dissenting). I rest my dissent upon the following statement in the opinion of the court:

"We agree with the learned counsel that the Atlantic Coast Line Railroad Company of Virginia is a corporation of the state of North Carolina, and that it was so decided in *Staton v. Railroad*, 144 N. C. 135, 56 S. E. 794, and affirmed in *Railroad v. Spencer*, 166 N. C. 522, 82 S. E. 851."

I agree that this is a correct statement of fact and law, and it is supported by *Cox v. Railroad*, 166 N. C. 652, 82 S. E. 979, in addition to the authorities cited.

The court then holds that the stockholder must list his shares of stock for taxation because the corporation has not paid "a tax on its capital stock," and this position of the court will of course be met if I can show that it is not necessary for the corporation to actually pay "a tax on its capital stock" in order that the stockholder may be exempt, or, if necessary, that the corporation has paid the tax.

Is it necessary for the corporation to pay in order that the stockholder may be relieved?

I think clearly not, because the corporation is required by law to list its capital stock and pay the taxes thereon, and, if it does not do so, it is the duty of the taxing powers to make it pay, instead of trying to shift its burdens to the shoulders of the stockholders.

Does this corporation pay a tax on its capital stock?

It is alleged in the complaint and admitted in the answer that the Atlantic Coast Line Railroad Company of Virginia paid in this state in 1917 a license tax of \$10 per mile for 900 miles; that the ad valorem value of the tangible assets of the company for 1917 as fixed by the State Tax Commission was \$15,891,335; and that of the franchise for that year as fixed by said commission was \$18,754,010.

Note that the value of the franchise of said corporation as assessed by the State Tax Commission for taxation for the year 1917, which is the year for which the taxes in controversy in this action were assessed against the plaintiff, is admitted to be \$18,754,010.

Does this valuation of the franchise include capital stock?

This is answered by the agreement of the parties filed in the record as follows:

"In this case it is agreed as follows:

"(1) That under the Revenue Law and Machinery Act of 1917, in taxing railroad companies, the State Tax Commission in making up the tax to be assessed against railroad companies, whether domestic or foreign, did not tax the capital stock of any railroad company except as such capital stock was embraced within

the items mentioned in section 64 of the Machinery Act; that in assessing tax against railroad companies organized under the laws of this state, where such railroad companies were operated wholly within this state, the entire capital stock of the railroad company was embraced in and assessed as a part of the 'value of the franchise' as provided by section 64b of the Machinery Act; that in assessing tax against domestic railroad companies, a part of whose road is in this state and part in another state, the commission did not assess its capital stock other than as provided in section 64b, and only a part of its capital stock, as well as of its other property, was apportioned under section 65 of the Machinery Act of this state, 'in proportion to the length the main line of such road in this state bore to the whole length of said main line'; and in assessing tax against a foreign railroad, part of whose road was in this state and part thereof in another state, the assessment against the capital stock of such road, as well as its other property, was made in identically the same way as the assessment was made against a domestic railroad company, a part of whose road was in this state and part in another state."

Three facts are settled by this agreement.

(1) That in assessing tax against railroad companies organized under the laws of this state where such railroad companies were operated wholly within this state, the entire capital stock of the railroad company was embraced in and assessed as a part of the value of the franchise.

(2) That in assessing tax against domestic railroad companies a part of whose road is in this state and a part in another state, a proportionate part of the capital stock was valued as a part of the franchise; the part so valued being in proportion to the length the main line of such road in this state bore the whole length of said main line.

(3) That in assessing taxes against a foreign railroad a part of whose road was in this state and a part in another state, the assessment against the capital stock of such road was made in identically the same way as the assessment made against the domestic railroad company a part of whose road was in this state and a part in another state.

It therefore appears as an admitted fact in this record that, in the value of the franchise of the Atlantic Coast Line Railroad Company of Virginia, the State Tax Commission included the proportionate part of its capital stock in accordance with the terms of the legislative act, and that it has paid as other domestic corporations similarly situated.

Why then should not its stock have the same exemption granted to the stockholders of other corporations?

Particularly so when the court says in its opinion that the Atlantic Coast Line Railroad Company of Virginia is a corporation of North Carolina, and the State Tax Commission says in its answer:

"That it has been the policy of the state of North Carolina for more than 30 years not to require to be listed the shares of stock held by residents of the state in corporations created by and chartered under the laws of the state."

It is not contended, and cannot be, that the language, "pay a tax on its capital stock," means on its entire capital stock, because in the same statute provision is made for the valuation of the capital stock of domestic corporations, and that in assessing this value the value of the tangible property is deducted from the value of the capital stock so that no domestic corporation pays on its entire capital stock.

Again, in the same section quoted in the opinion of the court, it is provided that foreign corporations must pay on their entire capital stock in order that the stockholder may be exempt, making the clear distinction that as to the domestic corporation the stockholder shall not pay a tax on his stock if the corporation pays a tax on its capital stock, but that the foreign corporation must pay on its entire capital stock in order for this exemption to prevail.

Whether this is an unlawful discrimination between foreign and domestic corporations is not now before us, and I do not express any opinion on it.

I submit that this demonstrates that the Atlantic Coast Line Railroad Company of Virginia is paying a tax on its capital stock just as other domestic corporations do, and, if so, the shares of stock of the plaintiff are not liable to taxation.

It is insisted, however, notwithstanding the statement in the opinion, that there are two corporations, one domestic and the other foreign, and that the Atlantic Coast Line Railroad Company of Virginia, in which the plaintiff holds stock, and which is referred to as the parent corporation, and the North Carolina corporation as auxiliary, is the foreign corporation.

This renews the contest that has existed in this state since 1893, and which was regarded as settled by *Staton v. R. R.*, *Spencer v. R. R.*, and *Cox v. R. R.*; the court holding in each of these cases, in accordance with the contention of the state, that the corporation was domestic, unless we are willing to say that the same corporation is domestic when it is asking to exercise its privilege of removing its causes to the federal court for trial and foreign when the state is endeavoring to collect taxes.

The history of legislation on this question goes back of 1890, and, if the present question is understood, it must be considered.

The parent corporation of the Atlantic Coast Line system was the Wilmington & Weldon Railroad, chartered by the General Assembly of North Carolina in 1834.

In 1893 the right of this corporation to exemption from taxation was challenged, and

finally a settlement was reached, embodied in chapter 100, Private Laws 1893. At the same session the corporation was authorized to consolidate with other railroad companies; but, no action being taken under this statute, in 1899 the authority to consolidate was continued by chapter 105, Private Laws 1899, which contains this provision:

"That any and all corporations consolidated, leased or organized under the provisions of this act shall be domestic corporations of North Carolina and shall be subject to the laws and jurisdiction thereof."

These several acts were referred to and discussed in *Cox v. R. R.*, supra, and the court adds:

"It was under the authority of these several acts of the General Assembly that the Wilmington & Weldon Railroad became a part of the Atlantic Coast Line. It had its existence originally by reason of the legislative act of this state, and was therefore a creation of the state. It continued a domestic corporation of this state for more than 60 years and prospered under our laws. It finally came to the state and said that it desired to enter into other business arrangements, and the state consented, but upon condition that the Wilmington & Weldon Railroad Company or the company taking over its property or with which it should be consolidated should continue to be liable in the courts of the state for wrongs done in the state, which condition was accepted and acted on by the company."

If the condition as to removal of causes prevails by consolidating under the act, why should not the same effect be given to the provision that "any and all corporations consolidated, leased or organized under the provisions of this act shall be domestic corporations of North Carolina and shall be subject to the laws and jurisdiction thereof?"

Again in the *Staton Case* the court says:

"The statutes and public records show that the Wilmington & Weldon Railroad Company, a domestic corporation, has by permission of the Legislature become one of 'the constituent roads' in a line of consolidated railways extending through six states. In the consolidation are a large number of other 'constituent roads.' To say that each of these roads, chartered in six different states from Virginia to Alabama, have, by the consolidation, become citizens of the state of Virginia, is rather startling. If this result, so far as the Wilmington & Weldon Railroad Company is concerned, has been accomplished by virtue of the power conferred by the Act of 1899, c. 105, in defiance of the express provision in the statute that it should continue a domestic corporation, it would indicate an absence of power in the Legislature to guard the sovereign rights of the state in respect to corporations of its own creation. It would seem perfectly clear that a railroad corporation has no power to change its domicile. While the Legislature may permit a Virginia corporation to come into this state and consolidate with one of her own corporations, we can-

not perceive how, in availing itself of such permission, the Virginia corporation may take the North Carolina corporation out of this state into Virginia and so adopt it that the state, by virtue of whose laws it came into existence and continues to exist, loses jurisdiction of it for the purpose of bringing it into her courts to answer for wrongs done her own citizens. While we do not concede that such would be the result of permission to consolidate, in the absence of restrictive words, certainly where, in the statute conferring the power to consolidate, it is expressly provided that the corporation, together with any corporations with which it should consolidate, should remain a domestic corporation, it would seem that such restriction would place the question beyond controversy."

I think it therefore appears that chapter 77, Laws 1899, is not the only statute relating to the matter; that the consolidation of the Atlantic Coast Line was under chapter 105, Private Laws 1899; and that the Wilmington & Weldon Railroad, a corporation chartered by North Carolina, with its offices and property in this state, was not permitted to enter into this consolidation except upon condition that the corporations associated with it should be North Carolina corporations.

The Virginia corporation became a part of the system upon this condition, and we have heretofore held it is bound by it, and, in recognition of its obligation, it came to the state and asked that it be formally accepted as a North Carolina corporation, which was done by chapter 77, Laws of 1899.

And in this last statute, which has been accepted, the corporation, whether foreign or not, has been domesticated for the purposes of taxation, as it provides:

"Sec. 4. The powers given by this act to the Atlantic Coast Line Railroad Company of Virginia are granted upon the express condition that the property of the said Atlantic Coast Line Railroad Company of Virginia in this state shall always be liable to taxation under the Constitution and laws of this state, and that said company shall be subject to the tariffs, rules and regulations prescribed by the board of railroad commissioners."

Acting under this statute and under the revenue laws of the state, the corporation is now paying a privilege tax of \$9,000 and taxes on tangible property of the value of \$15,891,335, and on its franchise, which includes capital stock, according to the method of valuation adopted by the state, of \$18,754,010, which is all the corporation would have to pay on present valuations, if conceded to be a domestic corporation.

If therefore the Atlantic Coast Line Company of Virginia is now paying a tax on its capital stock and other property, and if the state is collecting taxes from it as a domestic corporation, why should not its stockholders enjoy the same exemption accorded to the stockholders of other domestic corporations?

I concur fully in the proposition that it is for the Legislature to determine the subjects of taxation, and think, under the facts in this record, it has said the shares of the plaintiff shall not be taxed.

I attach no importance to the failure to provide in those acts for a capital stock or the issuing of stock, because this is not usual in acts of consolidation, and, if the corporations become North Carolina corporations by entering into the consolidation, they brought with them their capital stock.

I think it wise to adhere to our former decisions, and when we fail to do so we assume the attitude of holding that the same corporation is domestic when it is invoking the right of removal to the federal court, and foreign when the state wishes to impose a tax.

We also run the risk of losing the tax on the franchise of the corporation, valued at \$18,754,010 (I do not say we will lose it), upon the ground that, being a foreign corporation engaged in interstate commerce, we can do no more than tax its property in this state, considered in connection with the use, and if such a result should be attained the corporation can well afford to reimburse the stockholders on stock of the par value of \$4,000,000. See Gloucester Ferry Case, 114 U. S. 196, 5 Sup. Ct. 826, 29 L. Ed. 158; P. & S., S. S. Co. v. Phila., 122 U. S. 344, 7 Sup. Ct. 1118, 30 L. Ed. 1200; Postal Tel. Co. v. Adams, 155 U. S. 688, 15 Sup. Ct. 268, 39 L. Ed. 311.

(179 N. C. 449)

**HODGIN v. NORTH CAROLINA PUBLIC SERVICE CO. et al. (No. 385.)**

(Supreme Court of North Carolina. April 14, 1920.)

**1. APPEAL AND ERROR ¶1002 — SPECIAL FINDINGS AS TO NEGLIGENCE ON CONFLICTING EVIDENCE NOT REVERSIBLE.**

Special findings by the jury as to negligence based on conflicting evidence will not be reversed.

**2. STREET RAILROADS ¶78 — STREET CAR COMPANY AND TRUCK OWNER HELD JOINT TORT-FEASORS.**

Where both the motorman of an electric car and the driver of a truck were guilty of negligence, causing the injuries to a pedestrian, who was struck by a street car and knocked under the truck, the street car company and truck owner were joint tort-feasors and jointly and severally liable for the injury sustained, though they were mainly caused by the truck; and it was error to find the street car company primarily liable.

**3. APPEAL AND ERROR ¶1152 — SUBMISSION OF PRIMARY LIABILITY BETWEEN JOINT TORT-FEASORS DOES NOT REQUIRE REVERSAL.**

Where defendants were joint tort-feasors, error in submitting to the jury the issue as to

which was primarily liable, and rendering a judgment based on a finding of primary liability by one, does not require a reversal, but the judgment can be modified to impose a joint and several liability.

Allen, J., dissenting in part.

Appeal from Superior Court, Guilford County; Bryson, Judge.

Action by S. A. Hodgin against the North Carolina Public Service Company and another. Judgment for the plaintiff, and both defendants appeal. Modified and affirmed.

This was an action for personal injuries against the North Carolina Public Service Company and R. G. Lassiter & Co. as joint tort-feasors.

About noon on March 13, 1917, the plaintiff was walking west on Spring Garden street about three-quarters of a mile outside of the city limits of Greensboro. The road was straight and the view was unobstructed eastward behind the plaintiff for 600 or 700 feet. Approaching him from the rear and going in the same westward direction was the street car of the defendant North Carolina Public Service Company, and about 10 feet behind and in close proximity to it was the truck of the defendant Lassiter Company, loaded with 3½ tons of asphalt. The street was paved with asphalt, and the plaintiff was walking along the concrete binder on the north side of the street, which divides the street proper from the space used by the street car track, which is unpaved. There was evidence that the street car was running some 10 miles an hour, and without warning or notice of any kind being given by the motorman operating the defendant street car, or from the chauffeur driving the truck of Lassiter & Co., they attempted to pass the plaintiff at almost the same time. The street car hit the plaintiff on his right shoulder and knocked him down in front of the oncoming truck, which struck his head, inflicting serious injuries. His face was badly cut and bruised; the tear duct of his eye was severed, so that there is a continuous flow from it and it is impossible for him to close it. His jaw was so injured that he has great difficulty to chew his food or to open his mouth, and his nervous system was greatly impaired from the shock.

The jury found on the issues submitted that: (1) The plaintiff was injured by the negligence of the defendant the North Carolina Public Service Company, as alleged in the complaint; (2) that the plaintiff was injured by the negligence of the R. G. Lassiter Company, as alleged in the complaint; (3) and (4) that the plaintiff did not by his own negligence contribute to his injury inflicted by either company; (5) that the plaintiff sustained damages \$2,500; (6) that the North



Carolina Public Service Company is primarily liable.

From the judgment on the verdict both defendants appealed.

Brooks, Sapp & Kelly, of Greensboro, for appellant North Carolina Public Service Co.

Parham & Lassiter, of Oxford, and King & King, of Greensboro, for appellant R. G. Lassiter & Co.

Clifford Frazier, W. P. Bynum, and R. C. Strudwick, all of Greensboro, for appellee.

CLARK, C. J. [1] The defendant public service company contended that the defendant was in a place of safety until a few seconds prior to the collision, and that when he changed his position it was too late for the motorman to avoid striking him. There was conflicting evidence on this point, and the jury found on the issue of fact that the defendant public service company was guilty of negligence and that the plaintiff did not contribute by his own negligence to the injury.

The defendant Lassiter & Co. contended that the injury was caused by the street car company, and that when the plaintiff was knocked into the street it was too late for the driver of the truck of the defendant Lassiter & Co. to avoid striking him; and contended that the defendant was guilty of contributory negligence by walking in the street until he could pass the obstruction. There was much evidence as to the facts concerning this and as to the details of the occurrence itself, but these were matters for the jury, who have found in response to the issues that the defendant Lassiter & Co. was guilty of negligence, and the plaintiff did not by his own negligence contribute to the injury sustained by him from the truck.

The plaintiff was struck by the street car, as the jury found, by reason of the negligence of the motorman, and upon such findings the public service company was liable. The injuries, however, sustained thereby were slight compared with those inflicted by Lassiter & Co.'s heavily laden truck, which the jury have found were caused by the negligence of the driver. It therefore was also liable.

[2] There is evidence which the jury found to be true that both the motorman on the street car and the chauffeur of the truck saw the plaintiff walking on the binder dividing the roadway from that part of the road occupied by the street car track, and though seeing him thus hemmed in each party negligently struck him. Both defendants therefore are joint tort-feasors, upon the findings of fact.

In Gregg v. Wilmington, 155 N. C. 18, 70 S. E. 1070, where the city permitted its co-defendant to pile upon the sidewalk bricks taken from a building being torn down, and the codefendant negligently piled the brick in such a manner as caused the alleged injury,

the city was held not responsible in damages unless it permitted the continuance of the negligent act after it was fixed with notice thereof. In that case it was held that the negligence was that of the codefendant, and the city was not responsible for its previous act in permitting the piling, which was within its discretion. In Ridge v. High Point, 176 N. C. 421, 97 S. E. 869, it was held that the city was not liable for an injury caused by its codefendant because it allowed the latter to operate a street car line. In Barnes v. R. R. & Express Co., 178 N. C. 285, 100 S. E. 519, it was held that, where the wrongful death was caused by the express company in the negligent loading of a heavy shaft, which would not have produced the injury but for the concurrent negligence of the railroad company in moving the car while being loaded, the defendants were joint tort-feasors.

[3] The two cases first named are clearly distinguishable from the present, while the latter closely resembles it. The authorities are fully discussed in those three cases, and we need not repeat the discussion. On the findings of fact by the jury, the injury was caused by the negligence of both defendants contributing thereto. They were joint tort-feasors and jointly and severally liable. It was not a case presenting the question of primary and secondary liability, and the charge of the court upon the sixth issue was erroneous; but this does not require a new trial. That issue will be struck out, and the judgment will be modified in accordance with this opinion.

Modified and affirmed.

ALLEN, J., dissented from the ruling as to defendant Lassiter.

(179 N. C. 441)

NORWOOD v. MOST WORSHIPFUL GRAND LODGE OF NORTH CAROLINA FREE AND ACCEPTED ANCIENT MASONS et al. (No. 355.)

(Supreme Court of North Carolina. April 14, 1920.)

1. INSURANCE — §19(1)—EVIDENCE HELD TO SUSTAIN FINDING THAT PLAINTIFF'S RECEIPT IN FULL WAS OBTAINED BY FRAUD.

In an action by the beneficiary of an insurance certificate issued by a fraternal association, brought against the association and the presiding officer of a subordinate lodge, wherein the defense of payment and receipt in full was interposed, evidence held sufficient to support refusal of a judgment of nonsuit and to sustain allegations that the presiding officer of the subordinate lodge fraudulently represented to plaintiff that the association refused to pay the full amount, when in fact he had orders for full payment in his possession at the time.

**2. INSURANCE ¶695—AGENT TO COLLECT INSURANCE MUST ACCOUNT FOR FULL AMOUNT COLLECTED.**

Where the presiding officer of a subordinate lodge of a fraternal association obtains from the beneficiary possession of the policy for its collection, along with a policy issued by another fraternal association, and collects the full amount due upon both policies, but pays her only a part thereof, he as the beneficiary's agent may be required to pay to such beneficiary the balance of the money collected.

**3. EVIDENCE ¶408(2)—RECEIPT IN FULL IS ONLY PRIMA FACIE EVIDENCE AND DOES NOT PRECLUDE SHOWING TRUE AMOUNT RECEIVED.**

Where the beneficiary of an insurance policy issued by a fraternal association gave a receipt for payment in full on representations by the presiding officer of the subordinate lodge that part only could be collected, such receipt was only prima facie evidence of its correctness, and would not preclude plaintiff from showing by parol the true amount of money paid.

**4. INSURANCE ¶801—BENEFICIARY'S RECEIPT IN FULL NOT BINDING WHERE PROCURED BY MISREPRESENTATIONS OF INSURER'S COMMITTEE.**

In an action by a beneficiary of an insurance policy issued by a fraternal association, brought against such association and the presiding officer of the subordinate lodge, wherein the association relied upon payment and a receipt in full procured by the members of a committee, an instruction that, if such committee made misrepresentations in order to procure the receipt, plaintiff would not be bound thereby was proper; inquiry being pending before the jury as to the liability of the association, and of the presiding officer at the time such receipt was given.

Appeal from Superior Court, Rockingham County; McElroy, Judge.

Action by Katie Norwood against the Most Worshipful Grand Lodge of North Carolina Free and Accepted Ancient Masons and R. S. Graves. Judgment on a verdict against defendant Graves alone, and he appeals. No error.

This is an action brought by Katie Norwood, widow of A. W. Norwood, against the Grand Lodge of Masons and R. S. Graves, to recover the balance alleged to be due on a policy of insurance for \$300 held by her husband in the benefit department of the Masonic Order.

The defendants admitted that the policy of insurance had been issued and that the plaintiff was the beneficiary therein, and alleged that the amount due thereon had been paid to the plaintiff.

The plaintiff introduced evidence tending to prove that, in addition to the policy of \$300 in the Masonic Order, her husband also had a policy of \$200 in the Odd Fellows Order; that, shortly after her husband died,

the defendant R. S. Graves came to her and asked her to give him both policies and that he would collect the money due on the policies for her; that she gave the policies to him, and in about a month thereafter the said Graves told her that her husband was not in good standing at the time of his death and he did not think he could get all of the money; that about a month after this conversation the said Graves sent for her again, and then told her that he was unable to collect the full sum due, that he could only collect \$100 from the Odd Fellows and \$100 from the Masons, making \$200 on both policies, and that these two orders refused to pay more than that sum; that her husband was not in good standing with either lodge, and he advised that she accept the said sum; that the plaintiff was an uneducated negro woman, who read with difficulty, and the said Graves was an educated intelligent negro man; that at the time he told the plaintiff that the Odd Fellows and the Masons would not pay more than \$200 he had in his possession three money orders of \$100 each delivered to him by the Masons to be used in the payment of the policy of \$300 and a draft for \$200 delivered to him by the Odd Fellows with which to pay the policy of the Odd Fellows; that he also told her in this conversation that there was an attorney's fee of \$25 that would have to be paid out of the \$200 he had collected; that, relying on these statements, she accepted \$175 in settlement for the two policies and executed receipts in full; that at the same time he asked her to sign several papers, and, without knowing what they were, she indorsed the three money orders for \$100 each and the draft for \$200, and they were delivered to the said Graves; that some time thereafter she learned that Graves had collected \$500 on the two policies; that he came to see her again and made other representations to her which were false and paid her the additional sum of \$25, which she claimed was the balance due on the policy of the Odd Fellows, and that she had received nothing from the Masonic Order; that after this action was commenced a committee from the local lodge of the Masons at Reidsville went to see her and asked her how much she claimed to be due, and that she told them that she had not received anything from the Masons; that they told her that the money that she had received was on the Masonic policy; that the \$175 and the \$25 was paid on that policy and that they gave her an additional sum of \$100, she relying on their statement that \$100 had already been paid on their policy; that in the several transactions she gave receipts aggregating \$900 or \$1,100, when in fact she only received \$300 on both policies.

At the conclusion of the evidence, there was a motion for judgment of nonsuit, which was overruled, and the defendants excepted.

His honor charged the jury, among other things, as follows:

"If you find by the greater weight of the evidence that, when the receipt was procured by the committee for \$300, the committee represented to her that the Masons had already paid her the sum of \$200, when in truth and in fact they had not paid her anything, and she, relying upon their statements and believing it to be true that the \$200 which had been paid her had come from the Masons, when in truth and in fact it had not come from the Masonic Order, then if you find these facts by the greater weight of the evidence, the court charges you it would be your duty to answer the issue, 'Yes,' that this receipt was procured by fraud and misrepresentation."

The defendant excepted.

The jury returned the following verdict:

"(1) At the time of the death of A. W. Norwood, did he have a certificate of insurance in the Masonic Lodge in the amount of \$300? Answer: Yes.

"(2) Is the plaintiff, Katie Norwood, the beneficiary named in the certificate of insurance in the amount of \$300 insured by the Masonic insurance department? Answer: Yes.

"(3) Did the defendants, or either of them, obtain receipts from the plaintiff for the \$300 referred to in the Masonic certificate of insurance? Answer: Yes.

"(4) If so, were said receipts obtained by fraud or misrepresentation? Answer: Yes.

"(5) Are the defendants, or either of them, indebted to the plaintiff? If so, what amount? Answer: \$200 and interest from date of post office money orders, but not the Grand Lodge but R. S. Graves."

Judgment was entered upon the verdict against the defendant R. S. Graves alone, and he excepted and appealed.

P. W. Gildewell and W. R. Dalton, both of Reidsville, for appellant.

J. M. Sharp and J. R. Joyce, both of Reidsville, for appellee.

ALLEN, J. [1] The recital of the evidence, as stated above, fully justifies the refusal of his honor to grant the motion of the defendant for judgment of nonsuit and is ample to sustain the allegations of fraud.

[2] If, however, there was no fraud in the transaction, the evidence shows that the defendant Graves was the agent of the plaintiff for the collection of the policies; that he collected \$500 and has only paid to her \$300; and he would, of course, be required to pay to her the balance of the money in his hands.

[3] The receipts purporting to cover the entire amounts collected by the defendant Graves are only prima facie evidence of their correctness and would not preclude the plaintiff from showing the true amount of the money paid to her.

"When a receipt is evidence of a contract between parties, it stands on the same footing

with other contracts in writing, and cannot be contradicted or varied by parol evidence; but, when it is an acknowledgment of the payment of money or of the delivery of goods, it is merely prima facie evidence of the fact which it recites, and may be contradicted by oral testimony. 1 Greenleaf on Evidence, § 308; Reid v. Reid, 2 Dev. [13 N. C.] 247 [18 Am. Dec. 570]; Wilson v. Derr, 69 N. C. 137." Harper v. Dail, 92 N. C. 397.

The cases in our reports in support of this proposition are numerous.

[4] The exception to the charge upon the ground that the committee from the lodge were not the agents of the defendant Graves, and that therefore he is not bound by their representations, would be entitled to more consideration but for the fact that at that time the inquiry was pending before the jury as to the liability of the Masonic Order as well as the liability of the defendant Graves, and, as the Masonic Order was relying upon the plea of payment and of the receipt procured by the members of the committee, it was proper for the judge to charge the jury that, if they made misrepresentations in order to procure the receipts, the plaintiff would not be bound by them.

These are the exceptions principally relied on by the defendant.

We have, however, examined all of the exceptions and find no error.

No error.

(113 S. C. 541)

BEATTIE et al. v. CITY COUNCIL OF CITY OF GREENVILLE et al. (No. 10390.)

(Supreme Court of South Carolina. March 29 1920.)

1. JUDGMENT ~~¶~~715(1)—DECISION AS TO AUTHORITY OF FIRE COMMISSIONERS HELD NOT RES ADJUDICATA IN ACTION TO ENJOIN BOARD.

Judgment for plaintiff in suit by a citizen and taxpayer of the city of Greenville to enjoin the city council from exercising authority to purchase supplies for the fire department, and to determine that such authority was vested in the board of fire commissioners created under Act Feb. 16, 1903 (24 St. at Large, p. 242), held not res adjudicata of suit by other citizens and taxpayers to enjoin the board of fire commissioners from attempting to exercise any authority in the matter after the enabling statute had been superseded.

2. MUNICIPAL CORPORATIONS ~~¶~~48(2)—REINCORPORATION UNDER GENERAL LAW SUPERSEDED OLD CHARTER.

Reincorporation, under Civ. Code 1912, §§ 2893-3097, of the city of Greenville, originally chartered under an act approved Dec. 22, 1885 (19 St. at Large, p. 106) superseded the old charter and Act Feb. 16, 1903 (24 St. at Large, p. 242), which gave the board of fire commissioners thereby created authority to purchase

supplies for the fire department; such act having amounted only to an amendment of the old charter.

Appeal from Common Pleas Circuit Court of Greenville County; T. J. Mauldin, Judge.

Action by W. E. Beattie and another against the City Council of City of Greenville and the Board of Fire Commissioners of the City. From judgment for plaintiffs, defendant Fire Commissioners appeal. Affirmed.

The decree of the court below follows:

This action has been brought by the plaintiffs herein, as citizens and taxpayers of the city of Greenville, in behalf of themselves and all other citizens and taxpayers of said city, to declare the act under which the defendants, the fire commissioners of said city, claim authority to act, as unconstitutional, upon the grounds set forth in said petition, and to permanently enjoin said board of fire commissioners and the members thereof from attempting to exercise any authority in the matter of purchasing supplies and equipment for the fire department of said city.

Upon the verified petition of the petitioners, Chief Justice Gary issued an order requiring the defendants to show cause before him at Abbeville, S. C., on March 12, 1919, why the prayer of the petition should not be granted. The defendants made return to said rule to show cause, the city of Greenville admitting the allegations of the petition, and joining in the prayer thereof, and upon the hearing of the case Chief Justice Gary granted a temporary injunction until the case could be heard on its merits. Subsequent thereto the defendants the fire commissioners of the city of Greenville amended their return, and asked that the city council of Greenville be also enjoined until the case could be heard upon its merits, and by consent of the attorneys an order was granted by Chief Justice Gary also enjoining the said city council from exercising any control over the fire department or purchasing any supplies and equipment for the fire department until the further order of the court.

The plaintiffs have demurred to the return or answer of the board of fire commissioners "upon the ground that it appears from the face of said answer that it does not constitute a defense to the cause of action set up in the complaint, in that it admits all material facts set up in the complaint, and in that the new matter alleged in said answer does not constitute a defense, and it follows that, as a matter of law, the plaintiffs are entitled to the relief demanded," and further that said answer is frivolous, and prays for judgment thereon.

The case is therefore before me for a decision of the questions involved. The facts may be stated briefly as follows: The city of Greenville was chartered under an act approved December 22, 1885 (19 St. at Large, p. 106); it being declared in said act that the charter should continue for a period of 21 years and until the end of the next ensuing session of the General Assembly. Section 15 of this act gave the city council full authority to organize, equip, and control the fire department. By an act of February 16, 1903 (24 St. at Large, p. 242), there was created for the city of Green-

ville a board of fire commissioners, with authority to purchase all material and supplies for the fire department of said city. In February, 1907, after the expiration of the said special charter, the city of Greenville was rechartered under the general law as contained in the Code of Laws of 1912 as a city of more than 5,000 inhabitants. A controversy arose in the early part of 1918 between the city council and the board of fire commissioners as to the purchase of a pumping engine. The fire commissioners recommended the purchase of a La France fire engine, and the city council decided to purchase a Seagrave fire engine. Thereupon a suit was brought by one J. N. Stewart against the city council to enjoin them from purchasing a Seagrave fire engine, and to construe the act of 1903, under which said board of fire commissioners was created. Judge Wilson construed said act, and held that the fire commissioners were vested with full power to purchase equipment and supplies, and enjoined said city council from purchasing the Seagrave fire engine, and based that injunction upon the construction of the statute. The constitutionality of the statute was not raised by the pleadings in the case, and the court in no wise undertook to pass upon the constitutionality of the statute. The defendants the fire commissioners are now contending that the judgment in the case of Stewart against the city of Greenville is res judicata, and that said judgment precludes the plaintiffs herein from making any constitutional objections to the act of 1903 under which said board of fire commissioners was created.

The first question that I shall pass upon is the question of res judicata. It is a familiar principle that, where legal proceedings involve rights claimed under a statute, the court will not consider the question as to whether the statute is constitutional unless such question is clearly made by the pleadings. It necessarily follows, therefore, that no judgment involving merely the construction of a statute will be regarded as determining the constitutionality of the statute. In order that there should be an adjudication touching the constitutionality of a statute, that question must be clearly raised and decided by the court. It is also well settled that a judgment in a case questioning the constitutionality of a statute upon one ground will not adjudicate the question as to whether the statute is unconstitutional upon a different ground. The following authorities sustain these propositions: 23 Cyc. 1230; *Cromwell v. County of Sac*, 94 U. S. 351, 24 L. Ed. 195; *W. & W. R. R. v. Alsbrook*, 146 U. S. 279, 13 Sup. Ct. 72, 36 L. Ed. 972; *Nesbitt v. Riverside Independent District*, 144 U. S. 610, 12 Sup. Ct. 746, 36 L. Ed. 562; *Douglass v. County of Pike*, 101 U. S. 677, 25 L. Ed. 968; *Whaley v. Gaillard*, 21 S. C. 575; *Hart v. Bates*, 17 S. C. 35; *Anderson v. Cave*, 49 S. C. 505, 27 S. E. 478; *State v. Tucker*, 56 S. C. 516, 35 S. E. 215; *Ex parte Florence School*, 43 S. C. 15, 20 S. E. 794; *State v. Cain*, 78 S. C. 352, 58 S. E. 937; *Cannon v. Cox*, 98 S. C. 185, 82 S. E. 399; *Kirven v. V. C. Chem. Co.*, 77 S. E. 493, 58 S. E. 424; *Id.*, 215 U. S. 252, 30 Sup. Ct. 78, 54 L. Ed. 179; *Board of Commissioners v. Union Bank*, 37 O. C. A. 493, 96 Fed. 293; *Board of Commissioners v. Sutliff*, 38 O. C. A. 167, 97 Fed. 270.

In *State v. Tucker*, supra, quoting from the

syllabus, it is held: "An adjudication in one appeal of one constitutional objection to a statute does not preclude the same party from making another constitutional objection to the same statute on a subsequent appeal."

"A judgment on a different cause of action is not res judicata in a subsequent action where the issues involved in the second action were not necessarily involved, and were not actually litigated, in the first action." *Cannon v. Cox*, supra. To the same effect, see *Whaley v. Gaillard*, supra.

In the case of *Ex parte Florence School*, supra, it was held the court will never "pass upon the constitutionality of an act of the Legislature \* \* \* unless it is necessary to the determination of the case in which such a question is presented."

Judge Wilson, in the case of *Stewart v. City Council*, did not attempt to pass upon the constitutionality of the act of 1903, which was before him, for the question of the constitutionality of the act was not necessarily involved. It was merely a question under the provisions of the act as to who had the power to purchase the equipment for the fire department. The constitutionality of the act not having been raised or decided in the *Stewart* case, I am of the opinion that the judgment of Judge Wilson is not res judicata as to the questions raised in this case.

The other question to be determined is as to whether the act of February 16, 1903, under which the board of fire commissioners of the city of Greenville was created, contravenes section 1 of article 8 of the Constitution of 1895, which is as follows: "The General Assembly shall provide by general laws for the organization and classification of municipal corporations. The powers of each class shall be defined so that no such corporation shall have any powers or be subject to any restrictions other than all corporations of the same class. Cities and towns now existing under special charters may reorganize under the general laws of the state, and when so reorganized their special charters shall cease and determine."

The statute in question applies only to Greenville, and the restrictions therein put upon Greenville are not placed upon other municipal corporations in the same class, which is plainly violative of the Constitution as special legislation. *Carroll v. Town of York*, 109 S. C. 1, 95 S. E. 121; *Paris Mt. Water Co. v. City of Greenville*, 105 S. C. 180, 89 S. E. 669. By the express terms of the Constitution, the special charter of the city of Greenville ceased and determined upon its reorganization under the general laws. The city of Greenville was organized as a city of more than 5,000 inhabitants under article 3 of the Code of Laws, § 2924 et seq.

Article 4 of the Code of Laws contains provisions common to all cities and towns containing more than one thousand inhabitants. By section 2952 of the Code of Laws it is provided: "The said [city] council shall have power and authority to equip and control a fire department for the protection of said city in such way as they may deem necessary." It is manifest that by the Constitution it was intended that the cities organized under the Constitution and laws passed in pursuance thereof should possess only those powers and be subject to those re-

strictions applicable to all other cities of the same class. It is equally manifest that by the general law passed in pursuance of the Constitution it was intended that the city councils of all cities having more than 1,000 inhabitants should have the control of the fire department and the authority to equip the same.

The control of the fire department, then, by the board of fire commissioners after the re-incorporation of the city of Greenville under the general law passed in pursuance of the Constitution is utterly inconsistent with the constitutional provision and the express terms of the statute.

The act of 1903 creating a board of fire commissioners for the city of Greenville and conferring upon that board authority to control and equip the fire department under the principle recognized by all courts is to be regarded as in the nature of an amendment to the special legislative city charter, and, as such, the powers of the board of fire commissioners ceased with the expiration of the city charter. This act does not by its terms amend the act of 1885, but it operates to do so.

"The true view of the legislation to which we have referred, considered as a whole, is that the statutes authorizing towns and cities to contract to pay money at a time beyond the original charter life are to be construed as legislative amendments of the original charters." *Black v. Fishburne*, 84 S. C. 451, 68 S. E. 681, 19 Ann. Cas. 1104.

"If independent acts relate to the rights, powers, duties, and obligations of the city, they are to be regarded as parts of the city charter." *State v. Ermentraut*, 63 Minn. 104, 65 N. W. at page 253.

In *City of Rochester v. Briggs*, 50 N. Y. 553, the court, speaking of the charter of the city of Rochester, said: "The charter, as it is called, consists of the creative act and all laws in force relating to the corporation, whether in defining its powers or regulating their mode of exercise." And again the court in the same case said: "A city charter embraces many minor subjects, and yet they are all embraced in the general subject of the charter or corporation."

"In order that a law may operate as an amendment to a municipal charter, it is not necessary that it shall specify that it is an amendment thereto, but it is sufficient that the provisions affect the corporation in its governmental capacity." 20 A. & E. p. 1139; 28 Cyc. 240 N.; *City Council v. Walker*, 154 Ala. 242, 45 South. 586, 129 Am. St. Rep. 54; *City of Rochester v. Briggs*, 50 N. Y. 553.

It has been suggested by counsel that, if this act is unconstitutional, certain other acts affecting Greenville are invalid. This may or may not be true, but the court cannot take these matters into consideration until properly presented, and the fact, if it be a fact, that they are unconstitutional, can have no effect in determining the validity of this statute.

I have, therefore, reached the conclusion that the act of February 16, 1903, creating a board of fire commissioners for the city of Greenville was in the nature of an amendment to the city charter; that this statute created a special provision, applicable only to the city of Greenville, and is therefore special legislation, and violative of section 1 of article 8 of the Constitution of 1895; that when the city of Green-

ville was reorganized in February, 1907, under the general laws of the state, the Charter under which the city of Greenville had been operating, together with the special provision contained in the act of 1903, creating the board of fire commissioners, thereupon ceased and determined under the express provisions of the Constitution, and since that time the board of fire commissioners have been de facto officers, and not de jure. The city council now has full power and authority under the general laws, as contained in section 2952, Code of 1912, to control and equip the fire department.

It is therefore ordered and adjudged: That the demurrer to the answer of the board of fire commissioners be, and the same is hereby, sustained, and the act under which the board of fire commissioners for the city of Greenville was created be, and the same is hereby, declared unconstitutional, null, and void, and the board of fire commissioners of said city, and the members thereof, are permanently enjoined from exercising any control over the fire department, or attempting in any manner to purchase supplies and equipment for the fire department of said city, and that the temporary restraining order granted by Chief Justice Gary on March 28, 1919, enjoining and restraining the mayor and city council from doing any act toward the control of the fire department of said city, or toward the selection of fire equipment or apparatus, be, and the same is hereby, vacated and dissolved.

Wilton H. Earle, of Greenville, for appellants.

Haynsworth & Haynsworth and Oscar Hodges, all of Greenville, for respondents.

**HYDRICK, J.** Plaintiffs in behalf of themselves and all other citizens and taxpayers of the city of Greenville, brought this action, on March 4, 1919, against the city council and the board of fire commissioners of said city, to enjoin said board from attempting to exercise any authority in the matter of purchasing supplies and equipment for the fire department of said city.

Plaintiffs allege that the act of 1903 under which the board claims authority in the premises was superseded by the reincorporation of the city under the general law in 1907, and, if said act was not so superseded, that it contravenes section 1, art. 8, of the Constitution. On the verified complaint, a rule to show cause and temporary restraining order was issued against the board. The city council answered and joined with plaintiffs in their contention and prayed for injunction. The board of fire commissioners contested plaintiffs' grounds, and set up the defense of res adjudicata in bar of this action, to wit, the judgment in *Stewart v. City Council*, hereinafter mentioned. On hearing the answers, on motion of the board of fire commissioners, the city council was also enjoined pendente lite from exercising the authority in question. Thereafter, by consent of all parties, an order was passed modifying the previous orders, so that a committee of citi-

zens should select and purchase the necessary apparatus, and the council should secure the funds and make the necessary appropriation to pay for same.

The facts out of which the issues arise are: The city was chartered under an act approved December 22, 1885, for the period of 21 years, and until the end of the next ensuing session of the Legislature. Section 15 of that act gave the city council authority over the fire department. By an act approved February 16, 1903 (24 Stat. 242), provision was made for a board of fire commissioners, with authority, inter alia, to purchase supplies for the fire department.

The Constitution of 1895 (article 8, § 1) provides:

"The General Assembly shall provide by general laws for the organization and classification of municipal corporations. The powers of each class shall be defined so that no such corporation shall have any powers or be subject to any restrictions other than all corporations of the same class. Cities and towns now existing under special charters may reorganize under the general laws of the state, and when so reorganized their special charters shall cease and determine."

In February, 1907, the city was rechartered under the general laws (enacted pursuant to the provision of the Constitution above quoted) found in chapter 48, vol. 1, Civil Code 1912, section 2952 of which gives the city council power and authority to equip and control the fire department.

In the early part of 1918 a controversy arose between the city council and the board of fire commissioners as to which body had the right to purchase supplies for the fire department; and a suit was brought by J. N. Stewart, a citizen and taxpayer of the city, against the city council to have the court construe the act of 1903, under which the board was created, and determine, upon construction thereof, whether the authority to purchase supplies for the fire department was vested in the board of fire commissioners or in the council. Stewart concluded that the power was vested in said board, and prayed that the council be enjoined from exercising it, and his contention was sustained, and the council were accordingly enjoined. From that order there was no appeal, and that is the judgment which was pleaded in bar of this action.

The circuit court overruled the defense of res adjudicata on the ground that the only issue made and decided in Stewart's case was whether, upon proper construction of the act of 1903, the authority to purchase was in the council or in the board of fire commissioners, and that the grounds made by these plaintiffs were neither raised nor decided in that case; and the court sustained plaintiffs' contentions as to the act, and granted the injunction prayed for.

[1] The record in *Stewart v. City Council* is not before us. We assume that it shows what the circuit court says it does. That being so, the court was right in holding that it does not bar this action. The authorities cited by the court in its opinion, which are recited in respondents' brief, sustain the conclusions reached.

[2] We agree with the circuit court, also, in sustaining plaintiffs' contentions as to the act of 1903. Clearly the reincorporation of the city under the general law had the effect of superseding its old charter and the act of 1903 along with it, since that act in contemplation of law, amounted only to an amendment of the old charter. To hold otherwise would bring the act of 1903 in conflict with section 1 of article 8 of the Constitution. These conclusions are also sustained by the authorities cited by respondents.

Judgment affirmed.

GARY, C. J., and WATTS, FRASER, and GAGE, JJ., concur.

(113 S. C. 407)

STONE v. CITY COUNCIL OF CITY OF GREENVILLE. (No. 10691.)

(Supreme Court of South Carolina. March 29, 1920.)

1. JUDGMENT  $\S$  735—TAXPAYER'S RIGHT TO INJUNCTION AGAINST ISSUANCE OF NOTES BY COUNCIL HELD NOT CONCLUDED.

Order in suit to determine whether city council or fire commissioners had authority to purchase fire apparatus, merely allowing committee of citizens to do purchasing, council to provide means of payment, with necessary implication payment was to be in lawful manner, held not conclusive of taxpayer's right to temporary injunction against issuance of notes by city council provided for by act of March 1, 1913 (31 St. at Large, p. 549), claimed to be violative of Const. art. 8, § 7.

2. MUNICIPAL CORPORATIONS  $\S$  1000(6) — COURT SHOULD HAVE ENJOINED ISSUANCE OF NOTES BY CITY COUNCIL UNDER ACT HELD VOID.

In suit by taxpayer to enjoin city council from issuing notes authorized by act of March 1, 1919 (31 St. at Large, p. 549), for purchase of fire apparatus for city, having held the act void as permitting increase of bonded indebtedness without vote of the people in violation of Const. art. 8, § 7, the trial court erred in refusing plaintiff's prayer for injunction against issuance of the notes.

3. MUNICIPAL CORPORATIONS  $\S$  80, 63(1) — DISCRETION OF COUNCIL IN MANAGEMENT NOT CONTROLLABLE BY COURTS.

It is business of city council, and not of citizens, to determine what is best to be done

with regard to city's affairs, discretion being vested in council, and they not being controllable in its exercise by citizens nor by courts, if they act within law.

4. EVIDENCE  $\S$  83(2) — CITY COUNCILS PRESUMED TO ACT WITHIN LAW.

It will always be assumed that city councils act within the law until the contrary is made to appear.

Appeal from Common Pleas Circuit Court of Greenville County; T. J. Mauldin, Judge.

Action by C. B. Stone against the City Council of City of Greenville. From an order denying temporary injunction, plaintiff appeals. Reversed to the extent indicated in the opinion.

Martin & Blythe, of Greenville, for appellant.

Oscar Hodges and Haynsworth & Haynsworth, all of Greenville, for respondent.

HYDRICK, J. As a citizen and taxpayer of the city of Greenville, plaintiff sued to enjoin the city council from issuing notes authorized by an act of the Legislature approved March 1, 1919 (31 Stat. 549), for the purchase of fire apparatus for said city, on the ground that said act is unconstitutional, in that it permits the increase of the bonded debt of the city, without submitting the question to a vote of the people, as required by section 7 of article 8 of the Constitution and the statutes enacted in pursuance thereof.

The act authorizes the city council to borrow the sum of not exceeding \$50,000 for the purchase of additional fire apparatus and the equipment of the fire department of said city, and to issue notes for the amount borrowed, payable in ten annual payments, and requires the levy of a sufficient tax to pay the annual installments and the interest.

Prior to the commencement of this action, a dispute had arisen between the city council and the board of fire commissioners of said city as to which of said bodies had authority to control the fire department and purchase the necessary supplies and equipment therefor, and an action had been commenced by Beattie and other citizens and taxpayers against the city council and said board to determine that question. In that action both the council and the board of fire commissioners had been enjoined pendente lite from exercising the authority. But, as action in the premises by somebody appeared to be urgent by consent of all parties, in *Beattie et al. v. City Council et al.*, 102 S. E. 751, an order was passed modifying the previous injunction, so that a committee of citizens agreeable to all parties should select and purchase the necessary apparatus, and the city council should procure the funds and make the necessary appropriation to pay for same.

Plaintiff alleged that said committee selected and recommended the purchase of certain apparatus at and for the sum of approximately \$30,000; that the city council intended to pay for same by issuing notes therefor, according to the provisions of the act of March 1, 1919, and not merely by giving notes for money borrowed in anticipation of the collection of the taxes for the current year and to be paid out of such taxes, when collected, as is permissible under the section of the Constitution and statutes above referred to; that council could not hope to pay for said apparatus out of the income of the current year without so depleting the funds necessary for other municipal purposes as to create a large debt against the city; and that the purchase of said apparatus was unnecessary, as the city already had sufficient apparatus, with the limited force employed, for the protection of the citizens against fire.

On the verified complaint, a rule to show cause was issued, which carried a temporary restraining order against the purchase of the apparatus, or the issuance of notes in payment therefor under the act of March 1, 1919. The answer of the city council contested plaintiffs' conclusions as to the validity of the act of March 1, 1919, and its authority to issue the notes therein authorized, and denied the allegations of fact, except as specifically admitted. They alleged that the citizens' committee had authority, under the order passed in *Beattie et al. v. City Council et al.*, to select and purchase the necessary apparatus, and that their action in the premises was by the terms of said order final and conclusive upon all parties to said cause and all in privity with them, that said committee had actually purchased the apparatus mentioned in the complaint, and the same had been ordered shipped as soon as it could be manufactured and that the only duty the council had to perform was to obtain the necessary funds and make the appropriation to pay for same; and they pleaded said order as *res adjudicata* and conclusive of all matters therein adjudicated. They alleged, further, that if the court should conclude that the act of March 1, 1919, was unconstitutional, they should be allowed to make such other arrangement as they could to obtain the money to pay for the fire equipment which had been purchased, as above stated.

The case was heard by the judge at chambers on the pleadings and the record in *Beattie et al. v. City Council et al.* The plaintiff contended that, pending the hearing on the merits, the temporary restraining order should be continued of force.

The court held that plaintiff was concluded by the order issued in *Beattie's Case*; that the provision of section 7, art. 8, of the Constitution applies only to "bonded debts," and does not forbid a city from making contracts involving other liabilities which may

be necessary in the discharge of its governmental or administrative functions, such as the liability here involved; nevertheless the court held that the act of March 1, 1919, was unconstitutional. But the court held also that, as the city council had not yet determined the method which it would adopt in discharging the liability, and that as it might meet it out of the income from taxes and licenses for the current year, or by the issuance of bonds, after submission of the question to a vote of the people, or in some other constitutional manner, plaintiff was not entitled to the temporary injunction prayed for, and refused the same.

[1] The reasoning and conclusions of the circuit judge are apparently conflicting. However, we think he was in error in holding that plaintiff's right to a temporary injunction against the issuance of the notes provided for by the act of 1919 was concluded by the order in *Beattie et al. v. City Council et al.* The issue here was not involved in that case at all. The issue there was as to whether the council or the fire board had authority to purchase the apparatus. The order merely allowed a committee of citizens to do the purchasing, and the city council was to provide the means of payment. Nothing whatever was said as to the manner in which payment was to be made. It was necessarily implied that it was to be done in a lawful manner.

Council for the city said in the argument of this case that the city makes no claim that it can proceed under the act of 1919, and that it does not intend to issue the notes authorized by that act. If council had made that admission to the court below and its order had been in conformity therewith, there would have been no necessity for this appeal.

[2-4] But, according to the showing made at the hearing below, it appears to us that plaintiff was entitled at least to an injunction against the issuance of the notes authorized by the act of 1919. That was primarily the relief sought. He alleged that council intended to issue the notes authorized by that act. They did not specifically deny that such was their intention, but impliedly admitted it by contending that they had the right to do so. Having held that act void, the court erred in refusing plaintiff's prayer for an injunction against the issuance of the notes authorized by it. *Cudd v. Calvert*, 54 S. C. 457, 32 S. E. 503. As to other matters involved, we agree with the court below. It is the business of council, and not of the citizens, to determine what is best to be done with regard to the city's affairs. The discretion is vested in council by law, and they are not to be controlled in its exercise by the citizens, and not even by the courts, provided they act within the law, and it will always be assumed that they will so act, until the contrary is made to appear. If they go beyond



the law, the person who deals with them in so doing does so at his risk.

The order appealed from is reversed to the extent above indicated.

Reversed.

GARY, C. J., and FRASER, WATTS, and GAGE, JJ., concur.

(25 Ga. App. 114)

SEABOARD AIR LINE RY. CO. v. GREENE.  
(No. 10784.)

(Court of Appeals of Georgia, Division No. 2.  
April 7, 1920.)

*(Syllabus by the Court.)*

COURTS ⇐217—ERROR DOES NOT LIE FROM CITY COURT OF SPRINGFIELD TO COURT OF APPEALS.

In conformity with the recent ruling of the Supreme Court (*Ash v. People's Bank of Oliver*, 101 S. E. 912) to the effect that writs of error do not lie from the city court of Springfield to the Court of Appeals, the writ in this case must be dismissed.

Error from City Court of Springfield; P. D. Shearouse, Judge.

Action between the Seaboard Air Line Railway Company and W. T. Greene. From a judgment for the latter, the former brings error. Writ of error dismissed.

Anderson, Cann, Cann & Walsh, of Savannah, for plaintiff in error.

Seabrook & Kennedy, of Savannah, for defendant in error.

JENKINS, P. J. Writ of error dismissed.

STEPHENS and SMITH, JJ., concur.

(25 Ga. App. 116)

SOUTHERN RY. CO. v. HUNT. (No. 10884.)

(Court of Appeals of Georgia, Division No. 2.  
April 7, 1920.)

*(Syllabus by the Court.)*

CARRIERS ⇐57—TRANSFEREE OF "ORDER NOTIFY" BILL OF LADING MAY SUE CARRIER FOR SHORTAGE OCCURRING AFTER TRANSFER; MUST PROVE AMOUNT OF SHORTAGE OR LOSS.

While the transferee of an "order notify" bill of lading, after paying the draft attached and obtaining possession of the bill of lading, and thus acquiring the legal title to the goods mentioned therein, may maintain a suit against the carrier for any shortage in the shipment occasioned subsequently to the transfer of title and before delivery to him, where such shortage is traced to the carrier, yet where, in such a suit, the bill of lading does not appear in evidence, and there is no evidence of any admis-

sion upon the part of the carrier as to the amount of goods received by it from the consignor, or other evidence tending to prove the amount of goods in the possession of the carrier and delivered to the transferee, the latter, although proving title to the goods shipped and received, fails to prove any loss or damage to the shipment accruing after he had obtained title thereto.

Error from Superior Court, Hall County; J. B. Jones, Judge.

Action by J. W. Hunt against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

E. A. Neely, of Atlanta, C. R. Faulkner, of Bellton, and Ed Quillian and J. O. Adams, both of Gainesville, for plaintiff in error.

W. N. Oliver, of Gainesville, for defendant in error.

STEPHENS, J. Judgment reversed.

JENKINS, P. J., and SMITH, J., concur.

(127 Va. 800)

KING v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. March 30, 1920.)

INTOXICATING LIQUORS ⇐251—AUTOMOBILE USED TO TRANSPORT FORFEITED, NOTWITHSTANDING PURCHASE MONEY LIEN.

An automobile used in the illegal transportation of liquor will be forfeited to the state, under Acts 1918, c. 388, notwithstanding a claim of purchase-money lien on the automobile in favor of third party, who had no notice of such illegal use.

Error to Hustings Court of Richmond.

Proceeding by the Commonwealth to enforce forfeiture of an automobile, in which E. A. King intervened. Judgment of forfeiture, and intervener brings error. Affirmed.

Brockenbrough Lamb, of Richmond, for plaintiff in error.

Geo. E. Wise, of Richmond, for the Commonwealth.

BURKS, J. This is an information filed under section 57 of the Prohibition Act (Acts 1918, p. 612) to enforce the forfeiture of an automobile used in the illegal transportation of ardent spirits. There was a judgment of forfeiture, which E. A. King seeks to have reversed because he had a lien on the automobile for the purchase price thereof.

When the information was filed, King intervened, as he had the right to do under the statute, and claimed a lien on the automobile for \$550, balance of purchase money. Both parties waived a jury and submitted the case to the judge of the trial court upon the following agreed statement of facts:

"It is admitted that this automobile was used in the illegal transportation of ardent spirits at the time of its seizure November 29, 1918. It is admitted that E. A. King at that time held a lien for unpaid purchase money amounting to \$550 and interest, as set out in his answer, on said automobile, duly docketed prior thereto; that King exercised no control over the automobile at that time, and no part of his debt was then due; that King had no knowledge that the car was unlawfully used, and was innocent of the transportation of ardent spirits therein. King sold the automobile to Marinosci on September 17, 1918, as shown by written contract, and the automobile was in possession of said purchaser when seized."

The judgment of the trial court was adverse to King, and he obtained this writ of error.

The statute is very explicit that in a case of this kind, when ardent spirits are being illegally transported in an automobile, the officer shall take possession thereof, and the automobile "shall be forfeited to the commonwealth." No exception is made in favor of a creditor having a lien on such automobile. In *Landers v. Commonwealth*, 101 S. E. 778, we said:

"We think it plain that the innocence of the owner of any knowledge of the illegal use to which his vehicle is put is no defense to the forfeiture proceeding, and that the test of liability is the guilty knowledge of the 'person in charge.'"

The same rule applies to one having a lien upon the automobile. If it were otherwise, the forfeiture could easily be rendered ineffective. An owner intending to engage in the illegal enterprise could easily incumber his automobile to practically its full value, and then proceed to violate the statute, or let his automobile for that purpose, without fear of serious pecuniary loss. See *United States v. One Saxon Automobile*, 257 Fed. 251, 168 C. O. A. 335.

The other questions raised in the petition for the writ of error are fully answered in *Landers v. Commonwealth*, supra.

The judgment of the hustings court of the city of Richmond will therefore be affirmed. Affirmed.

(127 Va. 808)

PENNINGTON et al. v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. March 30, 1920.)

1. INTOXICATING LIQUORS §251 — PERSON USING AUTOMOBILE TO TRANSPORT LIQUOR HELD NOT PRESUMED TO HAVE ACQUIRED SAME BY THEFT OR TRESPASS.

In proceedings by the commonwealth for forfeiture of an automobile engaged in the illegal transportation of intoxicating liquor while in possession of a person other than the owner, in which the owner intervened, it will

not be presumed that the person in charge at the time of seizure acquired possession by theft or other trespass.

2. INTOXICATING LIQUORS §246 — AUTOMOBILE USED TO TRANSPORT LIQUOR FORFEITED, THOUGH DRIVER AGREED WITH OWNER NOT TO TAKE VEHICLE OUT OF STATE.

Where owner of automobile in other state permitted another person to use automobile under agreement not to take it out of such state, and where automobile, in violation of such agreement, was taken into this state, where it was seized by the commonwealth by reason of its use in illegal transportation of intoxicating liquors, the automobile will be forfeited to state, notwithstanding violation of agreement not to take it out of state, since person in possession at time of seizure had lawful possession in the first instance.

3. INTOXICATING LIQUORS §251 — AUTOMOBILE USED TO TRANSPORT LIQUOR FORFEITED, NOTWITHSTANDING RECORDED LIEN AGAINST IT.

Automobile used for illegal transportation of intoxicating liquor will be forfeited to the state, notwithstanding that it is subject to a recorded lien for money loaned; the lien being subordinate to the commonwealth's right to have automobile forfeited.

Error to Hustings Court of Richmond.

Proceeding by the Commonwealth for forfeiture of an automobile engaged in illegal transportation of intoxicating liquors, opposed by F. C. Pennington and J. L. Ricker. Judgment of forfeiture, and Pennington and Ricker bring error. Affirmed.

G. K. Pollock and Brockenbrough Lamb, both of Richmond, for plaintiffs in error.

Jno. R. Saunders, Atty. Gen., J. D. Hank, Jr., Asst. Atty. Gen., and Leon M. Bazile, of Richmond, for the Commonwealth.

BURKS, J. This writ of error brings under review a judgment of the hustings court of the city of Richmond forfeiting to the commonwealth an automobile engaged in the illegal transportation of intoxicating liquors. Two persons asserted claims upon the automobile as superior to the commonwealth's right of forfeiture—F. C. Pennington, as innocent owner, and J. L. Ricker, as a prior innocent lienor. By consent of parties the case was submitted to the decision of the judge of the trial court without the intervention of a jury. The trial judge decided that the rights of the commonwealth were superior to and overrode the claims of both Pennington and Ricker, and accordingly gave judgment of forfeiture of the automobile to the commonwealth. To that judgment this writ of error in this cause was awarded.

The facts agreed, so far as they need be stated, were as follows:

"That the car in question is worth the sum of \$1,500, and was seized in the city of Rich-

mond while engaged in the transportation of ardent spirits in violation of law. That F. C. Pennington, one of the respondents, is the owner of the automobile, and that the respondent J. L. Ricker had a recorded lien on the car for money furnished for the purchase thereof in the sum of \$2,100. That the lien was recorded prior to the seizure of said car, the original lien being filed herewith, in the following words and figures: \* \* \* That said Pennington was engaged in the general automobile for hire business in Augusta, Ga. That he rented said automobile, a few days prior to its seizure, to one John Allen for the purpose of delivering books in the state of Georgia, with the express understanding and agreement that the car was not to be taken outside the state of Georgia. That he had no knowledge that the car was taken outside the state until he learned of its seizure through one Harrison, a friend of Allen, who was arrested for the illegal transportation of liquor in said car when same was seized. That he never authorized the car to be taken outside the state of Georgia, nor would he have permitted it to be used to haul liquor. That he owed J. L. Ricker the purchase price of said car, \$2,100, and executed the lien above detailed, and that no part of the same had been paid said Ricker. That J. L. Ricker, one of the respondents, is a farmer and business man residing near Augusta, Ga. That he loaned F. C. Pennington the sum of \$2,100 for the purchase of the automobile seized herein. That he took a lien thereon and forthwith recorded the same, \* \* \* and that no part of same has been paid him and was still due him. \* \* \*

[1] It is not clear from the foregoing statement who was in charge of the car when it was seized, but it is probable that the word "who," in the sentence, "until he learned of its seizure through one Harrison, a friend of Allen, who was arrested for the illegal transportation of liquor in said car," was intended to refer to Allen, as no other person is alleged to have been in charge of the car, and the indictment charges that the car was seized by one J. H. Harris, a police officer of the city of Richmond, while ardent spirits were being transported therein. Allen unquestionably acquired possession from the owner lawfully in the first instance, and there is nothing in the record to show that he ever parted with that possession prior to the seizure. Pennington states in his answer that he leased the car to Allen "during the latter part of January, 1919," and the seizure was made on February 3, 1919. In the facts agreed it is stated that Pennington rented the car to Allen "a few days prior to its seizure"; and there is nothing in the record to show that there had been any change in the possession. But we do not regard this as material. It is an agreed fact that the car was "engaged in the transportation of ardent spirits in violation of law," and, in the absence of any evidence on the subject, it will not be presumed that the person in charge at the time of service

acquired possession by theft or other trespass.

[2] It was practically conceded in the argument that Allen was in possession at the time of seizure, but relief was sought on the ground that when he took the car out of the state of Georgia in contravention of his contract of hiring, his possession was no longer lawful, and he became a trespasser, and liable for the conversion. We are not concerned with the fact that there was a breach of bailment on the part of Allen, nor with the remedies of Pennington against Allen. The question is: How did Allen acquire possession from the owner? Was it with his consent? Did the owner intrust him with the car? If so, then the owner must suffer the consequence of his misplaced confidence. The question left open in *Landers v. Commonwealth*, 101 S. E. 778, was: What would be the result "where the possession was acquired from the owner by theft or other trespass"? That is not this case. Here it is admitted that the possession acquired from the owner was lawful, but exemption is sought because that which in the first instance was lawful subsequently became unlawful. This furnishes no ground for exemption from the forfeiture. The case, in this aspect, is controlled by the decision in *Landers v. Com'th*, supra.

It is true that in that case it was said that—

"If the owner is not a participant in the offense, its liability to forfeiture is dependent upon the guilty knowledge of the person lawfully in charge of the vehicle."

The court was there dealing with a case in which the person in charge had acquired possession lawfully from the owner and was "lawfully in charge," and what was said was with reference to the state of facts then before the court; it was not intended to be applicable to such a state of facts as here exists, and, as has been said, "what was not in the mind of the court was not decided."

It is stated in brief of the plaintiff in error, in reference to this case as a proceeding in rem, that—

"Intent cannot be imputed to an inanimate object from a person unlawfully in charge thereof. While in the possession of a trespasser a vehicle may by analogy be said to be under duress. The defense is similar in principle to the defense of insanity and requires no exception in the law; absence of a controlling mind negatives intent, a sine qua non of crime."

If this were true, there could never be a forfeiture, if the bailee did any act amounting to a conversion. If a car is let to a bailee to drive to Petersburg, and the bailee, instead, drives to Fredericksburg, that is a conversion; and yet, if the foregoing argument be sound, there could be no forfeiture if the

car were found in Fredericksburg filled with whisky. The illustration would seem to be a sufficient reply to the argument.

[3] The recorded lien of J. L. Ricker for the money loaned to Pennington is subordinate to the right of the commonwealth to have the automobile forfeited, as pointed out in *King v. Commonwealth*, 102 S. E. 757, decided to-day.

We are of opinion that the judgment of the trial court should be affirmed.

**Affirmed.**

(127 Va. 794)

**BUCHHOLZ v. COMMONWEALTH.**

(Supreme Court of Appeals of Virginia. March 30, 1920.)

**1. INTOXICATING LIQUORS — 246 — AUTOMOBILE STOLEN BY CHAUFFEUR, WITH WHOM OWNER TRUSTED IT, MAY BE FORFEITED.**

Where an owner in the District of Columbia intrusted his automobile to his chauffeur to take to repair shop, and the latter used it for unlawfully transporting ardent spirits into the commonwealth, the automobile was subject to forfeiture under the prohibition act (Acts 1918, p. 612, § 57), though under the law of the District the chauffeur became a thief before taking the car from the District, whether the right given the chauffeur by the owner was that of custody or possession.

**2. INTOXICATING LIQUORS — 245 — FORFEITURE PROVISIONS TO BE STRICTLY ENFORCED.**

In view of the facility with which liquor may be transported in automobiles, the forfeiture provided in the Prohibition Act (Acts 1918, p. 612, § 57) should be strictly enforced, unless the owner did not knowingly part with either custody or possession, especially in view of the declaration of section 58 of the act, providing that all of its provisions shall be liberally construed.

**Error to Hustings Court of Richmond.**

Information by the Commonwealth to enforce a forfeiture of an automobile seized while engaged in illegal transportation of ardent spirits, which was claimed by Gustav Buchholz. There was a judgment of forfeiture, and the claimant brings error. **Affirmed.**

Carlin & Carlin (Smith & Wools, of counsel), for plaintiff in error.

John R. Saunders, Atty. Gen., J. D. Hank, Jr., Asst. Atty. Gen., and Leon M. Bazile, of Richmond, for the Commonwealth.

**BURKS, J.** This is an information to enforce a forfeiture of an automobile seized under the provisions of section 57 of the Prohibition Act (Acts 1918, p. 612), while engaged in the illegal transportation of ardent spirits. There was a judgment establishing the for-

feiture, and to that judgment the writ of error in this case was awarded.

By consent of parties the case was heard by the court, without the intervention of a jury, on the following agreed state of facts:

"It is agreed that the car in question, to wit, Cadillac 7-passenger, D. C. license 10139-1918, Md. license 1918-H, engine No. 55-A-136, described in the information, was seized in the city of Richmond, Va., by certain police officers of said city, on December 19, 1918, while in the possession of one James A. Chisholm, and that the said car was transporting ardent spirits contrary to law, and that said car was of the value of \$1,250.

"It is further agreed that the car in question was and is now the property of the respondent, Gustav Buchholz, and that the said James A. Chisholm had no interest whatsoever in said automobile, and that the said respondent was not at the time of said transportation, or at any other time, aiding or abetting the said James A. Chisholm, or any other person, in the transportation of ardent spirits.

"It is further agreed that the respondent, Gustav Buchholz is a citizen of the city of Washington, D. C., having been a citizen of said city for the last 25 years; that he is the proprietor of the Hotel Occidental, in the said city of Washington, D. C.; that in connection with the operation of his hotel business he owns and operates several large automobiles for sight-seeing purposes, and that among these automobiles so used was the automobile in this case; that the said James A. Chisholm was employed by Gustav Buchholz as a chauffeur, his duties being to operate one of the said automobiles in the city of Washington, and in the District of Columbia, and nowhere else, carrying persons in and about said city and District for sight-seeing purposes; that on December 18, 1918, the said James A. Chisholm was directed by Gustav Buchholz, his employer, to take the car in question to a certain automobile repair shop in the city of Washington, D. C., so that certain repairs could be done upon said car that were necessary, and to place the automobile in the shop for this purpose; that the next morning, December 19, 1918, the said James A. Chisholm did not report to the hotel for duty, and upon inquiry, made by Mr. Buchholz at the repair shop, he learned to his utter surprise that the car in question had not been brought there at all, and that those in charge of said shop knew nothing of it; that thereupon Mr. Buchholz made inquiry in and about the city of Washington, trying to locate his said chauffeur and automobile, but in vain, and that he thereupon immediately reported the disappearance of his car to the superintendent of the metropolitan police force of Washington, D. C., Maj. R. W. Pulliam, and also to the police officer on the beat wherein his hotel is located, namely, one Isadore Rosenburg, with the request that steps be taken immediately to locate the said automobile and to arrest the said James A. Chisholm for stealing same; that on the night of said December 19, 1918, the said Gustav Buchholz was called up by long-distance telephone from Richmond, Va., and advised that a man by

the name of James A. Chisholm was arrested in said city with the automobile in question, which said automobile had ardent spirits, and that he, the said Chisholm, had advised that the automobile belonged to Mr. Buchholz; that Mr. Buchholz immediately went to Richmond, Va., saw his automobile, and identified it as being his property."

[1] There is nothing in principle to distinguish this case from *Landers v. Commonwealth*, 101 S. E. 778, except that it is insisted that, under the laws of the District of Columbia, Chisholm became a thief of the automobile before he ever brought the car into the state of Virginia, and hence the rights of the owner are superior to the claims of the state. The facts agreed show that the car was intrusted to Chisholm by the owner in the conduct of the latter's business. In taking charge of the car Chisholm was neither a trespasser nor a thief, and when the car was seized Chisholm was the "person in charge" thereof. There are many nice distinctions between custody and possession, applicable chiefly in the administration of the criminal law, where they have been practically eliminated by the statutes on embezzlement, but we do not regard them as applicable to the statute under consideration. As pointed out in *Pennington & Ricker v. Commonwealth*, 102 S. E. 758, decided to-day, the important inquiry is: Did the owner intrust his car to Chisholm? If he did, he must bear the consequences of his misplaced confidence. It is immaterial whether Chisholm had custody or possession. If he had either, it was with the consent of the owner, and this was sufficient to justify the forfeiture. The law on this subject is well stated by Judge Woods in *United States v. One Saxon Automobile*, 257 Fed. 251, 168 C. C. A. 335, cited by counsel for the plaintiff in error. He points out the reason why the property of the owner should not be subject to forfeiture when it has been taken from him in the first instance by trespass or theft, and in doing so bears in mind the fact that both custody and possession involve lawful acquisition, and are to be distinguished from trespass and theft which are unlawful.

In speaking of the rule of construction where the property was taken by trespass or theft, he says:

"This rule of construction has been extended without dissent to protect the innocent owner of property from forfeiture, even when provided by a statute which expresses no limitation or exemption of any kind, where the property *has been taken* by a trespasser or a thief, or the owner has been deprived of the possession by forces of nature beyond his control. This is for the reason that no right of possession or *custody* can be acquired by or from a trespasser or thief, or by virtue of the forces of nature against the will of the owner. In such case, the owner of the property has never in a legal sense parted with any right of *custody or possession*, and hence no statute can operate against his title by reason of the *use or custody or possession* of the thief or trespasser, or his deprivation of it by the forces of nature. This reasoning obviously does not apply when the owner *voluntarily parts with his possession and intrusts* his ship or vehicle to another, for in that case the owner is charged with knowledge that the person to whom he has relinquished possession, or some one acquiring the possession from him, may so use the property as to defeat the collection of the revenue, and thus bring it under the condemnation of forfeiture." (*Italics supplied.*)

[2] The facility with which liquor may be transported in automobiles is very great, and it is necessary that the forfeitures provided in the prohibition act should be strictly enforced, unless it can be shown that the owner did not knowingly part with either the custody or possession thereof. This necessity is emphasized by section 58 of the act, declaring that, in order to effect its objects, "all of its provisions shall be liberally construed."

The case is one of great hardship, but as the custody of the machine was acquired by Chisholm with the consent of the owner, we are of opinion that the case comes within the language of the statute and that there was no error in declaring the forfeiture. The judgment of the trial court must therefore be affirmed.

Affirmed.

(127 Va. 166)

**ELLIOTT v. BIRRELL.**

(Supreme Court of Appeals of Virginia. March 30, 1920.)

**1. LANDLORD AND TENANT §70 — ESTATE FROM YEAR TO YEAR OR MONTH TO MONTH IS "ESTATE FOR YEARS."**

An estate from year to year or from month to month is an "estate for years" (citing 8 Words and Phrases, p. 6908).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Estate for Years.]

**2. LANDLORD AND TENANT §114(1)—TENANCIES FROM YEAR TO YEAR CREATED BY AGREEMENT OR IMPLICATION.**

Tenancies from year to year arise either by express agreement or implication, and by judicial construction they have replaced tenancies at will and by sufferance, on account of the uncertainties and injustices of the latter.

**3. LANDLORD AND TENANT §114(1) — How PERIODIC TENANCY IS CREATED.**

When a tenant is in possession under a lease for an indefinite term, or under a general permission to occupy and pay a periodical rent, a periodical tenancy is thereby created; the length of the recurring periods being determined by character of the payments.

**4. LANDLORD AND TENANT §114(3)—TENANT FOR YEARS, HOLDING OVER, BECOMES A TENANT FROM YEAR TO YEAR.**

Where landlord allowed a tenant for a term of years to hold over after the expiration of his term, the one paying and the other receiving the rent formerly paid, without any new agreement, the tenant becomes a tenant from year to year; but where previous tenancy was for a term less than a year, the ensuing periodic estate takes the form of tenancy under which the tenant previously held.

**5. LANDLORD AND TENANT §114(1)—EVERY TENANCY PRIMA FACIE A TENANCY FROM YEAR TO YEAR.**

Generally every occupation of land is prima facie a tenancy from year to year, yet it may be shown to be any other tenancy.

**6. LANDLORD AND TENANT §114(1)—ESTATE AT WILL CONVERTED INTO ONE FOR PERIOD INDICATED BY PAYMENT OF RENT.**

In case of an estate at will, where there is an entry and payment of rent, the estate is converted into an implied tenancy from year to year, or for some other time, as may be indicated by the payment of rent.

**7. LANDLORD AND TENANT §115(1)—TENANCY FROM MONTH TO MONTH PRIMA FACIE CREATED BY PAYMENT OF RENT FOR SUCH PERIOD.**

A tenancy from month to month is created by the reservation or the payment of rent with reference to such period, when no period for the duration of the tenancy is named, even

though urban property is involved and the holding continues for more than 12 months.

**8. LANDLORD AND TENANT §115(1)—IN ABSENCE OF SPECIAL AGREEMENT, LEASE PRESUMED TO BE FOR A MONTH.**

In the absence of any special agreement as to the extent of the lease, it must be presumed to have been a monthly one.

**9. LANDLORD AND TENANT §114(1)—LENGTH OF RECURRING PERIODS ON A GENERAL LETTING DEPENDS ON INTENTION.**

An estate from year to year is not inexorably established on a general letting by the bare fact that rent is accepted or measured by an aliquot part of a year; but the length of recurring periods of estate so established should be derived from the character of the letting, the purpose of the lease, the nature of property leased, the payment of the rent, the annual value of the land, in contrast with the rent paid, and other attendant facts proper to be considered in seeking the intention of the parties.

**10. LANDLORD AND TENANT §115(1)—TENANCY CONSTRUED TO BE TENANCY FROM MONTH TO MONTH AND NOT FROM YEAR TO YEAR.**

Where a dwelling was leased at an agreed monthly rental of \$25 per month, nothing being said as to the length of the term, the tenancy was from month to month, and not from year to year.

Appeal from Circuit Court, Alexandria County.

Action by Katie Elliott against Edwin M. Birrell. Judgment for plaintiff in justice court was reversed on appeal to the circuit court, and judgment there rendered for defendant, from which plaintiff appeals. Reversed, and judgment entered for plaintiff.

Charles T. Jesse, of Rosslyn, for appellant.  
Robinson Moncure, of Alexandria, for appellee.

SAUNDERS, J. Julian N. Major was the owner of two lots in Cottage Park, Alexandria county, Va. On April 16, 1916, he leased these lots to Edwin M. Birrell, to be used as his dwelling, at an agreed monthly rental of \$25 per month, nothing being said as to the length of the term. Subsequently Major sold the property to one Katie Elliott, who thereafter regularly collected the monthly rent from the lessee.

Desiring to secure possession of her property, the plaintiff instituted an action of unlawful detainer before a justice of the peace of Alexandria county, giving the lessee a month's notice. The justice of the peace trying the warrant gave a judgment in favor of the plaintiff. From this judgment the defendant, Birrell, took an appeal to the cir-

cult court of Alexandria county. The case, by agreement, was submitted as to all matters of law and fact to the said court for determination. Thereafter, on May 8, 1919, the court, being of opinion that the plaintiff was not entitled to recover possession of the premises upon one month's notice, entered an order to that effect, giving judgment, with costs, in favor of the defendant. To this judgment a writ of error was allowed, and supersedeas awarded by one of the judges of this court.

The following stipulation of facts upon which the case was heard is a part of the record:

"On the 15th day of April, 1916, one Julian N. Major, who was then the owner of the property involved in this proceeding, to wit, lots numbered 11 and 12, in block 6, of the subdivision of Cottage Park, Jefferson magisterial district, Alexandria county, Va., leased the same to the defendant, Edwin M. Birrell, to be used by him as his dwelling, at a monthly rental of \$25 per month; nothing being said or agreed as to the length of the term, the defendant simply agreeing to take the property and pay \$25 per month. Subsequently the plaintiff, Katie Elliott, purchased said property, and is now the owner thereof, and has since her purchase, and up to the time of giving the notice hereinafter mentioned, received said monthly rent from the defendant.

"One month's proper and legal notice was given to the defendant by the plaintiff to quit and deliver up the premises, and upon the refusal of the defendant to do so, and after the expiration of the said month, plaintiff had a warrant of unlawful detainer issued against defendant for said premises, after affidavit duly made as required by the statute.

"The justice of the peace who tried said warrant gave judgment for the plaintiff, from which judgment the defendant appealed to the circuit court of Alexandria county."

The sole question presented for determination is whether the agreement of the parties created a tenancy from year to year or from month to month.

[1-3] An estate from year to year is an estate for years; so is an estate from month to month. Words and Phrases, vol. 8, p. 6908. See, also, Minor on Real Property, vol. 1, § 390; 2 Min. Inst. p. 201. Tenancies from year to year arise either by express agreement or implication, and by judicial construction they have replaced estates at will and by sufferance, on account of the uncertainties and injustices of the latter. From the circumstance that leases and rent are generally measured by yearly periods, these periodic estates are usually known as estates from year to year, but in many cases the period may be from month to month, week to week, etc. Minor on Real Prop. vol. 1, § 390; Blackstone, vol. 2, p. 147, and note; Tiffany, Landlord and Tenant, p. 121. When a tenant is in possession under a lease for an indefinite term, or under a general permission

to occupy and pay a periodical rent, a periodical tenancy is thereby created, the length of the recurring periods of which is determined by the character of the payments. 18 Am. & Eng. Ency. L. p. 193.

A tenancy analogous to that from year to year, and differing therefrom merely in the length of the recurring periods with reference to which it is measured, may be created expressly, or as a result of conditions similar to those giving rise to tenancy from year to year; that is, a tenancy from month to month, from week to week, indeed, from any period to like period, is created by the reservation or payment of rent, with reference to such period, when no period for the duration of the tenancy is named. Tiffany, Landlord and Tenant, p. 133.

The typical periodic tenancy is one from year to year, but the essential qualities of a tenancy from month to month are the same. Indeed, this and the other classes of periodic tenancies are merely a development from the tenancy from year to year. Tiffany, p. 121.

[4] Where a landlord allows a tenant for a term of years to hold over after the expiration of his term, the one paying and the other receiving the rent formerly paid, without any new agreement, the tenant becomes a tenant from year to year. Peirce v. Grice, 92 Va. 767, 24 S. E. 392, and cases cited. But this does not mean that every lessee holding over is entitled to hold for another year. The preceding estate may have been one of years, but for a less period than a year. This fact may determine the extent of the ensuing periodic estate.

"If a landlord elect to treat one holding over as a tenant, he thereby affirms the form of tenancy under which the tenant previously held. If that was a tenancy by the month, it will presumptively so continue." "The implied renewal of a lease assumes a continuation of its characteristic features." Hollis v. Burns, 100 Pa. 209, 45 Am. Rep. 379.

In Branton v. O'Briant, 93 N. C. 99, this instruction was approved:

"If the plaintiff rented a house at \$5 a month, and held over for several months, paying the same rent without a new agreement, she would be a tenant from month to month."

With respect to periodic estates arising by holding over, and the payment and receipt of rent, it will be noted that the agreement of the parties as to the character of the periodic estate is implied from and determined by the characteristics, including the payment of rent, of the estate which precedes it. Where the periodic estate is established by a general letting, the agreement as to payment of rent becomes of prime importance in determining the character of the periodic estate, whether it is to be held an estate from year to year, or for a lesser period. The

difference between the estate from year to year, and the lesser periodic estates, is chiefly with respect to the notice to be given for termination.

The chief difficulty in determining whether a tenancy for an indefinite time—that is, a general tenancy (*Bright v. McOuat*, 40 Ind. 521)—is a tenancy from year to year, or for a lesser period, arises in the main from the inconclusiveness and indefiniteness of the terms of agreement.

In *Minor's Real Property*, cited *supra* (section 390), and 2 *Minor's Institutes*, p. 200, it is stated that—

"Every general letting, if the lessor accepts yearly rent, or rent measured by any aliquot part of a year, if not expressed to be an estate at will, is an estate from year to year."

If this statement is of universal and inflexible application, then every letting for an indefinite time, whether the rent is to be paid yearly, half-yearly, every three months, or each month, will be a tenancy from year to year, without regard to the character of the property leased, whether urban or agricultural, or to other pregnant circumstances.

The statement in *Graves' Real Property*, § 67, is that if—

"under agreement for a lease, the tenant enters and pays an annual rent, or rent with reference to a year, he becomes a tenant from year to year."

The propriety of the conclusion, that a tenant for an indefinite time, who agrees to pay a yearly or half-yearly rent, becomes a tenant from year to year, is admitted. The agreement with respect to the payment of the rent yearly, or half-yearly, in the absence of other and more controlling circumstances, justifies the conclusion that the parties are contracting for a yearly period. But is this conclusion so apparent when the agreement for the rent contemplates a monthly payment? A month is an aliquot part of a year, but it is also a definite period of time with respect to which contracts are made. An agreement that the rent contracted for shall be paid by the month, if not controlled by other features of the case, is consistent with the conclusion that the parties have in mind a tenancy by the month. This distinction is evidently in the mind of the following writer:

"Where the letting is by the month indefinitely, and not as for an aliquot part of a year, the tenancy is from quarter to quarter, month to month," etc. *Taylor, Landlord and Tenant*, § 57.

In each given case, the contract between the parties, construed in the light of all the facts, must determine the tenancy, and fix the respective rights of the lessor and lessee.

[5] As a general proposition, "every occupation of land \* \* \* is \* \* \* *prima facie* \* \* \* a tenancy from year to

year," yet it may be shown to be any other tenancy. *Humphries v. Humphries*, 25 N. C. 363.

A large proportion of the English decisions under the general head of periodic tenancies, relate to farming lands. A demise of such lands, when no limit of time was fixed, and the rent was measured by any aliquot part of a year, would be interpreted with reference to the subject-matter. There is a certain succession of operations contemplated in the ordinary use of farming lands—planting, cultivation, and harvesting—requiring in the main the period of a year. Hence the natural conclusion that the parties, contracting for the lease of such lands for an indefinite period, intended the periodic estate to be from year to year, whether the payment of rent was to be made yearly, half-yearly, or by the month. But when the demise for an uncertain period is of urban property, the conclusion that the periodic estate is intended to be from year to year is not so readily drawn, particularly when the agreement provides that the rent is to be paid by the month. That it is proper to look to the purpose for which a lease of indefinite duration is made, to determine the character of the tenancy created, is established by the case of *Patton v. Axley*, 50 N. C. 440. In that case a demise for an indefinite period, rent to be paid at the end of each quarter, was held to create a tenancy from year to year. The court stated that this conclusion was arrived at partly from a consideration of the purpose for which the lease was made, and partly from the fact that the rent reserved was payable quarterly.

In most of the decided cases the facts very clearly indicate that a tenancy from year to year was intended. The intention to establish a tenancy of this character is frequently derived from the fact that the demise in terms provides for a yearly rent. The further fact that the rent is to be paid half-yearly, or quarterly is in aid of this conclusion that a tenancy from year to year was contemplated.

Lord Mansfield states the rule as to implied lettings from year to year as follows:

"A general letting at a yearly rent, though payable half-yearly, or quarterly, and though nothing is said about the duration of the term, is an implied letting from year to year." *Richardson v. Langridge*, 4 Taunton, 130.

See, also, *Tiffany*, p. 125:

"Tenancy from year to year may be created by express language, or by a letting with no limitation as to the duration of the tenancy, followed by the acceptance and payment of a yearly rent."

"The payment of a rent in order to give rise to an intention to create a tenancy from year to year, must be with reference to a yearly holding, by which is meant that it is paid as rent for a year, or as a part of rent computed by the year." *Id.* p. 126.



To the same effect is the following citation from Taylor on Landlord and Tenant, § 55:

"Since the time of the Year Books, the courts have treated a general occupation by permission, no time being fixed for its continuance, as a tenancy from year to year, whenever the reservation of rent, or other circumstances, indicated an agreement for an annual holding."

This we regard as a very accurate statement of the rule of interpretation proper to be applied to these indefinite lettings. If the reservation as to the rent, or other circumstances proper to be considered, indicate an agreement for an annual holding, then the tenancy is from year to year, but not so if the reservation of rent and other circumstances indicate that a tenancy for a lesser period is intended. For instance, in the same authority, section 57, it is stated that—

"Where the letting is by the month indefinitely, and not as for an aliquot part of a year, the tenancy is from quarter to quarter, month to month," etc.

"The theory of the creation of a periodic tenancy by the payment and receipt of rent, is that it shows an intention to create such a tenancy. But it is evidence merely of intention. The question is one for the jury." Tiffany, pp. 126, 127.

[8] To make the tenancy one from year to year, the payment of rent must mean a payment with reference to a yearly holding. *Johnson v. Albertson*, 51 Minn. 336, 53 N. W. 642. In case of an estate at will, where there is an entry and payment of rent, the estate is converted into an implied tenancy from year to year, or for some other time, as may be indicated by the payment of rent. *Hoover, Rhodes & Co. v. Pacific Oil Co.*, 41 Mo. App. 323, and cases cited.

The rule as to the creation of tenancies from year to year is rather broadly stated in 2 Minor's Institutes and Minor on Real Property, cited supra. Apparently these citations justify the conclusion that every general letting, if the lessor accepts rent, or rent measured by any aliquot part of a year, is an estate from year to year. In many cases this is doubtless the proper conclusion to be derived, but there are many general lettings with an agreement for, or an acceptance of rent measured by an aliquot portion of a year, which are not tenancies from year to year. It is, of course, proper to look to the terms of the letting, and the agreement for, or acceptance of, rent; but there are other determining factors, such as the character of the property leased or the annual value of the land, in contrast with the rent paid, which are likewise proper to be considered in reaching a conclusion as to the extent of the periodic estate created. The presence of these features, or other attendant features, may fully justify the finding that a general letting, with an agreement for the payment

of rent by the month, admittedly an aliquot part of a year, created a tenancy from month to month.

"Evidence of a gross disparity between the rent actually paid, and the annual value of the property, has been regarded as sufficient to rebut the presumption of a tenancy from year to year." Tiffany, p. 127; 18 Am. & Eng. Ency. L. p. 198.

[7] There is much authority for the specific proposition that a lease for no definite period, with a provision for the payment of rent by the month, creates a tenancy from month to month, and not one from year to year.

"A tenancy from month to month is created prima facie by the reservation, or the payment of rent, with reference to such a period, when no period for the duration of the tenancy is named. The view of many jurisdictions is that a letting at a monthly rent for no definite period, prima facie creates a tenancy from month to month." Tiffany, pp. 133, 134, and cases cited.

"To constitute a tenancy by the month," either "a special agreement to that effect" is necessary, "or the tenancy must be implied from the manner in which the rent is paid; for where it is paid by the week, month, quarter, or year, a weekly, monthly, quarterly, or yearly hiring is presumed, according to the circumstances."

\* \* \* Where it appears that there is an annual rent reserved, and the payment is to be made by the quarter, or month, or week," then it "is a yearly letting, without regard to the periods of payment." *Douglass v. Seiferd*, 18 Misc. Rep. 188, 41 N. Y. Supp. 289.

"When urban property is involved, as in this instance, occupancy and monthly payments as for each month's rent are insufficient, standing alone, to indicate an intention to create a yearly tenancy. These acts cannot be construed as indicative of anything more than an intention to create a tenancy from month to month, and the effect thereof cannot be changed by the mere length of time the occupation has continued." *Johnson v. Albertson*, 51 Minn. 336, 53 N. W. 643.

Hence, when a tenancy from month to month has begun, the bare fact that the holding thereunder continues for more than 12 months does not transform the same into a tenancy from year to year.

A lease to begin May 1, 1877, at \$10 a month, payable in advance, was held to be a tenancy from month to month. *Steffens v. Earl*, 40 N. J. Law, 128, 29 Am. Rep. 214. In this case it was insisted that the words used imported a tenancy at will, or from year to year, and that a notice of three months was required. This contention was overruled.

To constitute a tenancy from month to month, a special agreement to that effect may be made, or the tenancy may be implied from the manner in which the rent is paid. A lease for an indefinite term with monthly rent reserved creates a tenancy from month to month. 24 Cyc. p. 1034.

[8] In the absence of any special agreement as to the extent of the lease, it must be presumed to have been a monthly one. *Paquetel v. Gauche*, 17 La. Ann. 64.

If, after the termination of a term of years, the lessee agrees to pay rent as long as he occupies the premises, and continues to pay rent by the month, the demise becomes a tenancy from month to month. *Rogers v. Brown*, 57 Minn. 223, 224, 58 N. W. 981.

When premises are let for an indefinite term, the rent being paid monthly, then in contemplation of law a new letting commences with each monthly term. *Borman v. Sandgren*, 37 Ill. App. 163, and cases cited. *Woods, Landlord and Tenant*, § 539.

From the occupation and payment of monthly rent, the law creates a tenancy from month to month. *Sebastian v. Hill*, 51 Ill. App. 274; *Creighton v. Sanders*, 89 Ill. 543; *Warner v. Hale*, 65 Ill. 396; *Prickett v. Ritter*, 16 Ill. 96.

In most jurisdictions the reservation of a monthly rent will make the tenancy one from month to month, and not from year to year. *Tiffany, Landlord and Tenant*, p. 137, note.

The view in many jurisdictions is that a tenancy from month to month is *prima facie* created by a letting at a monthly rent for no definite period. This is supported by a number of cases cited. *Tiffany*, p. 134, note 506; *Hungerford v. Wagoner*, 5 App. Div. 590, 39 N. Y. Supp. 369; *Thomson v. Chick*, 92 Hun, 510, 37 N. Y. Supp. 59.

It must not be presumed that there are no authorities for the contention that all tenancies for an indefinite time are deemed to be tenancies from year to year. There are such authorities, and they will be cited in this connection; but their statement of the rule is a sweeping generalization, that may not be followed in many cases without committing palpable injustice.

The following extract is taken from *Stedman v. McIntosh*, 42 Am. Dec. 126:

"The courts early began to regard all demises for uncertain periods as tenancies from year to year, \* \* \* and at the present time tenancies for an indefinite period are generally regarded as tenancies from year to year."

"Tenancies of indeterminate duration, anciently deemed tenancies at will, are now considered

as from year to year." 24 Cyc. p. 1036, and cases cited.

But for a somewhat different statement of this principle see *Id.* p. 1028:

"Tenancy from year to year arises by implication, as when property is occupied generally under a rent payable yearly, half-yearly, or quarterly. Payment of rent is merely a fact bearing on the intent."

See, also, as to intent, 2 *Minor's Inst. and Minor on Real Property*, cited *supra*.

We have been cited to no Virginia decisions bearing precisely on the point in issue.

[9] Upon comparison and consideration of the authorities and precedents cited, this court is of opinion, with relation to the creation of periodic estates by a general letting, that an estate from year to year is not inexorably established upon such a letting by the bare fact that the rent is accepted, or measured by an aliquot part of a year, but that the length of the recurring periods of the estate so established should be derived from the character of the letting, the payment of the rent, and the attendant facts proper to be considered in seeking the intention of the parties.

The facts in this case, from which a conclusion of intent is to be derived, are: First, that there was no agreement between the parties as to the length of the term; second, that the lands are urban property, consisting of two lots in Cottage Park, in Alexandria county; third, that these lands were demised to the defendant to be used by him as his dwelling, at a monthly rental of \$25.

[10] Applying the principles announced to these facts, the court is of opinion that the periodic estate established by the contract of the parties in the instant case was a tenancy from month to month, and not from year to year, and that the learned judge of the circuit court of Alexandria county was in error in holding that the plaintiff was not entitled to recover possession of said premises upon a notice of one month.

The judgment complained of must be reversed, and this court will enter the order proper to have been made by the circuit court. **Reversed.**

(88 W. Va. 38)

(103 S.E.)

HUGHES v. McDERMITT et al. (No. 3939.)

(Supreme Court of Appeals of West Virginia.  
March 30, 1920.)*(Syllabus by the Court.)*

**JUDGMENT**  $\S$ 414, 846—COLLECTION OF INSOLVENT'S JUDGMENT AGAINST HIS SURETY WILL BE ENJOINED UNTIL SURETY'S LIABILITY IS ASCERTAINED; ASSIGNEE HAS NO GREATER RIGHT THAN ASSIGNOR.

Where a judgment debtor of an insolvent person is surety for such insolvent person, and the amount of his liability as such surety has not yet been determined, a court of equity will enjoin the collection of the judgment against him in favor of such insolvent party until such amount has been ascertained, and if paid by him applied as an offset against the judgment, or until he has been indemnified against loss because of his suretyship; and the fact that such insolvent party may have assigned such judgment to another will make no difference. The assignee will occupy no higher ground than his insolvent assignor.

Appeal from Circuit Court, Mason County.

Action by Ashbell Hughes against J. O. McDermitt and F. E. Bletner. Decree for defendants, and plaintiff appeals. Reversed and remanded for the adjustment of equities between the parties.

B. H. Blagg and Somerville & Somerville, all of Point Pleasant, for appellant.

Rankin Wiley, of Point Pleasant, for appellees.

**RITZ, J.** The defendant J. O. McDermitt was sheriff of Mason county for the four years ending on the 31st of December, 1908, and the plaintiff, Ashbell Hughes, was one of the sureties on his official bond as such sheriff, as well as one of his deputies, during his term of office. After the close of McDermitt's term of office, he was indebted to the county in considerable sums of money, and, not paying the same upon demand, suit was brought against him and his sureties, and a judgment recovered against them for more than \$19,000. It seems that the plaintiff, Hughes, was indebted to McDermitt because of funds placed in his hands as deputy sheriff which had not been accounted for, and, in a suit by McDermitt against Hughes and the sureties on his bond as deputy sheriff, a judgment was rendered for the sum of \$900 and costs. Upon this judgment Hughes paid \$300, and he says he also paid the costs; but it is not clear from the record just what is the fact in regard to this, leaving unpaid the sum of \$600 without dispute. Upon the judgment obtained by the county court against McDermitt and his sureties, collections were made from McDermitt by the sale of his property, and the balance, amounting to something like \$12,000,

was paid by his sureties. Prior to the institution of this suit, the plaintiff, Hughes, had paid \$400 of this balance due by McDermitt to the county court. At this stage an execution was sued out upon the judgment in favor of McDermitt against Hughes and his sureties claiming a balance of \$600 and costs, and placed in the hands of the sheriff of Mason county for collection. Hughes thereupon filed this bill seeking to enjoin the collection of that judgment, and to have set off against it the \$400 which he had paid for McDermitt on McDermitt's debt to the county court, and to have the collection of any residue restrained until it was ascertained whether or not he would have any further liability on account of said judgment of the county court against McDermitt and his sureties, or until McDermitt indemnified him because of such liability, further alleging that McDermitt was insolvent, and if this \$600 was collected from him on the execution, he would never be able to collect the \$400 which McDermitt already owed him on account of the payment made on the judgment of the county court, as well as any further sums which he might have to pay in the final adjustment of that judgment.

McDermitt answered this bill admitting all of the facts therein alleged except that he denied that he was insolvent, but he averred in effect that all of his property has been exhausted, and that his sureties would have to pay something like \$12,000 to discharge the judgment in favor of the county court against him, which was in effect admitting his insolvency, notwithstanding his denial thereof; and further alleging in his answer that he had assigned this judgment against Hughes to his sureties in his official bond, to be applied to the payment of the indebtedness of the county court against him when the same was collected.

Subsequently Hughes filed an amended and supplemental bill, alleging that since the filing of his original bill a suit had been brought by some of the sureties on McDermitt's official bond against others of such sureties for contribution, and that in such suit a settlement was had and the status of each of said sureties ascertained, and that it was therein determined that, in order to relieve him of his obligation upon the bond and to other sureties who had paid more than their share of the judgment, he would have to pay, in addition to the \$400 which he had paid, the sum of \$275, and that upon this being ascertained he had paid the said sum of \$275, making \$675 in all which he had paid out upon the judgment in favor of the county court against McDermitt and the sureties on his bond, and, this amount being in excess of the balance remaining unpaid on the judgment in favor of McDermitt against him, he prayed that the said McDermitt be forever enjoined from collecting that judgment, and that so much of the

amount which he had paid for McDermitt as would be necessary to that end be applied to discharge the said judgment, and a decree rendered in his favor against McDermitt for any amount remaining after so offsetting the judgment against him in favor of McDermitt.

A temporary injunction was granted by the circuit court upon the filing of the original bill, but upon a hearing of the cause this injunction was dissolved and the bill dismissed, and from this decree Hughes prosecutes this appeal.

It seems to be very well established that where one is indebted to an insolvent person, and is also liable for a debt of such insolvent person as surety or otherwise, he may in equity enjoin the collection of such indebtedness to such insolvent person until he is indemnified against liability as such surety, and in case his liability as surety has been ascertained and he has discharged the same, as is the case here, he is entitled in equity to have set off against his indebtedness to such insolvent person whatever amount he has been compelled to pay as such surety. *Mattingly v. Sutton*, 19 W. Va. 19; *Bowling v. Bluefield-Graham Fair Association*, 84 W. Va. —, 99 S. E. 184; *Williams v. Helme*, 16 N. C. 151, 18 Am. Dec. 580; *Tillis v. Folmar*, 145 Ala. 176, 39 South. 913, 117 Am. St. Rep. 31, and monographic note at page 38, 8 Ann. Cas. 78; *Scott v. Armstrong*, 146 U. S. 499, 13 Sup. Ct. 148, 36 L. Ed. 1059; *Brant on Suretyship & Guaranty*, § 249; 21 R. O. L. tit. "Principal and Surety," § 151. An assignee will stand on no higher ground than his insolvent assignor. In this case all of the elements exist to make applicable the authorities above cited. While it is denied by McDermitt that he is insolvent, the allegations of his answer show this to be the case, and it is abundantly corroborated by the proof taken. That Hughes has paid \$875 upon McDermitt's debt to the county court is admitted, and no reason is perceived why he is not entitled in equity to have that amount set off against the judgment in favor of McDermitt

against himself. It does not clearly appear from the record in this case just when the payment of \$400 was made by Hughes on the judgment against McDermitt. The judgment against Hughes in favor of McDermitt bears interest from its date, and, of course, if the payments made by Hughes were some time subsequent to the date of the judgment in favor of McDermitt against him, he would only be entitled to apply them to that judgment as of the date he actually made them, and because the dates of these payments do not appear we are unable to say whether or not, applying the payments made by Hughes on the judgment of the county court against McDermitt as offsets on this judgment of McDermitt against Hughes, as of the date they were made, it would be fully discharged or not.

Our conclusion, therefore, is to reverse the decree of the circuit court of Mason county and remand the cause in order that the equities may be properly adjusted between the parties, and should it turn out that the amount paid by Hughes on the judgment of the county court against McDermitt is sufficient to offset the balance remaining unpaid on the judgment of McDermitt against him, applying the payments as of the date they were made, the injunction should be perpetuated as to the whole of said judgment. If, on the other hand, these payments so applied do not fully discharge the judgment in favor of McDermitt against Hughes, it will be offset to the extent that such payments were made, and McDermitt allowed to enforce the execution for any balance; or if the payments made by Hughes, applied as aforesaid, more than pay off the balance remaining unpaid on the judgment in favor of McDermitt against him, he will be entitled to have the collection of the judgment enjoined in toto and to have a decree in his favor for the excess. The costs in this court will be awarded to the plaintiff against the defendant J. O. McDermitt.

(179 N. C. 426)

**COTTLE v. JOHNSON. (No. 304.)**

(Supreme Court of North Carolina. April 14, 1920.)

**1. DAMAGES §57—"MALICE" DEFINED.**

"Malice," as relating to damages, is defined as a disposition to do a wrong without legal excuse or as a reckless indifference to the rights of others, and does not necessarily mean ill will, and includes a wrongful act knowingly and intentionally done without just cause and excuse.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Malice.]

**2. HUSBAND AND WIFE §384(2)—PERSONAL ILL WILL, ETC., NECESSARY TO WARRANT PUNITIVE DAMAGES FOR ALIENATING WIFE'S AFFECTION.**

In a husband's action for alienation of his wife's affections, it being incumbent upon him to show circumstances of aggravation in addition to the malice implied by law from defendant's conduct in separating plaintiff and his wife which was necessary to recover compensatory damages, where the evidence was conflicting as to the cause of the alienation, it was error to charge the jury that they could award punitive damages without requiring a finding that defendant acted from personal ill will toward plaintiff or wantonly or oppressively or from reckless indifference to plaintiff's rights.

**3. HUSBAND AND WIFE §333(3)—CONVERSATIONS BETWEEN SPOUSES ADMISSIBLE IN HUSBAND'S ALIENATION SUIT.**

In an action for alienation of affections of plaintiff's wife, conversations and letters between them are not competent as substantive evidence of defendant's guilt, but are admissible to show their relationship both before and after association with defendant.

**4. HUSBAND AND WIFE §335—CONVERSATIONS AND LETTERS BETWEEN SPOUSES IN ALIENATION SUIT HELD NOT TO REQUIRE INSTRUCTION ON COLLUSION.**

In a suit for alienation of the wife's affections, evidence of conversations and letters between her and plaintiff affording opportunity for collusion should be kept within proper bounds by instructions, but failure to so instruct is not error where collusion is negated by the wife's being a witness for defendant and sustaining his contentions.

**5. DAMAGES §215(1)—SEPARATION OF ISSUES OF COMPENSATORY AND PUNITIVE DAMAGES DISCRETIONARY.**

The separation of the issues of compensatory and punitive damages is a matter addressed to the sound discretion of the court.

Brown, J., dissenting.

Appeal from Superior Court, Pender County; Allen, Judge.

Action by J. D. Cottle, Jr., against W. B. F. Johnson. Judgment for plaintiff, and defendant excepted and appeals. New trial ordered on the issue of damages.

This is an action to recover damages for the alienation of the affections of the plaintiff's wife and for criminal conversation.

The evidence of the plaintiff tended to show that he and his wife were married in 1913, and that they lived happily together until July, 1918, when the defendant induced and enticed her to leave him, and that she has lived separate from him since that time. Also, that the relationship between the defendant and his wife was improper and criminal.

The evidence in behalf of the defendant tended to prove that he did not induce or entice the wife to leave the plaintiff; that she left him because of his improper treatment of her and voluntarily went to the home of the defendant, where she lived with him and his wife as a companion and paying for her board.

His honor admitted evidence of conversations between the plaintiff and his wife prior to the separation and of letters written by them, and the defendant excepted.

The charge of his honor on the issue of damages was as follows:

"Upon that issue there is no other rule that I am aware of as to how you will proceed except this: (If he is entitled to damages at all, he would be entitled to reasonable compensation for the injury done him. And reasonable compensation is one of these things you cannot measure like you would measure out corn or determine the price on a horse, or something of that kind; you have to consider all the circumstances and say what, in your opinion, would be reasonable compensation to him for his damages.) To so much of his honor's charge as appears in parenthesis above, the defendant in apt time excepted.

"And then if you find he himself has been guilty of bad conduct towards his wife, you may consider that by way of reducing the damages that you think he would otherwise be entitled to and then say what that reasonable damage would be; and, then, you may (if you see fit in your discretion, add to that what we call punitive damages—that is, damages by way of punishment—if you think it ought to be done, or exemplary damages, as it is sometimes called, and then say, in considering all those matters, what damages he would be entitled to). To so much of his honor's charge as appears in parenthesis above, the defendant in apt time excepted."

The jury returned the following verdict:

"(1) Did the defendant alienate the affections of the plaintiff's wife and cause her to separate from her husband, the plaintiff, as alleged in the complaint? Answer: Yes.

"(2) Did the defendant seduce and carnally know the plaintiff's wife as alleged in the complaint? Answer: No.

"(3) If so, what amount of damages has the plaintiff sustained? Answer: \$8,000."

There was a judgment for the plaintiff, and the defendant excepted and appealed.

McClammy & Burgwin, of Wilmington, and Stevens & Beasley, of Warsaw, for appellant.

George R. Ward, of Wallace, and C. E. McCullen, of Burgaw, for appellee.

ALLEN, J. The complaint alleges two causes of action, one for alienation of the affections of the wife of the plaintiff, and the other for criminal conversation.

The gravamen of the first cause of action is the deprivation of the husband of his conjugal right to the society, affection, and assistance of his wife, and, of the second, the defilement of the wife by sexual relation.

In criminal conversation, "The authorities show the husband has certain personal and exclusive rights with regard to the person of his wife which are interfered with and invaded by criminal conversation with her; that such an act on the part of another man constitutes an assault even when, as is almost universally the case as proved, the wife in fact consents to the act, because the wife is in law incapable of giving any consent to affect the husband's rights as against the wrongdoer; and that an assault of this nature may properly be described as an injury to the personal rights and property of the husband, which is both malicious and willful." *Tinker v. Colwell*, 193 U. S. 473, 24 Sup. Ct. 505, 48 L. Ed. 754. And in an action for alienation of the affection it must be shown that the conduct of the defendant was intentional, and the defendant "is not liable unless he acted maliciously or from improper motives implying malice in law whether he is a parent of or a stranger to the plaintiff's spouse." 13 R. C. L. 1466.

"It may be laid down as a general rule, at least where there is no element of seduction or adultery, that a defendant in an action for alienation of affections is not liable unless he acted maliciously whether he is a parent of or stranger to the plaintiff's spouse. It is true that, as is hereinafter shown, it requires more evidence to establish malice on the part of the parent than is necessary in the case of a stranger, but this difference is an evidential one merely. \* \* \* The term 'malice' does not necessarily mean that which must proceed from a spiteful, malignant, or revengeful disposition, but implies merely a conduct injurious to another, though proceeding from an ill-regulated mind not sufficiently cautious before it occasions the injury. If the conduct is unjustifiable, and actually caused the injury complained of, malice in law will be implied. *Boland v. Stanley*, supra [88 Ark. 562, 115 S. W. 163, 129 Am. St. Rep. 114]; *Westlake v. Westlake*, 34 Ohio St. 621, 32 Am. Rep. 397." *Geromini v. Brunelli*, 46 L. R. A. (N. S.) 465, note.

[1] "Malice" is also defined as a disposition to do a wrong without legal excuse (*Railroad Co. v. Hardware Co.*, 143 N. C. 54, 55 S. E. 422), or as a reckless indifference to the rights of others (*Logan v. Hodg-*

*es*, 146 N. C. 44, 59 S. E. 349, 14 Ann. Cas. 103).

[2] It does not necessarily mean ill will, and includes a wrongful act knowingly and intentionally done without just cause or excuse. *Stanford v. Grocery Co.*, 143 N. C. 427, 55 S. E. 815. When understood in this sense, and as a necessary element in establishing the plaintiff's cause of action for alienation of affections, the finding upon the first issue that the defendant alienated the affections of the plaintiff's wife and caused her to separate from him, as alleged in the complaint, that is, maliciously, entitled the plaintiff to recover compensatory damages, which include loss of the society of his wife, loss of her affection and assistance, as well as for his humiliation and mental anguish; but the right to punitive damages does not attach as matter of law because the first issue was found for the plaintiff.

"The right under certain circumstances to recover damages of this character is well established with us; but, as said in *Holmes v. Railroad*, 94 N. C. 318, such damages are not to be allowed 'unless there is an element of fraud, malice, gross negligence, insult, or other cause of aggravation in the act which causes the injury.' And again, in the concurring opinion in *Ammons v. Railroad*, 140 N. C. 200 [52 S. E. 781], it is said: 'Such damages are not allowed as a matter of course, but only when there are some features of aggravation, as when the wrong is done willfully or under circumstances of oppression, or in a manner which evinces a reckless and wanton disregard of the plaintiff's rights.' " *Stanford v. Grocery Co.*, 143 N. C. 427, 55 S. E. 818.

"This court has said in many cases that punitive damages may be allowed, or not, as the jury see proper, but they have no right to allow them unless they draw from the evidence the conclusion that the wrongful act was accompanied by fraud, malice, recklessness, oppression, or other willful and wanton aggravation on the part of the defendant. In such cases the matter is within the sound discretion of the jury." *Hayes v. Railroad*, 141 N. C. 199, 53 S. E. 843.

"In this court the doctrine is well settled that in actions of tort the jury, in addition to the sum awarded by way of compensation for the plaintiff's injury, may award exemplary, punitive, or vindictive damages, sometimes called smart money, if the defendant has acted wantonly, or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations. But such guilty intention on the part of the defendant is required in order to charge him with exemplary or punitive damages." *Railroad v. Prentice*, 147 U. S. 101, 13 Sup. Ct. 261, 37 L. Ed. 97.

"While every legal wrong entitles the party injured to recover damages sufficient to compensate for the injury inflicted, not every legal wrong entitles the injured party to recover exemplary damages. To warrant the allowance of such damages the act complained of must not only be unlawful, but it must also partake somewhat of a criminal or wanton nature. And so it is an almost universally rec-

ognized rule that such damages may be recovered in cases, and in only such cases, where the wrongful act complained of is characterized by some such circumstances of aggravation as willfulness, wantonness, malice, oppression, brutality, insult, recklessness, gross negligence, or gross fraud on the part of the defendant." 8 R. C. L. 585.

"In order that there may be a recovery of exemplary damages, there must be present in the circumstances some element of malice, fraud, or gross negligence, otherwise the measure of damages is such an amount as will constitute a just and reasonable compensation for the loss sustained, and nothing more. In other words, the wrongs to which exemplary damages are applicable are those which besides violating a right, and inflicting actual damages, import insult, fraud, or oppression, and are not merely injuries, but injuries inflicted in a spirit of wanton disregard of the rights of others." 17 C. J. 974.

It follows, therefore, as it was incumbent on the plaintiff to show circumstances of aggravation in addition to the malice implied by law from the conduct of the defendant in causing the separation of the plaintiff and his wife, which was necessary to sustain a recovery of compensatory damages, and as the evidence was conflicting as to the conditions which brought about the alienation and separation, it was error to charge the jury they could award punitive damages without explaining to them that such damages could not be awarded unless the defendant acted from personal ill will to the plaintiff, or wantonly, or oppressively, or from reckless indifference to his rights.

This is not the case of a charge correct within itself, which fails to present the views of one or the other of the parties, who cannot complain in the absence of prayers for instructions, because here the instruction given is erroneous. The jury could not award punitive damages merely upon the finding on the first issue, as his honor instructed them they could do.

[3] The only other exception requiring notice is to the conversations between the plaintiff and his wife and to the letters.

This evidence was not competent as substantive evidence of the guilt of the defendant, but was admissible for the purpose of showing the relationship between the plaintiff and his wife before they became associated with the defendant and afterwards.

"For the purpose of showing the terms on which the spouse lived, evidence of their declarations, letters to each other, etc., are admissible. So the state of a spouse's affections after the alleged alienation of his or her affections is material, and, for the purpose of showing that his or her affections had been in fact alienated, evidence of his or her declarations and conduct showing a loss of affections is admissible. 13 R. C. L. 1476.

"When an act is done to which it is necessary to ascribe a motive, it is always considered that what is said at the time, from whence the

motive may be collected, is part of the *res gestæ*. It was necessary to explain the reason the witness advised her to leave her husband, and for this purpose her complaints of ill treatment, with the marks of violence on her person, were competent testimony. When the conduct of the wife is in question, her declarations have been held admissible for her husband in an action against him." *Gilchrist v. Bale*, 8 Watts, 358 (Pa.) 34 Am. Dec. 471.

"The mischief is a continuing one, going on from day to day, and becoming worse with the delay. The principles, therefore, which always allowed inquiry into the wife's feelings and conduct prior to and at the time of the seduction, must permit such inquiry during the whole period of alienation. The law cannot very well shut out what to every intelligent person must appear significant and free from any danger of fabrication and falsehood. Most of this evidence is explanatory of the wife's residence with her parents, and is the only means, except examining her as a witness, of comprehending it. It is daily conduct, explained by concurrent declarations, and we do not think it is beyond the scope of inquiries always allowed in such cases." *Edgell v. Francis*, 66 Mich. 305, 33 N. W. 501.

In *Rudd v. Rounds*, 64 Vt. 439, 25 Atl. 440, Ross, C. J., says:

"This is an action brought to recover damages for an alienation of the affections of the plaintiff's wife and thereby causing her to leave him. The wife's state of mind and regard for the plaintiff at the time she became acquainted with the defendant, and during the time of that acquaintance, until she left the plaintiff, and if there was a change during that period, whether caused by the conduct of the plaintiff, or the wrongful conduct of the defendant, were proper subjects of inquiry and investigation. The condition of her mind in regard to her husband, and what caused it to change from time to time, could be ascertained by her acts and conduct towards the plaintiff and defendant respectively, and by their acts and conduct towards her, and by her and their expression of their respective mental state towards and for each other, and of the causes thereof. The nature of the suit and what was involved in its solution, opened a broad field of inquiry and investigation. The wrongful alienation of her affection by the defendant, resulting in her leaving, and refusing to live with the plaintiff, as his wife, constitutes the gist of the action. Her leaving and refusal bore upon whether her affections had been alienated from some cause, and if caused by the wrongful conduct of the defendant, upon the amount of damages recoverable. What she said concurrent with, and while she was leaving the plaintiff's house, and on her way to the house where the defendant was stopping, and when she had reached there, and her refusal at the request of the defendant, to return to her husband, characterizing and giving the reason for her leaving, and refusal to return, were a part of the *res gestæ* of the leaving and refusal to return, and admissible in evidence."

[4] We recognize the danger of evidence of this kind and the opportunity it affords for collusion, and for this reason it should

be kept within proper bounds, with instructions as to how it should be considered; but in this case there was not only no collusion between husband and wife, but it appears that the wife was a witness for the defendant and sustained his contentions throughout her testimony.

We have carefully considered the other exceptions and find no error in them.

The prayers for instructions were given in substance, and the other exceptions to the charge are without merit.

[5] This appeal illustrates the wisdom of separating the issues of compensatory and punitive damages, which is, however, a matter addressed to the discretion of the court.

For the error in the charge, a new trial is ordered on the issue of damages.

Partial new trial.

BROWN, J., dissenting.

(179 N. C. 445)

PERRY v. PERRY et al. (No. 368.)

(Supreme Court of North Carolina. April 14, 1920.)

**1. JUDICIAL SALES §20—HIGHEST BIDDER MERELY PREFERRED PROPOSER PRIOR TO CONFIRMATION.**

Generally, the highest bidder at a judicial sale is regarded only as a preferred proposer without independent right in the property or suit until the sale has been reported to the court and confirmed.

**2. JUDICIAL SALES §31(2)—ON APPEAL FROM CLERK'S CONFIRMATION, MATTER IS OPEN TO REVISION BY JUDGE.**

When appeal is taken in apt time from clerk who approves a judicial sale to judge of court, confirmation is open to revision, and such further orders and decrees as right and justice may require, and is to be heard and decided on the same or such additional evidence as may aid him.

**3. APPEAL AND ERROR §115 — ORDER OF CLERK APPROVING OR SETTING ASIDE APPEALABLE.**

Action of clerk in approving or setting aside a judicial sale is an order appealable under Revisal 1905, §§ 610-614.

**4. EXECUTORS AND ADMINISTRATORS §379—COURT JUSTIFIED IN SETTING ASIDE BID AND ORDERING RESALE OF LAND TO MAKE ASSETS.**

On petition, pursuant to Revisal 1905, § 723, to sell land to make assets, showing that property was bid off at undervalue established by advanced bid of 20 per cent., justified court in setting aside bid and ordering resale, despite confirmation by clerk.

Appeal from Superior Court, Forsyth County; Long, Judge.

Petition to sell land to make assets by Mary C. Perry, administratrix, against Fred C. Perry and J. C. Brook, his guardian. From an order setting aside clerk's confirmation of sale and ordering resale, the purchaser appeals. **Affirmed.**

The questions presented and the pertinent facts are very clearly set forth in the case on appeal, as follows:

"This is a special proceeding originating before the clerk of the superior court of Forsyth county, upon the petition of Mary C. Perry, administratrix of W. S. Perry, for the sale of lands to make assets to pay debts. This petition deals with several distinct tracts of land but there is involved in this appeal only tracts 5 and 6 as described in said petition which tracts were later subdivided into lots and thereafter were and are referred to as lots 16 to 22, inclusive. At the sale J. E. Van Horn was the purchaser of the aforesaid lots, and upon report of said sale to the clerk of the court and upon the application in writing of the said J. E. Van Horn, said sale was confirmed by the clerk of the court on the 21st day of January, 1920. To which order of confirmation the petitioner excepted and appealed to the judge of the superior court, in which appeal the guardian of the infant defendant subsequently joined, which appeal was heard before B. F. Long, Judge, at Winston-Salem, N. C., on March 8, 1920, at which time he ordered a resale of the property purchased by the said J. E. Van Horn, and in all other respects affirmed the said order of the clerk.

"Said lots were sold on the 23d day of August, 1919, at which time they brought the sum of \$1,516. This sale was reported by the commissioner to the court on the 3d day of September, 1919, with the statement that the price bid was a fair and reasonable one, and the confirmation of the sale was recommended. By a supplemental report of date September 15, 1919, the commissioner reported that an increased bid had been offered on lots 16, 17, 18, 19, 20, 21, and 22, and a request was made for the resale of those lots as aforesaid. In accordance with the request of the commissioner as aforesaid, a resale of said property was had on the 11th day of October, 1919, when and where J. E. Van Horn was purchaser of the aforesaid lots at the price of \$1,872, and this sale was reported to the court on the 22d day of October, 1919, by the commissioner, with the statement that the price bid was fair and reasonable and the recommended confirmation of the sale. By a supplemental report of date November 13, 1919, the commissioner called to the attention of the court that there had been offered an increased bid on said lots, as a result of which a resale was ordered, which was had on the 29th day of November, 1919, when and where the aforesaid lots were bid off again by the said J. E. Van Horn at \$1,970, and on December 4, 1919, a report of this sale was made by the commissioner recommending confirmation.

"On December 27, 1919, the said J. E. Van Horn filed with the clerk of the court a written request that said sale be confirmed; the 20 days required having elapsed.

"On January 1, 1920, the commissioner filed



a supplemental report, setting forth that she had received an increased bid of \$30 on said lots, and asked for a resale.

"On January 8, 1920, the commissioner filed a second supplemental report, reciting that she had received an increased bid of \$197 and asked for a resale.

"With the record in this condition, the matter came on before the clerk of the superior court, and on January 21, 1920, he signed an order in which he found facts and overruled the request of the commissioner for a resale and affirmed the sale. The facts found in said order are as follows:

"(1) That the indebtedness of the estate amounts to about \$15,000, and upon which interest is accruing at the rate of about \$75 per month.

"(2) That there have been two other sales of this property, the present sale being the third one.

"(3) That on the 27th day of December, 1919, J. E. Van Horn, a purchaser at said land sale of certain parts of the property, filed with the court written request for confirmation of sale.

"(4) That on January 1, 1920, the commissioner filed a report stating that an increased bid had been offered upon certain parcels of land sold, and on January 8, 1920, filed a report setting forth that a 10 per cent. bid had been offered on the property bid off by J. E. Van Horn; but it was not stated in either of said reports that any security had been given or deposit made by the persons filing said increased bid for the performance of said bid.

"(5) Considering the costs of a resale, and the monthly interest accruing upon the indebtedness, and the other facts and circumstances herein set out, I find as a fact that the increased bids are inadequate and ought not to cause a resale, and for these reasons, and also because the purchasers acquired rights in the premises, I make this order confirming each and every of said sales.

"To this order of the clerk confirming the sale, the petitioner excepted and gave notice of appeal to the judge of the superior court, in which appeal the guardian of the infant defendant subsequently joined. This appeal came on to be heard before Long, Judge, at Winston-Salem, N. C., on the 8th day of March, 1920, at which time the said judge was present to hear only motions, the court in all other respects having been adjourned on account of influenza; and upon the hearing thereof and upon the consideration of the affidavits of J. C. Brock, the petitioner, G. C. Davis, S. F. Wooten, and J. A. Lancaster, which will be in the record, and the securing of the 20 per cent. increased bid, the order of the clerk was reversed and a resale of the aforesaid lots ordered. To which order of Judge Long the said J. E. Van Horn in open court excepted and appealed."

Hamilton & Morris, and Manly, Hendren, & Wombly, all of Winston-Salem, for appellant.

Holton & Holton and B. C. Brock, all of Winston-Salem, for appellees.

HOKE, J. [1] It is the generally accepted principle that the highest bidder at a judicial sale is only regarded as a preferred proposer,

and that he has no independent right in the property or the suit until the sale has been reported to the court and confirmed. Thus, in *Harrell v. Blythe*, 140 N. C. 415, 53 S. E. 232, it was held that—

"Judicial sales are only conditional and are not complete until \* \* \* reported to and confirmed by the court; and the bid may be rejected and the sale set aside, if, in the exercise of its sound discretion, the court should think proper to do so."

Walker, Judge, delivering the opinion, further states the position as follows:

"When land is sold under a decree of court, the purchaser acquires no independent right. He is regarded as a mere preferred proposer until confirmation, which is the judicial sanction or the acceptance of the court, and until it is obtained the bargain is not complete."

[2] *Joyner v. Futrell*, 136 N. C. 301, 43 S. E. 649, and many other well-considered cases are to the same effect. And this "confirmation of the sale" referred to and contemplated by these authorities means confirmation that has been fixed and determined according to the course and practice of the court. And, when an appeal is taken in apt time from the clerk to the judge, the question, under our procedure, is open to revision and such further orders and decrees on his part as the right and justice of the case may require and to be heard and decided by him on the same or such additional evidence as may aid him to a correct conclusion in the matter.

[3] It is well understood that the action of the clerk, in approving or setting aside judicial sales, is an appealable order. This has been so held in authoritative cases construing the general statutes regulating appeals from the clerk to the judge. Rev. §§ 610, 611, 612, and 613, and the ruling is emphasized and extended by section 614, providing that whenever any civil action or special proceeding, begun before the clerk of any superior court, shall be, for any ground whatever, sent to the superior court before the judge, the judge shall have jurisdiction, etc. *Taylor v. Carrow*, 156 N. C. 6, 72 S. E. 76; *Beckwith, Ex parte*, 124 N. C. 111, 32 S. E. 393; *McMillan v. McMillan*, 123 N. C. 577, 31 S. E. 729; *Ledbetter v. Pinner*, 120 N. C. 455, 27 S. E. 123; *Loviner v. Pearce*, 70 N. C. 169.

[4] This being a proceeding to sell land to make assets, in the due administration of an estate and on appeal taken in apt time, it having been made to appear that the property was bid off at an undervalue, that fact confirmed and established by an advanced bid of 20 per cent., in our opinion, his honor was in the provident exercise of his powers in setting aside the bid made and ordering a resale. The more recent cases of *Ex parte*

Garrett, 174 N. C. 343, 93 S. E. 838, and Upchurch v. Upchurch, 173 N. C. 88, 91 S. E. 702, are decisions construing section 2513, regulating sales for partition and which seem to confer on the purchaser the right of confirmation after 20 days from report of sale filed and when no objection is made before motion for confirmation entered.

Whether these cases correctly interpret the statute referred to, or are in necessary conflict with the principles approved by the court in *Tayloe v. Carrow*, supra, a decision also on the proper procedure in partition cases, is not now before us; the instant case, as stated, being a petition to sell land for assets which comes in this respect under a different statute, permissive in terms, Rev. § 723, and thus far governed by the general principles appertaining to judicial sales to which we have heretofore adverted.

We find no error in the record, and the judgment of his honor is affirmed.

**Affirmed.**

(179 N. C. 423)

**GREENLEAF JOHNSON LUMBER CO. v. VALENTINE et al.** (No. 263.)

(Supreme Court of North Carolina. April 14, 1920.)

**1. APPEAL AND ERROR ¶843(1)—MOOT QUESTION NOT CONSIDERED.**

Where the record on appeal presents only a moot question, the court should not express an opinion concerning it.

**2. LOGS AND LOGGING ¶2—EXCEPTIONS IN FAVOR OF TIMBER GRANTEE ELIMINATE SUBSEQUENT GRANTEES OF LAND.**

Grantees of land subsequent to a timber deed whose own deeds contain exception in favor of the timber grantee have no interest in the timber or right to cut it.

**3. GUARDIAN AND WARD ¶119—TIMBER GRANTEE MUST SECURE EXTENSION OF TIME FOR REMOVAL FROM MINOR DEVISEE OF GRANTOR.**

Title to timber being or having been in minor devisee of land, lumber company previously granted right to cut timber by testatrix, the then owner, must secure from devisee, and not from his guardian, by making stipulated payments, right to extension of time for cutting and removal, so that right can be established only in suit against or in favor of minor to which he has been made a party.

**4. WILLS ¶836—MINOR DEVISEE TAKES LAND SUBJECT TO EXTENSION RIGHTS OF TIMBER GRANTEE.**

Where timber is sold, deed providing for extension of time for removal on certain payments, and grantor dies, devising the land to a minor, timber grantee can secure extension for removal by paying or tendering the amount required under the timber deed to the guardian

of the minor devisee's estate; the fitness of the stipulation not being open to inquiry.

**5. DISMISSAL AND NONSUIT ¶75 — CASE PRESENTING ONLY FEIGNED ISSUE WILL BE DISMISSED.**

An action which presents only a feigned issue in that it is not against the proper party, a minor, but against his guardian and certain others, will be dismissed without prejudice to the right of the parties in any further litigation.

Appeal from Superior Court, Franklin County; Guion, Judge.

Action by the Greenleaf Johnson Lumber Company against J. W. Valentine, guardian of Arthur Jordan Griffin, minor, and others. From judgment for plaintiff, the named defendant appeals. Action dismissed.

The action purports to be one to establish a right in plaintiff company to cut the timber on a certain tract of land in said county belonging to an infant devisee, Arthur Jordan Griffin, and instituted against defendant J. W. Valentine as guardian of said minor and the two other defendants who had purchased a portion of the land.

From the admission in the pleadings and the facts in evidence it appeared that on December 1, 1905, Martha Yarboro, the owner of the land, sold and conveyed to plaintiff the timber thereon of certain dimensions to be cut within 10 years from date of said conveyance and with the privilege of five years' extension on payment of annual interest on the purchase price, etc.; that during the ten years said Martha Yarboro sold portions of the land to the two defendants Wardrope and Bartholemew, excepting, however, "the timber and the timber rights sold to plaintiff company"; that in 1912 Martha Yarboro, the owner, died, having devised the land to Arthur Jordan Griffin, a minor, appointing defendant J. W. Valentine her executor and also guardian of the devisee.

Plaintiff alleged and offered evidence tending to show that within the time specified and required by the timber deed it had paid or tendered the amount stipulated for securing the extension to J. W. Valentine and had maintained such tender for the successive years, etc.

Defendants Wardrope and Bartholemew make no defense. The defendant Valentine denies that any payment or tender of this extension money was ever made to him, and offered evidence in support of such denial. It further appeared that the timber had been cut by plaintiff company, and the proceeds held or appropriated by them.

On issue submitted the jury rendered the following verdict:

"I. Did the plaintiff, prior to December 1, 1915, pay to defendant the amount required to renew its timber deed for the succeeding year? Answer: Yes."

On the verdict judgment was entered that plaintiff company owned the timber and was entitled to cut and remove the same.

Defendant excepted and appealed.

W. M. Person, of Louisburg, for appellant.  
Wm. H. & Thos. W. Ruffin, of Louisburg, for appellee.

HOKE, J. [1] On careful consideration we think the record presents only a "moot question," and under our decisions the court should express no opinion concerning it. *Parker v. Bank*, 152 N. C. 253, 87 S. E. 492; *Blake v. Askew*, 76 N. C. 327. The cases on the subject hold that, in order to secure the right of extension under one of these timber deeds as ordinarily drawn and unless otherwise expressed in the instrument, the amount stipulated for must be paid or tendered to him who owns the title when the payment is due. And where the owner has died within the time, the title passing by his will or descent, the payment must be made or tendered to the devisee or heir. *Mizell v. Lumber Co.*, 174 N. C. 68, 93 S. E. 436; *Lumber Co. v. Wells*, 171 N. C. 264, 88 S. E. 327; *Lumber Co. v. Bryan*, 171 N. C. 266, 88 S. E. 329; *Bateman v. Lumber Co.*, 154 N. C. 248, 70 S. E. 474, 34 L. R. A. (N. S.) 615; *Hornthal v. Howcott*, 154 N. C. 228, 70 S. E. 171.

This action purports to be one to establish in plaintiff company the right to cut the timber on a certain tract of land now owned by a minor, Arthur Jordan Griffin, devisee under the will of Mrs. Yarboro.

[2, 3] From the facts in evidence it appears that the timber had been cut when the suit was commenced, and it or its proceeds held by the plaintiff company, and there is no one now a party or against whom the suit is or purports to be prosecuted who seeks to challenge plaintiff's right or is in any position to do so. Not the adult defendants. Their deeds contain exception in favor of the timber and the timber rights granted to plaintiff company and they have no interest therefore in this controversy and do not claim any. *Ricks v. McPherson*, 178 N. C. 154, 158, 100 S. E. 330, citing *Powell v. Lumber Co.*, 163 N. C. 36, 79 S. E. 272. Not the guardian. He does not own the timber. The title thereto is or was in the devisee, the minor, and it is from his interest and ownership that the right claimed by plaintiff must be secured. *Lumber Co. v. Bryan*, *supra*.

Such a right, therefore, can only be established and made efficient in a suit which is and purports to be against or in favor of the infant and to which he has been made a party. 21 Cyc. p. 193; 12 R. O. L. "Guardian and Ward," p. 1146; 14 R. O. L. § 53.

[4] It was stated on the argument and unchallenged, so far as noted, that such a suit had been instituted by the infant owner seeking to recover damages of the company for the alleged wrongful cutting of his timber.

In view of this statement and the suggestions of the court in the recent case of *Morton v. Lumber Co.*, 178 N. C. 163, 100 S. E. 322, to this effect, that a suit in court and due inquiry would be required to establish a valid tender where the title was held by an infant, we deem it not amiss to say that, the privilege of renewal having been provided for by a binding contract of the former owner, an inquiry into its fitness and whether such a stipulation would be to the advantage of the minor is no longer open to inquiry, and should it be properly shown in the alleged suit between the devisee and the company that a payment or tender of the amount required to secure the extension had been made by the company or its agent within the time, to the regularly constituted guardian of the infant's estate, it would suffice. Such fact, however, to have any effect and meaning, should be established in a suit between the infant owner and the company and presenting the only real issue now existent in this controversy; that is, whether the cutting of the timber by the company amounted to an actionable wrong.

The case of *Morton v. Lumber Co.* was well decided, as no payment or tender was shown within the time required to any one having authority to receive it. The suggestions referred to, however, are well calculated to mislead litigants in the trial of causes of this kind, and we take this early opportunity to correct the error.

[5] For the reasons stated, we are of opinion and so hold that the present action be dismissed as presenting only a feigned issue, but without prejudice to the rights of the parties in any further litigation that may be had between them.

Action dismissed.

(179 N. C. 452)

LAMBETH v. CITY OF THOMASVILLE.  
(No. 890.)

(Supreme Court of North Carolina. April 14, 1920.)

1. MUNICIPAL CORPORATIONS  $\S$  226—CONTRACT TO EXTEND WATER MAINS AND SEWERS NOT PRESUMED "ULTRA VIRES."

Where the charter of defendant city was not pleaded or in evidence, it will be presumed that it had the usual authority to lay out streets and to construct sewers and water mains, so that its contract to extend water mains and sewers in consideration of conveyance of property to it is not "ultra vires," which term designates the acts of corporations beyond the scope of their powers as defined by their charters or acts of incorporation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Ultra Vires.]

**2. MUNICIPAL CORPORATIONS ¶1036—EVIDENCE HELD TO WARRANT DENIAL OF NON-SUIT IN ACTION FOR BREACH OF CITY'S CONTRACT.**

In an action for damages for breach of a city's contract to extend its sewers and water mains to plaintiff's lots, evidence that the city failed to make the extension for 18 months and until after plaintiff had sold his lots, and had brought his action for damages, held to warrant denial of nonsuit, notwithstanding the city's claimed excuse of war conditions.

**3. DAMAGES ¶120(3)—MEASURE FOR BREACH OF CONTRACT TO INSTALL WATER AND SEWER PIPES IS DIFFERENCE IN VALUE OF LOTS.**

In an action for breach of a city's contract to extend its water mains and sewers in streets adjoining plaintiff's lots, the measure of damages is the difference between the value of the lots without the sewerage and water and their value if those improvements had been put in.

**4. EVIDENCE ¶474(18, 20)—OPINION AS TO VALUE OF LANDS ADMISSIBLE.**

The opinion of witnesses who have opportunity to know and have by such opportunities qualified themselves to testify is competent evidence as to the value of lands and the damages thereto by breach of contract to extend water mains and sewers.

**5. MUNICIPAL CORPORATIONS ¶250—IN ABSENCE OF TIME LIMIT FOR PERFORMANCE OF CONTRACT REASONABLE TIME IS PRESUMED.**

Where a contract by a city to extend its water pipes and sewers did not specify the time within which the extension should be made, a reasonable time for performance, depending on the situation of the parties, the subject-matter of the contract, and the attending circumstances, is implied.

**6. MUNICIPAL CORPORATIONS ¶1036—REASONABLENESS OF TIME FOR PERFORMANCE OF CONTRACT HELD PROPER QUESTION FOR JURY.**

Though the question of a reasonable time for performance of a contract is generally one of law, the issue was properly submitted to the jury in an action for breach of a city's contract to extend water mains and sewers, where the city had failed to make the extension for more than 18 months, claiming war conditions as an excuse.

Appeal from Superior Court, Davidson County; Bryson, Judge.

Action by John W. Lambeth against the City of Thomasville. Judgment for plaintiff, and defendant appeals. Affirmed.

The action is brought for a breach of the following contract entered into between the plaintiff and the defendant on the 26th of March, 1917:

"Upon motion of M. H. Stone, seconded by T. A. Finch, it is ordained by the city council of the city of Thomasville, in regular session, March 26, 1917, that the propositions of Mr. J. W. Lambeth submitted at this meeting be adopted and accepted. The propositions are as follows, viz:

"First. In consideration of a conveyance from said J. W. Lambeth of sufficient land to the city of Thomasville to lay out, open, construct, and extend Taylor avenue through and across the property of said J. W. Lambeth known as 'Fair View' in the most direct line to School avenue at that point where the said School avenue crossed Hamby's creek, the city of Thomasville proposes and agrees to lay out, construct and run a four-inch water main from Main street down said Taylor avenue to Ridge Crest street, placing a hydrant or water plug at the corner of Taylor avenue and Montilieu street, and one at the corner of Taylor avenue (as it is extended) and Ridge Crest street. The city of Thomasville also proposes and agrees to extend the city sewer line from the outlet near Hamby's creek along and up said Taylor avenue, as it is extended, to the corner of Montilieu street and Taylor avenue.

"Second. In consideration of J. W. Lambeth conveying to the city of Thomasville lot No. 1, as is shown on the plat of Fair View property, and paying to the city of Thomasville treasurer the sum of one hundred and twenty-five dollars, the city of Thomasville proposes and agrees to extend both the water and sewer lines of the city of Thomasville from the corner of Montilieu street and Taylor avenue up and along Montilieu street to the corner of Fifth avenue and Montilieu street, and place a hydrant or fire plug at said corner."

The following issues were submitted:

"(1) Did the plaintiff and defendant enter into the contract as alleged in the complaint? Answer: Yes.

"(2) Did defendant fail to perform said contract? Answer: Yes.

"(3) What damages, if any, is plaintiff entitled to recover? Answer: \$1,000."

Defendant appealed.

B. B. Vinson, of Thomasville, and J. F. Spruill and J. R. McCrary, both of Lexington, for appellant.

H. R. Kyser, of Thomasville, and Phillips & Bower and Raper & Raper, all of Lexington, for appellee.

BROWN, J. [1] The power of the defendant to enter into the contract sued upon does not seem to be denied, at least it is not raised by any assignment of error or discussed in the defendant's brief. The term "ultra vires" is used to designate the acts of corporations beyond the scope of their powers as defined by their charters or acts of incorporation. Such lack of power upon the part of the defendant is not pleaded, and the charter of the defendant is not in the record. We therefore assume that the defendant is vested with the usual authority given to cities and towns to lay out streets and to construct sewers and water mains and other municipal conveniences and necessities within the corporate limits of the city. Assuming that the defendant city has the usual corporate authority generally accorded to municipalities,

we conclude that the defendant had power to enter into the contract sued on.

The evidence tends to prove that plaintiff owned a tract of land in the city near its center and adjoining the graded school grounds. He had a plot of same made, subdividing into about 42 lots, laying off streets. He applied to the board of aldermen to have water lines and sewer lines placed along the streets of the property, so that the purchasers of the lots might have access to those necessities.

The city desired to acquire one of the lots of plaintiff for enlargement of its school grounds, and desired to extend one of the city streets across plaintiff's lands and to take sufficient lands for the extended street. Whereupon the contract set out above was entered into between the plaintiff and the defendant on the 26th of March, 1917.

Under the terms of the contract, the city acquired by deed, which was afterwards executed, the lot it desired, and the land for the extension of the street it sought, and for a sidewalk along same, and immediately took possession of the lot, and opened up the street through plaintiff's land. The evidence shows that the defendant failed to carry out its contract until after the action was brought and after the sale of the lands hereinafter mentioned. The plaintiff made repeated demands on defendant to comply with the contract, and filed its claim for damages in writing for breach of it. In September, 1918, after repeated notice to defendant, plaintiff offered his lots for sale at public auction, and sold them.

The damage sought is the loss sustained on account of defendant's failure to carry out and perform the contract, alleging that the lots would have sold for a much greater price if defendant had performed its contract.

[2] The defendant does not deny the contract, but seeks to excuse itself for failure to comply, on account of war conditions, and also contends that it did put in water and sewer lines, after the sale by the plaintiff. Defendant also contends that at time of sale a load of sewer pipe was scattered around on the ground, and after about six lots had been sold the mayor announced at sale that the city was under contract to put in water and sewer.

We are of opinion that under the above evidence the motion to nonsuit was properly overruled.

Upon the question of damages his honor charged the jury:

"As a basis for this damage, the court charges you that it would be the difference which the plaintiff has satisfied you by the greater weight or preponderance of the evidence, as between the actual market value of the land without the water main and sewer connection and hydrant and what would have been the actual market value of the land with the water main, sewer pipes, and hydrant installed; the burden being

upon the plaintiff to satisfy you by the greater weight and preponderance of the evidence of these facts and circumstances."

[3, 4] We think the rule of damages laid down by his honor is correct. It is not a question of recovery of speculative profits which cannot be measured by any rule of reasonable certainty. The value of the land may always be proven by opinion evidence properly qualified, and the difference between its value without the sewerage and the water and with it may also be proven by the opinion of those witnesses who are qualified to speak from experience and observation. Absolute certainty is not required, but the amount of the loss must be shown with some reasonable certainty. Substantial damages may be recovered, though plaintiff can give his loss only approximately. *Sutherland on Damages* (4th Ed.) §§ 70, 867-870. The opinion of witnesses who have opportunity to know and have by such opportunities qualified themselves to testify has always been received as to values and damages. *Wyatt v. Railroad*, 156 N. C. 307, 72 S. E. 383; *Whitfield v. Lumber Co.*, 152 N. C. 211, 67 S. E. 512; *Davenport v. Railroad*, 148 N. C. 287, 62 S. E. 431, 128 Am. St. Rep. 599; *Wade v. Telephone Co.*, 147 N. C. 219, 60 S. E. 987; *Wilkinson v. Dunbar*, 149 N. C. 20, 62 S. E. 748; *Railroad v. Church*, 104 N. C. 525, 10 S. E. 761.

The contention of the defendant that at the time of the sale there was a load of sewer pipe on the ground, and that the mayor announced after six lots had been sold that the city was under contract to put in water and sewerage, was put to the jury very clearly by the learned judge in these words:

"The plaintiff contends that the promise of the mayor was not received by the people there assembled and taken as if the work had actually been done. The plaintiff contends that this matter had dragged along from time to time for many months. The plaintiff contends that at least 18 months had elapsed from the time that the contract was made up until the present, and that it was apparent for any one to see that no effort was made to complete the contract, and that there was nothing there to assure that the statement of the mayor and promise would be carried out except a wagonload of tiling that was scattered about on different parts of the grounds, and the plaintiff contends that these facts were obvious."

[5, 6] The fact that there was no time limit fixed in the contract within which the water and sewerage was to be put in the street does not prevent a recovery. In such contracts it is well settled that, if the party fails in the performance of it within a reasonable time, recovery of damages for breach may be had. In *Ruling Case Law* the rule is laid down:

"That a reasonable time for performance is implied in a contract which expresses no time for performance." 6 R. C. L. p. 896.

What is a reasonable time within which an act is to be performed when a contract is silent upon the subject must depend on the situation of the parties and the subject-matter of the contract, and it is proper to consider all the circumstances attending the performance together with the circumstances surrounding the parties at the time. While the question of reasonable time is generally one of law, yet under the circumstances of this case we think the judge very properly left it to the jury. The charge in this case is very full and lucid and presented the whole case to the jury so clearly that they could not fail to understand the issues submitted to them.

**Affirmed.**

(179 N. C. 436)

**COMMISSIONERS OF CLEVELAND COUNTY v. SIDNEY SPITZER & CO.**  
(No. 474.)

(Supreme Court of North Carolina. April 14, 1920.)

**COUNTIES ~~§~~178—FILING OF PETITIONS FOR BOND ELECTION BEFORE ACT INCREASING INTEREST WAS RATIFIED DOES NOT INVALIDATE BONDS.**

An issue of township bonds bearing 6 per cent. interest is not invalid because the petition for the election was filed before the ratification of Laws 1919, c. 188, which amended Laws 1913, c. 122, by increasing the interest rate from 5 per cent. to 6 per cent. where the election was not ordered until after ratification.

**Appeal from Superior Court, Cleveland County; Adams, Judge.**

Controversy by Commissioners of Cleveland County against Sidney Spitzer & Co., submitted without action under Revisal 1905, § 803. From a judgment for plaintiffs, defendants appeal. **Affirmed.**

This action was instituted in Cleveland county by the commissioners thereof, but by consent of parties it was agreed that the judge might hear and render judgment upon the case agreed in vacation and out of the district, and that the judgment should be filed immediately by the clerk of the superior court of Cleveland, each party reserving the right to appeal therefrom. From the judgment rendered the defendants appealed.

J. H. Folger, of Mt. Airy, for appellants.  
Ryburn & Hoey, of Shelby, for appellees.

CLARK, C. J. On July 21, 1919, after due advertisement, the commissioners of Cleveland offered for sale \$30,000 road bonds issued on behalf of township No. 11, "bearing 6 per cent. interest, by virtue of chapter 122, Laws 1913, and acts amendatory thereof."

Chapter 122, Laws 1913, authorizing an election upon the issuance of these bonds, was regularly enacted in the constitutional mode. By chapter 188, Laws 1919, also duly enacted, and ratified March 8, 1919, the aforesaid act was amended to authorize a change in the interest from 5 per cent. to 6 per cent. The petition to order this election was filed with the commissioners March 3, five days before the ratification of the amendatory act, but they did not grant the order until at an adjourned meeting held March 11. The election was duly held, and the issuance of the bonds bearing 6 per cent. interest authorized by a vote of the people on April 14 thereafter.

The defendants were the last and highest bidders for the bonds, and admit the legality in all respects in the enactment of the statutes and election under which the bonds were issued, and that they were in conformity to the Constitution, but decline to accept the bonds upon the ground that they are invalid because the petition was filed with the commissioners prior to the ratification of the amendatory act authorizing the increase of interest to be borne by said bonds from 5 per cent. to 6 per cent. There is no other question presented to us by this appeal.

At the time the commissioners granted the order, and consequently when the election was held, the authority to submit the proposition to the vote of the people had been regularly and constitutionally enacted. We cannot see that the filing of the petition before the act changing the rate of interest was ratified can in any way invalidate the issuance of the bonds. There is no authority exactly in point for the reason probably that an objection upon such state of facts has never been made before and is now only presented out of abundant caution. In *Guire v. Com'rs*, 178 N. C. 39, 100 S. E. 141, the court held that, where the amendatory statute increasing the rate of interest from 5 per cent. to 6 per cent. was invalid, but the bonds had notwithstanding been voted at the election, the bonds issued at the rate of interest authorized in the prior statute would be valid. In the present case the increased rate was authorized by a valid statute ratified before the issue of bonds was submitted to popular vote.

The judgment of his honor is affirmed.

~~§~~For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(179 N. C. 433)

GATLIN et al. v. NORFOLK-SOUTHERN R. CO. et al. (No. 296.)

(Supreme Court of North Carolina. April 14, 1920.)

**1. CARRIERS ⇨88—LIABLE FOR DELAY FROM SENDING SHIPMENT TO WRONG STATION.**

Where defendant carrier, receiving shipment billed for station the name of which had been changed because of similarity to name of another station, sent the shipment to the wrong station, where it remained for two weeks, it was guilty of an act of negligence independent of that of the carrier from whom it received goods, and was liable in damages for delay.

**2. TRIAL ⇨260(3, 4, 7)—REFUSAL OF INSTRUCTIONS COVERED IN SUBSTANCE BY OTHERS NOT ERROR.**

In an action against railroad company for injury to cotton crop resulting from delay in delivery of fertilizer, requested instructions on burden of proof, demeanor of witnesses, and weather conditions as affected crop, were properly refused, where substantially given in charge.

**3. CARRIERS ⇨105(2)—DAMAGES TO CROP FROM NEGLIGENT DELAY IN DELIVERING FERTILIZER.**

In an action against a railroad company for damages to cotton resulting from delayed delivery of nitrate of soda for fertilizer, it was hardly possible that defendant did not know the purpose of the goods, so that it was liable.

**4. APPEAL AND ERROR ⇨1004(3), 1005(1)—DECISION, ON MOTION TO SET ASIDE VERDICT AS AGAINST EVIDENCE AND EXCESSIVE, NOT REVIEWABLE.**

The superior court's decisions on motions to set aside a verdict as against the weight of the evidence and because damages were excessive are not reviewable in the Supreme Court.

Brown, J., dissenting.

Appeal from Superior Court, Hoke County; Allen, Judge.

Action by B. R. Gatlin and another against the Norfolk-Southern Railroad Company, and the Atlantic Coast Line Railroad Company, in which, after nonsuit was entered as to the last-named defendant, verdict and judgment was given against the other defendant, and it appeals. No error.

Plaintiffs sued for damage to their cotton crop which they alleged was caused by the negligent failure of the defendants to carry and deliver to them 115 bags of nitrate of soda, which was shipped from Wilmington, N. C. It was delivered for shipment to the Atlantic Coast Line Railroad Company at Wilmington, which company issued a bill of lading marked "To B. R. Gatlin, Woodley's Siding, N. C. [N. S. near Ellerbee]," a station in Richmond county, N. C. Its name had been changed to Plainview to prevent confusion, as there was a station on the Norfolk-Southern Railroad Company's line in Tyrrell

county, N. C., called "Woodley." The soda was sent by way of Fayetteville and delivered there by the Atlantic Coast Line Railroad Company to the Norfolk-Southern Railroad Company, but the latter's agent never saw the bill of lading, and received only the waybill, on which the address was Woodley's Siding, N. C.; the words in brackets, "N. S. near Ellerbee," having been omitted. The agent of the Norfolk-Southern Railroad Company at Fayetteville forwarded the soda to Woodley in Tyrrell county, where it remained from June 30, 1917, until July 14, 1917, on which day it was reshipped by the Norfolk-Southern Railroad Company to Woodley's Siding, where it arrived on July 17, 1917, and was delivered to the consignee on July 18, 1917.

The defendant Norfolk-Southern Railroad Company contended that the negligence was that of the Atlantic Coast Line Railroad Company in not giving the true address of the consignee on its waybill or in not notifying it in some way, but his honor failed to take that view, and, holding that the Atlantic Coast Line Railroad Company was faultless, he granted a nonsuit as to that company and proceeded against the other defendant alone.

There was a verdict and judgment for the plaintiff and an appeal by the defendant.

H. W. B. Whitley, of Raeford, H. McD. Robinson, of Fayetteville, and W. B. Rodman, Jr., of Washington, N. C., for appellant.

Smith & McQueen and Currie & Leach, all of Raeford, for appellees.

WALKER, J. (after stating the facts as above). [1] First. The court committed no error in holding that there was evidence of negligence by the Norfolk-Southern Railroad Company, apart from the failure of its co-defendant to notify it of the proper address, and in this respect the case is unlike that of *Gregg v. City of Wilmington*, 155 N. C. 18, 70 S. E. 1070. There the principal wrong was done by Woolvin in piling the bricks in the streets, and though he did so with the city's permission, or license, as between the defendants, Woolvin's was the primary negligence which entitled the city to indemnity from him. In this case, the Norfolk-Southern Railroad Company committed a distinct and independent act of negligence from that of the Atlantic Coast Line Railroad Company, in that, after it received the goods for the purpose of being forwarded to their final destination, it carelessly failed to do so, when it had a sufficient address, in view of the facts, to know what station was meant, that is, "Woodley's Siding," near Ellerbee, in Richmond county, and not Woodley, N. C., which is in Tyrrell county. There was evidence on the question that, while the name of "Woodley's Siding" had been changed to Plainview, goods had been addressed to different parties at Woodley's Siding, and forwarded to and received at that place by the Norfolk-South-

ern Railroad Company and delivered there to the consignees. Plaintiff, B. R. Gatlin, testified that he had received shipments there constantly in 1917, addressed to him at Woodley's Siding, N. C., and that he "had shipped there for four years and never knew it by any other name." He lived one mile from the station. The defendant then recognized this as one of its stations by the name of "Woodley's Siding" and actually received and shipped goods to it by that name, although the name had been changed, which change, from the evidence, would seem not to have been put in force. At any rate, it was called by the name of Woodley's Siding, and this continued to be the case even after the change of name was made. Why the defendant should have sent the freight to Woodley, in Tyrrell county, a station far in the east, many miles away, and not having the same name, is not sufficiently or satisfactorily explained, or excused. The evidence of negligence in this respect was properly submitted to the jury.

[2] Second. Without going into details, we are of the opinion that the requests for instructions were substantially given, especially those relating to the burden of proof, the bearing and demeanor of the witnesses, and, lastly, as to the weather conditions, and not the negligence of the defendant, being the cause of the injury to the crop. The objections to the evidence are not of material importance and could not have affected the result enough for us to disturb the verdict.

[3] Third. There was some evidence as to the damages, which was not objected to, if objectionable, and which was properly submitted to the jury. It is hardly possible that defendant did not know for what purpose the nitrate of soda was being shipped, and that it was a fertilizer intended to be used on the plaintiff's lands to aid in its better cultivation. The case is governed in this respect by *Neal v. Hardware Co.*, 122 N. C. 104, 29 S. E. 98, 65 Am. St. Rep. 697; *Herring v. Armwood*, 180 N. C. 177, 41 S. E. 96, 57 L. R. A. 958; *Lumber Co. v. Railroad Co.*, 151 N. C. 217, 65 S. E. 920; *Pendergraph v. Express Co.*, 178 N. C. 344, 100 S. E. 525. See, also, *Tomlinson v. Morgan*, 166 N. C. 557, 82 S. E. 958; *Guano Co. v. Live-Stock Co.*, 168 N. C. 451, 84 S. E. 774, L. R. A. 1915D, 875; *Carter v. McGill*, 168 N. C. 507, 84 S. E. 802; *Ibid.* 171 N. C. 775, 89 S. E. 23.

[4] The verdict was a full one, and may have been too large, as contended by defendant; but a motion was made in the superior court to set it aside as being against the weight of the evidence, which was denied, and we presume the judge was also asked to set it aside because the damages were excessive.

His decision on these motions is not reviewable in this court.

No error.

BROWN, J., dissents.

(179 N. C. 437)

**MIDDLETON et al. v. RIGSBEE et al.**  
(No. 830.)

(Supreme Court of North Carolina. April 14, 1920.)

**1. TRUSTS ¶189—LIFE TENANT HELD ENTITLED TO COMPEL TRUSTEE TO SELL ONE OF SEVERAL LOTS TO PROVIDE IMPROVEMENTS.**

Despite provision of will that principal of trust fund should not be used or diminished during 30 years, except to pay insurance premiums, devisee of life estate in city lots, improved and unimproved, with dilapidated buildings on some, under order to install sewerage, but without means to do so, *held* entitled to compel trustee to sell single lot in consideration of cash and improvements on rest of property in order to procure money to pay for other improvements.

**2. LIFE ESTATES ¶17—LIFE TENANT REQUIRED TO REPAIR, BUT NOT CHARGEABLE WITH PERMANENT IMPROVEMENTS.**

A life tenant is required to make all ordinary repairs incident to present enjoyment, and to prevent waste, but is not chargeable alone with the cost of permanent improvements enhancing the remainderman's estate as well as his own.

**3. JUDICIAL SALES ¶8—SALE AT AUCTION OR PRIVATELY DISCRETIONARY WITH COURT.**

Where power of sale exists in the court, and the case is properly presented, the sale may be had in the sound discretion of the court and subject to its approval either at public auction or by private negotiation as the best interests of the parties require.

Appeal from Superior Court, Durham County; Stacy, Judge.

Action by Mary E. Middleton and E. L. Middleton, her husband, against R. H. Riggsbee, as trustee and individually, and others. From judgment for plaintiffs on demurrer to the complaint, defendants appeal. Affirmed.

Bryant, Brogden & Bryant, of Durham, for appellants.

J. L. Morehead, of Durham, for appellees.

HOKE, J. On matters more directly relevant to the inquiry, the complaint alleges: That under the will of her deceased father, Atlas M. Riggsbee, the feme plaintiff is the owner of a life estate in quite a number of lots in the city of Durham, improved and unimproved, with remainder to her children who may be living at the time of her death, with ulterior limitations over to trustees on certain contingencies set forth in said will. That the present living children of feme plaintiff and all other ultimate takers who are known have been made parties defendant, and all who are infants or cannot now be ascertained are represented by a guardian ad litem appointed by the court after due inquiry as the statute provides. Rev. §



1590. That the houses on the improved lots let for a small weekly rental aggregating not over \$70 per month and are at present in a rundown condition, greatly in need of repairs, new roofs, painting, etc., in order to keep them in a condition to make them attractive. Furthermore, the city of Durham, has ordered plaintiff to install sewerage in many of the houses and advised plaintiff that unless this is done the permits for the use of dry closets would be withdrawn, etc., all of which would result in large expenditures of money or in the loss of renters now occupying said houses, etc. That several of the vacant lots so devised to plaintiff, etc., are now low, seamed with gullies and washouts, and of such grade formation as to be unfit for building in their present shape and condition and practically of no value unless certain culverts and pipes are installed thereon and the lots improved and leveled up to a proper grade with the streets and surrounding property. That plaintiff has made an advantageous bargain with one R. J. Aiken to sell one of the lots 60x165 feet for \$4,000, with the further consideration that said Aiken will remove a house now on said lot and place same in proper condition on one of the vacant lots owned by plaintiff for life and further level up the gullies and washouts on the other vacant lots referred to, etc.

The complaint contains averment further that plaintiffs are not able financially to make the repairs which are now called for and necessary to the preservation and proper use and enjoyment of the property, nor to meet the demands being now made by the city of Durham, nor are her children able to do so, and that the best interests of the estate and all of the parties will be materially enhanced by the sale of the 65-foot lot referred to and by using the consideration in the improvement of the property as indicated and by which its value and the present and future income will be greatly increased.

[1] Upon these averments admitted in the demurrer to be true, we concur in the view of his honor and are of opinion that the demurrer has been properly overruled.

As appertaining to the facts of this record, the decided cases on the subject hold that courts in the exercise of general equitable jurisdiction may decree a sale of property for reinvestment, where it is shown that such a course is required for the preservation of the estate and the protection of its owners; and the position may in proper instances be extended to a sale of a portion of the property for the protection and preservation of the remainder.

The principle adverted to has been not infrequently applied in the proper administration of charitable and other trusts, and the exercise of the power has been justified and upheld, notwithstanding limitations in the lease or deed creating the estate which ap-

parently imposed restrictions on the powers of the trustees in this respect, when it is properly established that a sale is required by the necessities of the case and the successful carrying out of the dominant purposes of the trust. *Trust Co. v. Nicholson*, 162 N. C. 257, 78 S. E. 152; *Grace Church v. Ange*, 161 N. C. 315, 77 S. E. 239; *Jones v. Habersham*, 107 U. S. 174, 2 Sup. Ct. 336, 27 L. Ed. 401; *Stanley v. Colt*, 72 U. S. (5 Wall.) 119-169, 18 L. Ed. 502; *Weld v. Weld*, 23 R. I. 311, 50 Atl. 490. And in a well-considered case of *Gavin v. Curtin*, 171 Ill. 640, 49 N. E. 523, 40 L. R. A. 776, the doctrine was extended to the case of a life tenant and ulterior remainderman on contingency of a common-law estate, where it was made to appear that a piece of property in the city of Chicago, valuable but unproductive, by reason of accumulating taxes and charges upon it, would be entirely lost to the owners unless a sale could be made; the principle ruling in the case being stated as follows:

"Upon a bill by a life tenant, equity may appoint trustees to take the fee in the property, sell the same, and reinvest the proceeds for the benefit of the life tenant and the remainderman, where it appears that unless equity interferes the property will be lost to both life tenant and remainderman."

The position is put beyond question in the present case, this being a proceeding under section 1590 of the Revisal authorizing a sale of property affected by certain contingencies, and the statute making express provision to the effect that, when the interest of all the parties would be materially enhanced by it, a sale may be had of the property or any portion for reinvestment either in purchasing or improving real estate, and the court having held that by correct interpretation the statute authorizes in proper instances a sale of a part of the property for the preservation and improvement of the remainder. *Smith v. Miller*, 158 N. C. 99, 73 S. E. 118, and same case, 151 N. C. 620, 66 S. E. 671.

In approving this position we have not been inadvertent to the clause in the will which provides that the principal of the trust fund shall not be used or diminished during the period of 30 years, except to pay the premiums on certain specified insurance policies. This limitation applies only to the administration of the trust estate, and an examination of the cases cited will disclose that, while such a provision may at times be effective as against the voluntary action of the trustees, it will not operate to prevent the court from ordering a sale when required by the necessities of the estate.

[2] Again, on matters relevant to the inquiry, while authority is to the effect that a life tenant is required to make all the ordinary repairs incident to the present enjoyment of the property and required to prevent its going to waste, he is not chargeable alone

with the costs of permanent improvements thereon and which tend to enhance the value of the remainderman's estate as well as his own. The decisions on the subject hold that these should be properly apportioned between them, and that the cost of sewerage required by valid municipal regulations comes well within the principle. In *re Laytin* (Sur.) 20 N. Y. Supp. 72; *Huston v. Tribbetts*, 171 Ill. 547, 49 N. E. 711, 63 Am. St. Rep. 275; *Wilson, Adm'r. v. Edmonds*, 24 N. H. 517; *Hay et al. v. McDaniel*, 26 Ind. App. 683, 60 N. E. 729; *Chambers v. Chambers*, 20 R. I. 370, 30 Atl. 243; *Kline v. Dowling*, 176 Ind. 521, 96 N. E. 579.

In this last citation the correct doctrine is stated as follows:

"A tenant for life must make all ordinary repairs, but is not bound to make any permanent improvements. Permanent improvements, such as sewers and farm drains, add to the value of both the life estate and remainder, and the burden of making them should be equitably prorated between the life tenant and remainderman, taking into account the probable duration of the life estate, and other relevant facts."

[3] And further it is the accepted position in this jurisdiction that, where the power of sale exists and the question is properly presented, such sale may be had in the sound discretion of the court and subject to its approval either at public auction or by private negotiation as the best interests of the parties may require. *Thompson v. Rospigliosi*, 162 N. C. 146, 77 S. E. 113, and authorities cited.

A correct application of these principles is in full support of the power of sale on the facts presented, and the judgment of his honor overruling the demurrer is affirmed.

Affirmed.

ALLEN, J., did not sit.

(179 N. C. 467)

MILLER v. MELTON-RHODES CO., Inc.  
(No. 889.)

(Supreme Court of North Carolina. April 21, 1920.)

EVIDENCE  $\Rightarrow$  583—RESTRICTION OF PLAINTIFF'S EVIDENCE ON FORMER TRIAL TO CORROBORATION AND IMPEACHMENT HELD ERROR.

In a servant's action for personal injuries, wherein he testified that he did not discover the lever for shutting off the power of the saw injuring him until after he was injured, it was error, in admitting plaintiff's evidence on a former trial that he knew where the lever was, but tried to dialogize the piece of wood with a stick, to restrict its purposes to corroboration and impeachment; the evidence being primary.

Appeal from Superior Court, Guilford County; Bryson, Judge.

Action by W. E. Miller against the Melton-Rhodes Company, Incorporated. Judgment for plaintiff, and defendant appeals. New trial.

This is an action to recover damages for personal injury, the plaintiff alleging that he was injured by the negligence of the defendant in the following particulars:

"(a) In that the defendant negligently and carelessly failed to properly instruct the plaintiff as to the safe and proper manner of operating said machine.

"(b) In that it carelessly and negligently failed to provide said machine with a lever so that the plaintiff while operating said machine could cut off the motive power if necessary.

"(c) In that the said defendant negligently and carelessly failed to equip the said machine with a guard over the saw upon said machine, such as is approved and in general use upon machines of like character.

"(d) In that the said defendant carelessly and negligently permitted a certain slot in said machine to remain open while the plaintiff was operating the said machine, such slot having caught the material hereinbefore referred to, which acts of negligence on the part of the said defendant were the proximate cause of plaintiff's injury."

At the time of the injury the plaintiff was operating a rip saw for the defendant. He had not worked at that machine before that time. He was ordered by the foreman of the defendant to cut some materials, and under his instructions went to the basement of the building to throw the belt on the shafting. When he returned the foreman was gone and the machine running.

He offered evidence tending to prove that no instructions were given to him as to the operation of the machine, and that when he undertook to put a piece of material through the machine it was caught therein, and that the plaintiff started in another piece to force the first piece through; that this piece also lodged, and he then tried to force it through by using a small stick; that there was a slot open in the machine, but that the plaintiff did not know this; that he did not know that there was a lever which controlled the machine and by which it could be stopped; and that while attempting to force the timber through his hand was thrown on the unguarded saw and he was severely injured.

The plaintiff was examined as a witness in his own behalf, and, among other things, he testified: "I did not discover where the lever was until after I was injured."

The defendant offered evidence tending to show that there was no negligence, and, among other things, introduced the examination of the plaintiff on a former trial in which appears, among other things, the following question and answer:

"Q. So you say you know where the power lever was, but it would have been too much

(101 S.E.)

bother to go around there, and you thought you would get the piece out with your stick, with another stick? A. Yes, sir; I thought it could be gotten out quickly."

There were other facts stated in this examination tending to prove the contention of the defendant.

When this examination was introduced by the defendant, his honor instructed the jury that—

"This testimony is introduced and allowed to be introduced and is to be considered by you as either tending to corroborate or impeach the testimony of the witness Miller given in this action on a former trial. It shall not be construed by you as substantive testimony, but only as corroborating or impeaching the witness, Miller."

And the defendant excepted.

There was a motion for judgment of nonsuit, which was overruled, and the defendant excepted. There was a verdict and judgment for the plaintiff, and the defendant excepted and appealed.

Shuping, Hobbs & Davis and Charles A. Hines, all of Greensboro, for appellant.

Wilson & Frazier, of Greensboro, for appellee.

ALLEN, J. His honor was in error in restricting the examination of the plaintiff, Miller, upon the former trial to the purposes of corroboration and impeachment, and he was doubtless misled by not taking into consideration that it was the examination of a party, and not of an involuntary witness.

"Statements contained in the evidence given by a party as a witness or adopted by him are primary in their nature and constitute informal judicial admissions which affect the party not only in the trial where given, but in any other hearing of the suit even upon appeal." Chamberlain on Evidence, vol. 2, § 1268.

The principle applicable to the evidence of a witness and of a party is tersely stated in *Medlin v. Board of Education*, 167 N. C. 241, 83 S. E. 484, Ann. Cas. 1916E, 300, where the court says:

"Evidence of contradictory statements are not substantive evidence, but merely impeaching testimony, unless it is an admission by a party in interest."

One of the important facts upon this trial was whether the plaintiff knew of the existence of the lever and of its use and whether it was placed so that it could be reached by him, and the defendant was entitled to have the jury consider his statement as to this and other relevant facts made during his examination on the former trial as substantive evidence.

There is therefore error which entitles the defendant to a new trial.

We have carefully considered the record, and are of opinion that there is evidence of negligence which the jury ought to be permitted to consider, and that the motion for judgment of nonsuit was properly overruled. New trial.

(114 S. C. 41)

STACKHOUSE et al. v. CARMICHAEL  
(No. 10401.)

(Supreme Court of South Carolina. April 18, 1920.)

LOGS AND LOGGING §—3(7)—TIMBER DEED  
CONSTRUCTED AS TO TIME FOR REMOVAL OF LOGGING RAILROAD.

Where one timber deed fixed a period of 90 days after expiration for removal of a logging road constructed by the grantee, while another deed contained no such provision, the logging road would become property of the grantors in the first case in event of failure to remove within the time stipulated, while in the latter case the grantee would have a reasonable time after expiration of the period fixed for removal of timber to remove the logging railroad; this being so regardless of whether the railroad be deemed a fixture.

Appeal from Common Pleas Circuit Court of Dillon County; Frank B. Gary, Judge.

Action by W. F. Stackhouse and the Farmers' & Merchants' Bank against Mike Carmichael. From a judgment for defendant, plaintiffs appeal. New trial.

L. D. Lide and H. S. McCandlish, both of Marion, for appellants.

Gibson & Muller, of Dillon, for respondent.

WATTS, J. This was an action for the recovery of certain personal property of the admitted value of \$4,500. The action was commenced August 15, 1917. After issue joined the cause was tried before Judge Gary and a jury at Dillon, S. C., March term, 1918. After evidence was all in both plaintiffs and defendant moved for a directed verdict, and his honor directed a verdict in favor of the defendant for the property in dispute or value thereof, \$4,500, after entry of judgment. Plaintiffs appeal, and by eight exceptions complain of error.

These exceptions raise the following exceptions: (1) The property in question was not a fixture. (2) The failure to remove the property within the duration of the timber deeds did not forfeit plaintiffs' title thereto. (3) There was evidence to go to the jury upon the question of waiver by the defendant. (4) The timber deed executed by Fanny McNeely stipulated no time relating to the removal of any of the property, except building, and, since one-half of the rails were laid upon the lands covered by this deed, a general verdict should not have been directed for the defendant.

The railroad in question was not a fixture, but personal property; but in the case at bar the parties themselves contracted with reference to the right of grantees to remove structures or fixtures placed by the grantees upon the land. One deed had 90 days after it expired for such removal. This deed expired in June, 1916. The grantees under the lease had the right to remove before the expiration of the lease, within the 10 years, or within 90 days after its expiration. This was the contract made between them and by which they are bound. A failure to remove within the time contracted for by the parties worked a forfeiture. Both parties are bound by the provisions of the contract made between the grantor and grantees, so under the Carskaddon Young Company deed the rail on this land becomes the property of the grantor when there was a failure to remove within the time provided for in said deed; not that they were fixtures, but because of the plain provisions of the contract made between the parties. The McNeely deed contained no such provision, and, that being the case, a reasonable time should be allowed after the expiration of the time allowed by the timber deed. There was clearly sufficient evidence to carry the case to the jury on the question of waiver, and his honor was in error in not submitting this question.

Judgment reversed, and new trial granted. New trial.

GARY, C. J., and HYDRICK and GAGE, JJ., concur.

FRASER, J. I concur in the result only. I think that the limit fixed in the deed affects only the right of entry on the land and not the title to personal property left thereon. I think the property in dispute, as a matter of law, is the property of the plaintiffs, and a verdict should have been directed in their favor.

(114 S. C. 32)

SUNSHINE et al. v. FURTICK. (No. 10397.)

(Supreme Court of South Carolina. April 12, 1920.)

1. CONTRACTS ⇨176(2)—CONTRACT IN UNAMBIGUOUS CORRESPONDENCE CONSTRUED BY COURT ALONE.

Where contract is contained in correspondence which is unambiguous, the court alone should construe the same.

2. SALES ⇨32 — CORRESPONDENCE HELD TO SHOW CONTRACT TO SELL TWO LOTS OF SHIRTS.

Correspondence held to show contract by plaintiff to sell defendant two lots of shirts, one to be shipped immediately, and others about two weeks later, payment to be made within ten days after receipt.

3. EVIDENCE ⇨96(2)—DEFENDANT HAS BURDEN OF PROVING HIS COUNTERCLAIM.

Defendant has the burden of proving his counterclaim.

4. SALES ⇨348(2) — PARTY RELYING ON BREACH OF CONTRACT TO MAKE SECOND SHIPMENT MUST SHOW PERFORMANCE.

Where plaintiff agreed to sell defendants two lots of shirts, one to be shipped at once, and the other about two weeks later, if received, payment to be made within ten days, defendant cannot by counterclaim recover damages for plaintiff's failure to make the last shipment without showing performance on his part and payment.

Appeal from Common Pleas Court of Richland County; M. S. Whaley, Judge.

Action by Herman D. Sunshine, Benjamin Sunshine, and Joaquin Cartada, copartners in trade, doing business under the name of Sunshine Bros. & Co., against William F. Furtick. From a judgment for defendant on his counterclaim, plaintiffs appeal. Reversed.

A. W. Ray and D. C. Ray, both of Columbia, for appellants.

R. Y. Kibler, of Columbia, for respondent.

GAGE, J. The plaintiffs, Sunshine & Co., merchants at New York, sued the defendant, Furtick, merchant at Columbia, to recover \$195.25, the purchase price of 35½ dozen shirts sold by the plaintiff to the defendant. The defendant admitted his liability to pay \$107.75 of the amount claimed, and that has now been paid and is out of view. The defendant denied liability for the balance of \$87.50 of the account, and that is the matter at issue.

The defendant does not deny that the price of the shirts is correctly laid at \$195.25; but his contention is that the plaintiff contracted to sell him also 25 dozen other shirts which they wrongfully declined to perform, to his damage in a sum equal to the balance of \$87.50, and he set so much up by counterclaim.

The jury found for the defendant, and the plaintiffs have appealed.

The defendant visited the plaintiffs' stores in New York, saw the shirts, and there was then talk of a purchase and sale betwixt them of two lots of shirts, one of 35 dozen at \$5.50 per dozen, those that were thereafter delivered, and another lot of 25 dozen at a higher price. But all that which was said at that interview is now out of view; for shortly subsequent thereto the whole transaction was concluded by four letters which speak for themselves. The court so properly ruled.

[1] The rights of the parties must be governed by the letters and the court was bound to construe the letters. The court ruled that it was generally the duty of a court to con-

strue a written contract; but in the present instance the court left it to the jury to find what the parties meant by the letters because they were ambiguous. That was error, for the letters are free from ambiguity. The court ought to have construed them.

[2] The letters are dated March 30th, March 31st, April 3d, and April 5th; and the last three are expressly in answer to that which went before it.

By the first letter Furtick offered to buy both lots of shirts, "3% off, 10 d/s," check on receipt of goods.

By the second letter Sunshine & Co. declined to sell on credit, because they were not satisfied with Furtick's commercial rating; but they expressed a willingness to sell for cash 5 per cent. off.

By the third letter Furtick offered to buy both lots of shirts, 7 per cent. off, with sight draft and bill of lading attached. He added that "as a guaranty of his good faith" he inclosed a check for \$25, and he directed thus about the check. If his offer should be accepted credit the \$25 check on invoice price; if his offer should not be accepted, return the check. Up to this point there was no contract, but only proposals.

By the fourth letter Sunshine & Co. returned the check, and they declined to allow 7 per cent. off. But, moved by the good faith of Furtick in sending the check, Sunshine & Co. consented to open an account with Furtick—that is, to credit him—and on that day Sunshine & Co. shipped to Furtick 35 dozen shirts at \$5.50, "and you can remit us for this lot 3 per cent. 10 days, *as per your letter of 30th March ultimo*, which we trust is satisfactory." The italics are supplied. The writer further said:

"With reference to the lot of 25 dozen C. M. at \$7.00, what we had on the floor has already been disposed of, and we are waiting another lot from the factory, and as soon as it comes, which will be in the course of the next two weeks, we shall be pleased to ship your order."

This was an acceptance by Sunshine & Co. of the terms proposed by Furtick in the first letter, and that was to sell him on open account two lots of shirts, one lot sent presently and another lot to be sent in about two weeks if the same could be got from the factory within that time.

Sunshine & Co. testified that this "proposition" made by them in the fourth letter was never accepted by Furtick; but so much is not correct. Furtick had ordered the same goods at the same price by the first letter, and Sunshine & Co. had declined to fill the order only because Furtick's credit was not

good. Sunshine & Co. relented in the fourth letter, and in that letter expressly referred to the first letter, and by necessary implication it was an acceptance of the first letter; the minds of the contractors met then on terms of payment, the only circumstance that had divided them.

The terms of payment were "3% 10 d/s." Sunshine wrote Furtick on April 21st that Furtick's contract was to "remit to us 10 days after they (the goods) were received." So much is an explanation of "10 d/s." The other symbol, "3%" means that, if so paid in "10 d/s," 3 per cent. should be deducted from the price.

It does not appear when the first lot was received by Furtick; but it does appear that payment therefor was not made until after this action was commenced in October, 1917.

The transaction thus established is a single contract by Sunshine & Co. to sell to Furtick two lots of shirts; it is not two contracts to sell two lots of shirts. *Norrington v. Wright*, 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366. The issues of fact and of law thus made are: (1) Did Sunshine & Co. rescind the contract? and (2) did they have the right to do so?

[3, 4] There is no denial but that Furtick is due to pay for the first lot of shirts. The issue arises on his demand for damages for the failure of Sunshine & Co. to deliver the second lot of shirts. For that alleged wrong Furtick is the acting plaintiff. He sues (by counterclaim), and he must prove his case.

The answer which sets up the counterclaim alleges that Sunshine & Co. have refused to carry out the contract. So much for the fact of rescission.

The case thus falls squarely under *Norrington v. Wright*, supra, and the second issue, that of law, is settled by this quotation from that case:

"The plaintiff [Furtick], denying the defendants' [Sunshine & Co.] right to rescind, and asserting that the contract was still in force, was bound to show such performance on his part as entitled him to demand performance on their part, and, having failed to do so, cannot maintain this action."

The instant case is differentiated from *Collins v. Hewlett*, 109 S. C. 245, 95 S. E. 511, by the facts of it.

There was no issue for the jury, and the court ought to have directed a verdict for the plaintiff, and must yet do so.

The judgment is reversed.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

(114 S. C. 37)

**LARK v. COOPER FURNITURE CO.**  
(No. 10399.)

(Supreme Court of South Carolina. April 12, 1920.)

**FORCIBLE ENTRY AND DETAINER**  $\Leftrightarrow$  **4-ENTRY OVER PROTEST OF OWNER HELD "UNLAWFUL ENTRY."**

After plaintiff's tenant, who was in arrears, abandoned the premises leaving therein furniture which he had bought from defendant but had not finished paying for, defendant's entry into the premises to remove the furniture, made over protest of plaintiff, was an "unlawful entry" within Civ. Code 1912, § 4064, and cannot be justified even though there was no breach of the peace.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Unlawful Entry.]

Appeal from Common Pleas Circuit Court of Anderson County; Frank B. Gary, Judge.

Action by Laura Lark against the Cooper Furniture Company, begun in magistrate's court and appealed to the circuit court. From a judgment of the circuit court for defendant, plaintiff appeals. Judgment of circuit court reversed, and that of magistrate affirmed.

L. L. Rice, of Anderson, for appellant.

A. H. Dagnall, of Anderson, for respondent.

**GAGE, J.** The plaintiff sued in tort for wrongful entry into her house. The magistrate found for the plaintiff for \$25.

The circuit court reversed that judgment and ordered judgment for the defendant.

The plaintiff has appealed therefrom.

The following are the circumstances in the case:

The plaintiff is a negress. She rented a house to Wilson, and he was in arrears of rent for \$46. Wilson had in the house a lot of furniture which he had bought from the defendant, and upon which he owed \$26.25, and Wilson held the furniture on a "written lease" from the defendant which was not of record. Wilson abandoned the house and instructed the defendant to take the furniture. The defendant did take the property "over the protest" of the plaintiff, but without a breach of the peace, and carried it away. The plaintiff, Lark, had notice of the existence of the written lease.

These are the facts found by the circuit court. There is testimony tending to support the finding, so the finding is conclusive.

As matter of law the court concluded that the furniture did not belong to Wilson in his own right, and it was therefore not subject to distress for rent.

Conceding so much of fact and law to be true, it yet remains to inquire if the defend-

ant's servant committed a wrong when he entered the plaintiff's house to enforce a right against personalty situate in the house over the protest of the owner of the house.

Mr. Cooley assigns three reasons why there should not be a forcible entry upon a peaceable possession. Cooley on Tort, p. 323.

Even though the entry in the instant case did not break the peace, yet it was made without right, for it was made against the protest of the owner, and with manifestation of force.

The entry was in violation of a statute enacted 600 years ago. Section 4064, Code of Laws.

The judgment therefore of the magistrate was right, and that of the circuit court was wrong. The one is affirmed, and the other reversed.

**GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.**

(114 S. C. 7)

**WELCH v. ATLANTIC COAST LINE R. CO.** (No. 10394.)

(Supreme Court of South Carolina. April 12, 1920.)

**1. WATERS AND WATER COURSES**  $\Leftrightarrow$  **171(2)—UNPRECEDENTED RAINFALL WHICH FLOODED PLAINTIFF'S LANDS ACT OF GOD.**

An unprecedented rainfall, which flooded plaintiff's lands that were adjacent to railroad right of way, must be deemed an act of God for which the railroad company is not responsible, regardless of the responsibility of it for impounding waters and preventing their escape.

**2. WATERS AND WATER COURSES**  $\Leftrightarrow$  **179(6)—RESPONSIBILITY OF RAILROAD FOR IMPOUNDING WATERS HELD FOR JURY.**

Where a railroad company as directed by the railway commission closed an open drain, substituting a pipe, and plaintiff, whose lands were flooded by unprecedented rains, asserted that the pipe was not sufficient outlet, the question whether the pipe was a sufficient outlet, it not appearing that the commission prescribed the size or number of pipes, is for the jury, for the company cannot exonerate itself without showing the unprecedented rain was the sole cause of the injury.

Appeal from Common Pleas Circuit Court of Lee County; Frank B. Gary, Judge.

Action by L. D. Welch against the Atlantic Coast Line Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

H. E. Davis, of Florence, and Tatum & Jennings, of Bishopville, for appellant.

McLeod & Dennis, of Bishopville, for respondent.

FRASER, J. This is an appeal from a refusal of the presiding judge to direct a verdict for the defendant, on the ground that there was no evidence that the negligence of the defendant was the proximate cause of the injury to the plaintiff.

The plaintiff planted lands along the railroad of the defendant, in part owned by the plaintiff and in part rented by him from another. The lands of the plaintiff are flat, and there is very slight fall for the water. The plaintiff complained that the defendant drained its roadbed over a large area and threw it in large volume upon plaintiff's land; that there was an open waterway about 15 feet wide at the plaintiff's land, and the defendant closed the waterway by putting in an iron pipe, only 3 feet in diameter, and closed the remaining portion of the waterway; that the 3-foot pipe was insufficient to carry off the accumulated water and caused it to pond in plaintiff's field and destroyed his crop to his damage in the sum of \$400. There was a verdict for the plaintiff for \$300, and from the judgment entered on this verdict this appeal is taken.

About the essential facts there is but little dispute. There was testimony for the plaintiff that the water from the extended area did not come to the plaintiff's land, and on motion to direct a verdict this must be taken to be true.

There is evidence, and it is undisputed, that about the middle of July, 1916, there was an unprecedented rainfall; that the average rainfall for six months fell in the month of July, 1916; that the crops on some 700,000 acres of land in South Carolina were seriously injured or destroyed; that there was no record of such a rainfall in this state.

There had been trouble here before, and the defendant claimed that the plaintiff was estopped because, when the trouble arose in 1912, the defendant paid the plaintiff \$300 to fix the drains, and, if the drains were inadequate, it was the plaintiff's fault and not the fault of the defendant. There was evidence that the defendant had extended the drained area after the plaintiff finished his work. This also must be taken against the defendant on this motion.

[1] I. There is no evidence, however, that this land had been covered with water in ordinary times or at any other time, except as to the result of this storm. If there was any conflict of testimony as to the nature or extent of this storm, then the case should have gone to the jury on that question. The defendant pleaded the act of God as to the water that went upon the land, and upon this there was no dispute. It is undisputed and indisputable, so far as the record shows, that accumulation of the water on the plaintiff's crops was the act of God, for which defendant is not responsible.

[2] II. The plaintiff claims further that the defendant was negligent in closing the waterway so as to prevent the escape of the water from plaintiff's land; that the defendant knew from previous controversies that the fall was very slight, and, in consequence thereof, the movement of the water would be slow; and that it was negligence to reduce the flow from 15 feet to 3 feet. The defendant's answer to that was that the water came from plaintiff's field, through another drain only 2 feet wide, and that a drain 3 feet wide could carry away about twice the water that would come through a drain 2 feet wide, and, besides, that the railroad commission of this state ordered them to close open waterways and put in pipes, and they merely complied with the orders of the state authorities, and the defendant is not responsible for the damage.

There was evidence that there was other water than that which came from plaintiff's field, and evidence from which the jury might have inferred that the plaintiff's drain was closed by backwater from the railroad. There is nothing in the record to show that the railroad commission fixed the size of the drainpipes or the number to be used at any particular place. It was for the jury to say whether the size of the pipe was sufficient, under all the circumstances. In order to relieve itself, the defendant must show that the act of God was the sole cause. Was it the sole cause? That was a question for the jury, and his honor was right in refusing to direct a verdict.

The judgment is affirmed.

GARY, C. J., and HYDRICK, WATTS, and GAGE, JJ., concur.

(114 S. C. 45)

PROSSER v. PROSSER. (No. 10402.)

(Supreme Court of South Carolina. April 13, 1920.)

HUSBAND AND WIFE  $\S$  205(2)—WIFE MAY SUE HUSBAND IN TORT FOR BEATING.

Under Code Civ. Proc. 1912, §§ 114, 160, and 163, particularly in view of sections 483, 487, wife may maintain action in tort against her husband for willfully beating her.

Gary, C. J., dissenting.

Appeal from Common Pleas Circuit Court of Florence County; T. J. Mauldin, Judge.

Action by Eola A. Prosser against James B. Prosser. From judgment dismissing the complaint on demurrer, plaintiff appeals. Order reversed, and cause remanded for trial.

Willcox & Willcox, of Florence, for appellant.

Arrowsmith, Muldrow, Bridges & Hicks, of Florence, for respondent.

**GAGE, J.** A wife sued her husband in tort for willfully beating her, and the circuit court held that for such she had no cause of action. The complaint was dismissed on demurrer, the plaintiff has appealed, and the only question to be decided is the right of the wife in such circumstances.

The gravamen of the demurrer is: (1) That by the common law the wife had no such right, (2) that the Legislature alone can give her such right, and (3) that the Legislature has not done so. The first and second postulates are pitifully true. The third postulate is not true, and we come immediately to the consideration of that issue.

Neither the Constitution of 1868, nor that of 1895, nor the statutes enacted pursuant thereto, by so many words give to a married woman power "to sue." The act of 1891 (20 St. at Large, p. 1121; section 3761, Code of Laws) declared she might "enforce" the "contract" made with her, but it makes no mention of actions for tort.

The Constitution of 1868 merely conferred on the wife the power to hold property; that of 1895 added to so much the power to contract. The act of 1870 (14 St. at Large, p. 325), passed "to carry into effect the provisions of the Constitution," did little more than enact the provisions of the Constitution of 1868 and added the power to contract.

But the Code of Procedure enacted in 1870 provides comprehensive "remedies" for the redress of wrongs.

At the common law it was, of course, an actionable wrong for a stranger to beat a married woman. If the beating was by her husband the wrong was none the less, for the act was at least a violation of the criminal law. But the courts denied a civil action to the wife upon the theory that she could not sue herself, and the husband was part of herself. The judges pointed her for a remedy to the divorce courts and the criminal courts. The anomaly was thus presented of incarcerating a wife beater if he should beat his wife-self, but loosing his purse if he should commit the identical act. For the beating she suffered the wrong, but she had not the remedy by civil action.

The act of 1870 entitled the Code of Procedure gave her the remedy. That statute defines an action as a proceeding, amongst other things, to redress a private wrong (section 114); and it provides that actions shall be prosecuted by the real party in interest (section 160); and it provides, by necessary implication, that a married woman may sue (section 163), and that in two instances she may sue alone, (1) when the action concerns her separate property, and (2) when the action is between herself and her husband. The necessary implication is that the second instance is not included in the first instance; that is to say, she may sue her husband in

circumstances not concerning her "separate" property.

The Code of Procedure is thus in derogation of the common law, and it must not be strictly construed. Section 487.

The necessary inference is that by a liberal and not by a strict construction the Code of Procedure was enacted to give to a wife every remedy against her husband for any wrong she might suffer at his hands. More than this, a wife has a right in her person; and a suit for a wrong to her person is a thing in action; and a thing in action is property, and her property. Section 483.

This action is therefore maintainable under our own case of *Messervy v. Messervy*, 82 S. C. 559, 64 S. E. 753.

The order of the circuit court is reversed, and the cause is remanded there for trial.

**HYDRICK, WATTS, and FRASER, JJ.,** concur.

**GARY, C. J.,** dissents.

(114 S. C. 40)

**SHARPE v. HUGGINS.** (No. 10400.)

(Supreme Court of South Carolina. April 12, 1920.)

**1. COURTS ¶=99(1)—FORMER DECISION ON MOTION TO OPEN JUDGMENT LAW OF CASE.**

Where defendant's original motion to open a judgment for excusable neglect was denied by the trial court and the judgment affirmed, such decision is the law of the case, and is conclusive against a second motion to open the judgment on the ground of the same excusable neglect.

**2. JUDGMENT ¶=569—ALL EVIDENCE SHOULD BE PRESENTED ON ORIGINAL MOTION TO OPEN JUDGMENT FOR EXCUSABLE NEGLECT.**

On the original motion to open judgment for excusable neglect, all the evidence should be presented, and after denial of the first motion a second on the same ground cannot be granted on the theory that different evidence was presented.

Appeal from Common Pleas Circuit Court of Lexington County; John S. Wilson, Judge.

Action by Bunyan Sharpe against L. Virginia Huggins. From an order which opened the judgment on the ground of excusable neglect, plaintiff appeals. Order reversed, and motion dismissed.

C. M. Efrd, of Lexington, for appellant.

G. A. Alderman and W. N. Graydon, both of Columbia, for respondent.

**GAGE, J.** The appeal is from an order of the circuit court which opened a judgment upon the ground of excusable neglect as is



provided by section 225 of the Code of Procedure.

[1] The order ought not to have been granted. An identical motion had been made by the defendant a year before the instant motion was made; and it was denied by the circuit court, and that order was affirmed by this court. 110 S. C. 180, 93 S. E. 256.

The first motion was made, as is the instant action, on grounds of excusable neglect; and the circuit court denied the first motion for the reason that the neglect was not excusable, and this court on the authority of *Gales v. Poe*, 107 S. C. 483, 93 S. E. 189, affirmed that order. It is now said, however, that this court affirmed that order for other reasons than that assigned by the circuit court, but that is not correct; the order was affirmed on the authority of *Gales v. Poe*, 107 S. C. 483, 93 S. E. 189, and that case arose under section 225, and the court there denied the motion because the neglect was not excusable.

Therefore the matters now mooted were raised on a prior motion of identical character, and were there adjudged against the movant; that ends the controversy.

[2] But it is said by the defendant that evidence was presented to the court on the second motion different from that presented on the first motion. A sufficient answer to that is that all the evidence ought to have been presented on the first motion. See *McDowall v. McDowall*, Bailey Eq. 830.

The order below is reversed, and the motion is dismissed.

GARY, C. J., and HYDRICK, WATTS, and FRAZER, JJ., concur.

(127 Va. 180)

HARRISON et al. v. BARKSDALE, Judge.

(Supreme Court of Appeals of Virginia. March 30, 1920.)

**1. MANDAMUS  $\S$  74(5)—DUTY TO DECLARE RESULT OF ELECTION IS MINISTERIAL DUTY WHICH MAY BE ENFORCED.**

The duty of the judge of the circuit court to enter an order declaring a result of a special election for the adoption of the city manager plan of government under Acts 1914, p. 165, as amended by Acts 1916, p. 672, and Acts 1918, p. 402, is a public ministerial act which judge can be compelled to perform by mandamus.

**2. MANDAMUS  $\S$  148—INDIVIDUAL WITHOUT SPECIAL INTEREST MAY BRING SUIT TO ENFORCE PUBLIC DUTY.**

Mandamus will lie at the suit of a private individual having no special or pecuniary interest to enforce the performance of a public ministerial duty.

**3. MANDAMUS  $\S$  51—ENTRY OF IMPROPER ORDER DECLARING ELECTION RESULT DOES NOT PREVENT MANDAMUS TO COMPEL PROPER ORDER.**

The entry of improper order declaring the result of a city election to adopt the city manager plan of government as provided by Acts 1914, p. 165, as amended by Acts 1916, p. 672, and Acts 1918, p. 402, is a nullity, and does not prevent issuance of mandamus to compel the entry of a proper order.

**4. MANDAMUS  $\S$  12—DECLARATION OF ELECTION RESULT IS MINISTERIAL AND MAY BE CORRECTED.**

That an order of the judge declaring the result of an election held for the purpose of voting on change of government to "city manager plan" is in the form of an order of court does not affect authority of the judge subsequently to enter a contrary order if the first was improper, since the order was not judicial, but a ministerial declaration.

**5. MANDAMUS  $\S$  168(3)—EVIDENCE TO SHOW NUMBER OF VOTERS AT PRECEDING ELECTION HELD ADMISSIBLE.**

In mandamus proceedings to compel the issuance of a proper order declaring the result of a special city election, certificates of the clerks and registrars showing the number of qualified electors at the last general election are competent and are material to show that the questions whether a majority of those voting or a majority of all entitled to vote was necessary was not a moot question.

**6. MUNICIPAL CORPORATIONS  $\S$  48(1)—"MAJORITY VOTE" AT SPECIAL ELECTION IS MAJORITY OF THOSE VOTING.**

Under Const. § 117, as amended in 1912, and Acts 1914, p. 165, as amended by Acts 1916, p. 672, and Acts 1918, p. 402, authorizing the adoption of the city manager plan by a majority vote of the qualified electors at an election to be held therefor, a majority of those voting at a special election where only that question was submitted is sufficient, though they are not a majority of those qualified to vote.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Majority.]

**7. MUNICIPAL CORPORATIONS  $\S$  48(1)—STATUTE NOT PROVIDING OTHERWISE, MAJORITY OF THOSE VOTING DETERMINES RESULT; "MAJORITY VOTE."**

A statute requiring a majority vote of the qualified electors to determine a question of change in city government which provides no means for determining the number qualified to vote at the election requires only a majority of the votes cast at the election unless an intention to require a majority of all those qualified to vote is clearly expressed.

**8. MUNICIPAL CORPORATIONS  $\S$  48(1)—PROVISIONS OF CONSTITUTION AS TO MAJORITY VOTING ON AMENDMENTS HELD NOT APPLICABLE TO VOTING ON CITY MANAGER PLAN.**

The fact that Const. §§ 186 and 197, requiring a majority vote to ratify a proposed amendment or to call a constitutional conven-

tion, expressly state it to be a majority of those "voting thereon," does not require section 117, authorizing adoption of the city manager plan of government by a majority vote without the qualifying statement, to be construed to require a majority of all qualified to vote.

**9. CONSTITUTIONAL LAW §14—LACK OF UNIFORMITY OF LANGUAGE DOES NOT SHOW DIFFERENT INTENT.**

Lack of uniformity of language in various sections of the Constitution relating to similar subjects does not indicate an intention to give different meanings to those provisions, especially where the later expression is in an amendment adopted at a different time by a different body of men.

**10. MUNICIPAL CORPORATIONS §48(1)—LANGUAGE OF STATUTE DOES NOT AID CONSTRUCTION OF CONSTITUTIONAL PROVISION AS TO VOTING ON CITY MANAGER PLAN.**

The fact that Code 1904, § 944a, cl. 39, and section 1038e, cl. 7, expressly require a majority of those voting on questions submitted does not require Const. § 117, as amended in 1912, requiring merely a majority of the qualified electors, to be construed to require a majority of all qualified to vote.

**11. MUNICIPAL CORPORATIONS §48(1)—DIFFERENCES IN LANGUAGE IN AMENDING STATUTE HELD TO EXPRESS SAME MEANING.**

The provisions of Acts 1914, p. 165, as amended by Acts 1916, p. 672, requiring a majority of the qualified voters authorized or qualified to vote, and the provision of the subsequent amendment thereof by Acts 1918, p. 402, requiring a majority vote of the qualified electors, which is practically the language of Const. § 117, as amended in 1912, authorizing the election, are merely different forms to express the same, and not a different, meaning.

**12. CONSTITUTIONAL LAW §20—CONSTRUCTION BY LEGISLATURE NOT CONTROLLING.**

The construction placed by the Legislature on a constitutional amendment, though entitled to great consideration, is not controlling on the courts, which are specially charged with the responsibility of construing the Constitution.

Original petition for mandamus by Randolph Harrison and others against Hon. William R. Barksdale, Judge of the Circuit Court of the City of Lynchburg. Mandamus denied.

This is a proceeding instituted by the petition of Randolph Harrison and others, citizens, taxpayers, and qualified voters of the city of Lynchburg, praying of this court a writ of mandamus to compel the respondent, Hon. Wm. R. Barksdale, to enter an order precisely contrary in its purport to the order which was in fact heretofore entered by him in the case.

The case involves a special election held in the city of Lynchburg on November 4, 1919, under the statute (Acts 1914, p. 165, as amended by Acts 1916, p. 672, and Acts 1918,

p. 402), which was enacted in pursuance of section 117 of the Constitution as amended in 1912, providing, among other things, for a change in the previously existing form of government of cities and towns to the plan known as the "city manager plan."

The Constitution, as amended as aforesaid, in so far as material to be stated here, provides that the changed form of government aforesaid shall not become operative except as to such cities or towns as may thereafter adopt the same "by a majority vote of its qualified electors at an election to be held as may be prescribed therefor by law."

The statute aforesaid, in so far as material to be here stated, provides that special elections for the purpose aforesaid may be ordered by the circuit court having jurisdiction over the municipality "upon the petition of electors, equal in number to at least ten per centum of those qualified to vote at the last preceding general election at which a mayor or council was elected," and provides also that such special elections shall be conducted in the manner prescribed by law for the conduct of regular elections and by the regular election officers of the municipality, for secret ballot, and for the form of the ballot, after which the statute continues as follows:

"Returns of the election shall be certified by the commissioners of election, or their clerk, to the court, or the judge thereof in vacation; and if it shall appear that the proposed change has not been adopted by a majority vote of the qualified electors, an order shall be entered of record accordingly, \* \* \* but if the said proposed change is adopted by a majority vote of the qualified electors, the court or judge thereof, shall enter an order accordingly, a copy of which shall be forthwith certified by the clerk of such court to the council of such city or town for recordation upon its journal." Acts 1918, pp. 403, 404.

From the proceeding in which the special election aforesaid was ordered it appears from evidence consisting of certificates of registrars and of the clerk of the corporation court of said city and the affidavit of one Peter O. Adams that those qualified to vote at the last preceding general election aforesaid theretofore held were in number, so far as disclosed by the evidence adduced, 3,191, but at most could not have exceeded 4,000; that more than 10 per cent. of that number, namely, 600, had petitioned for the election; and that the election was accordingly ordered by said court.

It appears from the returns of the special election held as aforesaid on November 4, 1919, certified by the commissioners of election, that the total number of votes cast was 1,208, of which 774 were for and 434 against the proposed change in the municipal government.

No question is raised in the case on the

subject of whether those who cast the said 1,208 votes were all qualified electors of the city of Lynchburg, and that they were such electors seems to be a concession in the case.

Accompanying the petition for mandamus is evidence, consisting of the certificates and affidavits of registrars and the certificate of the clerk of the corporation court of the said city, tending to show that the electors of the city registered and otherwise qualified to vote at said special election on November 4, 1919, were in number approximately 3,981, and were at least as many as 3,191, the number, as disclosed by the evidence adduced, who were qualified to vote at the preceding general election theretofore held as aforesaid.

The petitioners appeared before the respondent, by his permission, as *amici curiæ*, prior to his action on the election returns and certificate of the commissioners of election aforesaid, and presented to him the same evidence mentioned in the paragraph next above, and urged upon him the position which is the same as that taken in the petition for mandamus, that it appeared that the proposed change in the city's form of government had not been adopted by a majority vote of the electors as required by the provisions on that subject of the Constitution and statute law aforesaid, and that therefore it was the duty of respondent under the statute to enter an order of record accordingly. Respondent, however, took a different view of the matter, declined to consider the evidence presented to him as aforesaid or any other extraneous fact or facts outside of the certificate of the commissioners of election aforesaid, and, in vacation, entered the following order:

"The commissioners of election for the city of Lynchburg having certified to the court the returns on the election held in the city of Lynchburg on the 4th day of November, 1919, heretofore ordered on the proposed change in form of municipal government from the existing form to that known as the 'city manager plan' as defined and prescribed by acts of assembly of 1916 and 1918, and it appearing from said returns that 774 votes were cast in favor of the change in the form of municipal government, and that 434 votes were cast against the change in the form of municipal government, and the court having heard argument by Leon Goodman for the petitioners, and Volney E. Howard, A. R. Long, Don P. Halsey, and Randolph Harrison, *amici curiæ*, as to the meaning of the words 'majority vote of its qualified electors,' as used in the Constitution (section 117) and Acts of the General Assembly 1918 (page 402), counsel for petitioners contending that a majority of the electors voting was sufficient under the law to cause a change in the form of present municipal government of Lynchburg, and counsel acting as *amici curiæ* contending that no such change in the present form of municipal government had been adopted by reason of the fact that a majority of all the qualified electors had not voted in favor of said change, and the court, having fully considered the arguments, being of opinion that

said votes so cast in favor of the change in the form of municipal government constitute in contemplation of law a majority of the qualified electors of said city, the court doth order that said change in the form of municipal government is adopted by a majority vote of the qualified electors of the said city of Lynchburg.

"The clerk of this court is hereby directed to forthwith certify a copy of this order to the council of the city of Lynchburg for recordation upon its journal, as required by law.

"The clerk of this court is directed to enter this order upon the records of this court, and the same is certified to him for entry as a vacation order."

Harrison & Long, Don P. Halsey, and Volney E. Howard, all of Lynchburg, for petitioners.

Harper & Goodman, of Lynchburg, for respondent.

SIMS, J. (after stating the facts as above). The questions presented by the record for decision will be disposed of in their order as stated below.

We are confronted at the outset with a question of procedure, namely:

[1, 2] 1. If the position of the petitioners were well taken, and it was the duty of the respondent to have entered a contrary order from that which he did enter, would mandamus lie to compel him to do so?

This question must be answered in the affirmative.

In view of the full discussion of this subject in the opinion of this court delivered by Judge Burks in the case of the City of Roanoke v. Elliott, 123 Va. 393, 96 S. E. 819, we here refer thereto, and will add to that opinion at this point only such additional matter as seems appropriate in view of the positions taken and the authorities cited for respondent in the case in judgment.

The jurisdiction which this court exercises, under the statute in such case made and provided, in the matter of mandamus, is coextensive with that exercised at common law by the Court of King's Bench in England. *Clay v. Ballard*, 87 Va. 787, 789, 13 S. E. 262. The duty of respondent in question, if it exists, is a public duty; and, since the case of *Rex v. Railroad Company*, 2 Barn. & Ald. 646, it has been uniformly held that mandamus will lie, at the suit of a private individual, although the latter is without any special or pecuniary interest which is affected, to enforce a public ministerial duty imposed on the respondent by statute. *Union Pacific R. Co. v. Hall*, 91 U. S. 343, 23 L. Ed. 428, 432.

The same principle has been applied in West Virginia in the holding that mandamus will lie at the suit of a citizen, voter, and taxpayer to compel the council of a town and the county court of a county to perform a ministerial duty imposed by statute of causing an election to be held. *State v. Town of Davis*, 76 W. Va. 587, 85 S. E. 779, 780;

*Frantz v. Wyoming County*, 69 W. Va. 734, 73 S. E. 328; and other West Virginia cases therein cited.

[3] In opposition to the conclusion which we have above reached on the question under consideration, it is urged in argument before us, however, that the office of a mandamus is to compel the performance of some act which has not been performed, and that it does not lie to compel a respondent to undo what he has already done, that in the latter case the respondent has become *functus officio*, with no further power in the premises, that for mandamus to lie the respondent must be in possession of the power to perform the act sought at the time the writ is asked to be issued, and the following authorities are cited to sustain such positions, namely: *Thurston v. Hudgins*, 93 Va. 780, 20 S. E. 966; *White's Creek Turnpike v. Marshall*, 2 Baxt. (Tenn.) 104; *Sweet v. Conley*, 20 R. I. 381, 39 Atl. 326; *Maxwell v. Burton*, 2 Utah, 595; *State v. Miller*, 1 Lea (Tenn.) 596; and *Tennant v. Crocker*, 85 Mich. 328, 48 N. W. 577.

Now, the mere fact that an act has been done, if it be a purely ministerial act, has no effect upon the remedy of mandamus, if that act be not the one which it was the duty of the respondent to perform. Whatsoever ministerial action the respondent may take which is contrary to statutory authority which imposes upon him the duty in question is null and void; is as if it had never been taken; and the action which his statutory duty imposes upon him remains still unperformed. It is true that mandamus will not lie unless the respondent is in possession of the authority to perform the act sought at the time the writ is asked to be issued; but the mere fact that he has done something contrary to his duty does not of itself deprive the respondent of the authority later to reverse such actions and perform his duty aright. The lack of such authority, if there be such lack, must be due to some other cause. And upon examination of the authorities last mentioned we find nothing therein in conflict with these views, but much to sustain them.

In *Thurston v. Hudgins*, supra, 93 Va. 780, 20 S. E. 966, the act which had been done was that of an officer in the exercise of quasi judicial duties, requiring the exercise of judgment and discretion. It was for that reason there held that mandamus would not lie to undo the action, and not merely because the action was a past event. The same is true of the powers of the commissioners in the case of *White's Creek Turnpike v. Marshall*, supra, 2 Baxt. (Tenn.) 104, the exercise of which the court said would not be controlled by mandamus.

In *State v. Miller*, supra, 1 Lea (Tenn.) 596, a committing magistrate, on a preliminary examination being waived by the accused, did not examine the witnesses for the state and reduce their testimony to writing, as the statute directed, but sent the accused on to the

circuit court for indictment and trial. While the accused was still in custody of the circuit court, mandamus was sought to compel the magistrate to perform the duty aforesaid. The court held that the case had passed from the jurisdiction of the magistrate, that he had then no power to order the accused out of the jurisdiction of the circuit court and bring him back before the magistrate for examination, and that because of these reasons the respondent magistrate lacked the authority, at the time the writ was sought, to perform the duty in question, if it ever existed. On the latter point, indeed, the majority of the court held that such duty never in truth existed, as the preliminary examination was waived by the accused.

In *Sweet v. Conley*, supra, 20 R. I. 381, 39 Atl. 326, the respondent was a mere surveyor (overseer) of the highway, who acted, in changing a grade of a street, under a void order of the municipal council, and hence it was held that the respondent had no authority at any time to act in the premises, either to do or to undo what he did. The opinion of the court in that case does say that it has been frequently held that the form of action by mandamus will not lie to undo what ought not to have been done, citing *White's Creek Turnpike v. Marshall*, supra, 2 Baxt. (Tenn.) 121, and *Ex parte Nash*, 15 Q. B. 92. We have seen above that what was sought to be undone in the former case was the action of commissioners performing quasi judicial functions involving the exercise of judgment and discretion. In the latter case the situation was peculiar. The mandamus did not seek to compel the performance of any duty, but solely to undo an act done without authority of statute, as the petitioners claimed. They did not seek to compel the respondent to discharge any duty which he had not discharged. As said by Lord Campbell, G. J., with respect to the writ of mandamus:

"We grant it when that has not been done which a statute orders to be done, but not for the purpose of undoing what has been done. We may, upon an application for a mandamus, entertain the question whether a corporation, not having affixed its seal, be bound to do so, but not the question whether, when they have affixed it, they have been right in so doing."

In *Maxwell v. Burton*, supra, 2 Utah, 595, there was a statute which directed the respondent, a registrar, to do precisely what he did, and the court merely held that it could not enter upon a consideration of the validity of such statute in a mandamus proceeding; (of which the appellate court in that state, as set forth in the opinion, had no original jurisdiction); the only jurisdiction of the court being on appeal.

In *Tennant v. Crocker*, supra, 85 Mich. 328, 48 N. W. 577, the mandamus was denied, not because the act in question had been done, but on the ground that the court in the matter of

granting or refusing a writ of mandamus exercised a certain discretionary power (but see *Clay v. Ballard*, supra, 87 Va. at page 790, 13 S. E. 262) and that, the action there involved (which was that of a mayor in declaring that a resolution was adopted) being on its face illegal and void, so that no valid contract of the municipality could be entered into under it, and hence so that no injury to the municipality could arise, the mandamus should be (as it was) refused. The court, however, in that case, expressly held that it had the power to issue the mandamus. In this connection the court said:

"The decision of the mayor in the case under consideration did not involve the exercise of discretion, but was ministerial, as a presiding officer of the council. If the resolution did not have the requisite two-thirds vote to support it, it was his duty to declare it lost. Jurisdiction is given by the Constitution to this court to issue the writ of mandamus, and it is within the province of the court to restrain public bodies and officers of the municipal divisions of the state from exceeding their jurisdiction, and to require them to perform such specific duties as the law imposes upon them"—citing cases.

[4] In the case in judgment the mere circumstance that the action of respondent which is in question was in the form of an order of court does not affect the authority of respondent to subsequently enter a contrary order, because the order which has been entered was not a judicial order, but purely a ministerial declaration put in that form as directed by the statute. *Roanoke v. Elliott*, supra, 123 Va. 393, 96 S. E. 819.

[5] 2. On the question of fact of what was the number of electors of the city of Lynchburg qualified to vote at the special election on the proposition of the proposed change in form of the city government, we are of opinion that, so far as material, the evidence tending to show what was the number of such electors, which accompanies the petition in the case in judgment, is admissible and should be considered by us. It is the same character of evidence as that on which the court below in the proceeding in which it ordered the special election ascertained what was, at most the number of electors of such city qualified to vote at the next preceding election designated in the statute, and, since courts will not adjudicate moot cases, such evidence is material in order to make the record present the questions involved for adjudication.

We come now to the consideration of the case on its merits, upon which the question presented for our determination is the following:

[6] 3. Under the provision of the Constitution drawn in question, is a majority of the qualified electors of a municipality actually voting in favor of the change of the form of municipal government, at a special election

held as prescribed by law at which that is the only proposition voted upon, sufficient to adopt the changed form of government, though in point of fact it was not a majority of all of the electors who were qualified and entitled to vote at such election, but a minority of such electors?

This question must be answered in the affirmative.

The specific language of the Constitution which provides by what vote the change in form of municipal government must be adopted before it can go into effect requires the municipality to adopt the changed form of government "by a majority vote of its qualified electors at an election," etc.

We assume, in accordance with what seems to be a concession in the case, that the votes cast at the special election drawn in question were cast by qualified electors of the city. The evidence aforesaid satisfactorily shows that those voting in the affirmative were not a majority of the qualified electors entitled to vote, but were a majority of such electors who actually voted, at such election.

In *Dillon on Mun. Corp.* (5th Ed.) § 383, p. 663, concerning the legislative or constitutional meaning of the language "a majority of the voters," or "a majority of the legal voters," or "a majority of the qualified voters," and of similar phrases, in a Constitution or statute prescribing the vote required for election to office or for any other municipal purpose, it is said:

"The *natural meaning* of these phrases, when not qualified, is a majority of all those within the electorate who are entitled to participate in the election." (*Italics supplied.*)

But, as the same author says in substance, in construing such a constitutional or statutory provision, what the courts must ascertain is not the abstract natural meaning of such phrases per se, but the actual constitutional or statutory meaning with which such phrases are used in such a provision. And, as laid down by the same learned work just cited, the latter meaning must be ascertained by reference "to the principles and practical working of representative government." *Id.* § 383, p. 663.

And, as stated in the same work (section 383, pp. 653, 654):

"In elections where there is an indefinite number of voters, the general rule, where not otherwise provided, is that those absenting themselves and those who being present abstain from voting are considered as acquiescing in the result declared by a majority of those actually voting, though in point of fact only a minority of those entitled to vote really do vote, and the majority of those voting constitutes merely a majority of a minority. This principle is inherent in representative government and is necessary to the practical working of the elective system"—citing the leading English case of *Oldknow v. Wainwright*, 2 Burr. 1017, 1021, in which Lord Mansfield de-

livered the opinion of the court, and Supreme Court and other cases.

As said of a contrary construction in *Taylor v. Taylor*, 10 Minn. 107 (Gil. 81), where the language under consideration was "a majority of the electors of the county":

"This construction is perhaps in accordance with the letter of the Constitution, but it leads to such practical inconvenience, hardship, and absurdity we cannot believe it to be in accordance with the spirit and meaning of that instrument."

Accordingly we find, from the time of the holding of *Lord Mansfield* in *Oldknow v. Wainwright* down to the present, that it is held by the great weight of authority that, unless a contrary intention is clearly expressed in the Constitution or statute in question, the actual meaning of such phrases as aforesaid is that a majority, or other proportion stipulated, of those of the class mentioned actually voting at the election at which the proposition to be determined is voted on, or the officer to be chosen is voted for, is sufficient to satisfy the requirement as to the vote contained in such phrases. 1 *Dillon on Mun. Corp.* (5th Ed.) § 383, pp. 654, 655, and note 2, citing the following among other cases, which involve, respectively, the phraseology which is quoted after each case cited, namely: *St. Joseph Township v. Rogers*, 16 Wall. 644, 21 L. Ed. 328 ("majority of the legal voters of a township"); *Carroll County v. Smith*, 111 U. S. 556, 4 Sup. Ct. 539, 28 L. Ed. 517 ("two-thirds of the qualified voters of such county at a special election or regular election to be held therein"); *Knox County v. Ninth Nat. Bank*, 147 U. S. 91, 99, 13 Sup. Ct. 267, 270, 37 L. Ed. 93 ("two-thirds of the qualified voters of such county at a regular or special election to be held therein"); *Mobile Sav. Bank v. Oktibbeha County* (D. C.) 22 Fed. 580 ("two-thirds of the qualified voters of such county at a special election or regular election to be held therein"); *Pacific Imp. Co. v. Clarksdale*, 74 Fed. 528, 532, 20 C. C. A. 635 ("two-thirds of the qualified voters"); *Vance v. Austell*, 45 Ark. 400 ("consent of a majority of the qualified voters of the county"); *State v. Sumpter County Commissioners*, 19 Fla. 518, 539 ("majority of the number of registered votes"); *Pickett v. Russell*, 42 Fla. 116, 139, 28 South. 764, 771 ("majority of the qualified electors" of a school district "that pay a tax on real or personal property"); *Green v. State Board of Canvassers*, 5 Idaho, 130, 138, 142, 47 Pac. 259, 261, 262, 95 Am. St. Rep. 169 ("majority of the electors"); *People v. Garner*, 47 Ill. 246 ("majority of the voters of such county at any general election"); *Melvin v. Lisenby*, 72 Ill. 63, 67, 22 Am. Rep. 141 ("majority of the legal voters living in the county"); *Kuns v. Robertson*, 154 Ill. 394, 412, 40 N. E. 343, 348 ("two-thirds of the whole society"); *Citizens and Taxpayers v. Williams*, 49 La. Ann. 422, 440, 21 South. 647, 654, 37 L. R. A. 761 ("majority

of the property taxpayers in number and value"); *Foy v. Gardiner Water Dist.*, 98 Me. 82, 85, 56 Atl. 201, 202 ("majority vote of the legal voters within said district"); *Walker v. Oswald*, 68 Md. 146, 155, 11 Atl. 711, 714 ("majority of the voters of said county"); *Murdock v. Strange*, 99 Md. 89, 57 Atl. 628, 3 Ann. Cas. 66; *Shearer v. Bay County Supervisors*, 128 Mich. 552, 556, 87 N. W. 789 ("majority vote of the electors of said county"); *Rike v. Floyd*, 6 Ohio Cir. Ct. R. 80, 125; *Schlichter v. Ketter*, 156 Pa. 119, 27 Atl. 45, 22 L. R. A. 161 ("two-thirds of the whole society"). To the same effect, see 10 *Am. & Eng. Ency. L.* (2d Ed.) p. 754; 15 *Cyc.* 388; note in 13 *Ann. Cas.* 415; *McCreary on Elections* (4th Ed.) § 208; *Richardson v. McReynolds*, 114 Mo. 641, 21 S. W. 901 (two-thirds of the legal voters of said district").

[7] In the case in judgment there was "an indefinite number of voters" in the sense in which that phrase is used in the quotation above made from *Dillon on Mun. Corp.* p. 653; that is to say, the provisions of the Constitution involved and of the statute putting the Constitution into effect do not provide any machinery for ascertaining and certifying to the court the definite number of qualified electors entitled to vote at the election; so that the ascertainment of that fact definitely must depend upon evidence aliunde. Statutes exist in this state which prescribe the various essential things which go to make a citizen a qualified elector entitled to vote at such an election as that in question, such as the requisite age, residence, registration, exemption from or prepayment of poll taxes, with entry of name on the treasurer's list where the exemption does not exist. If correct when originally made, such records, however, may be rendered inaccurate by subsequent deaths, convictions of crime, or removals of former electors. There is no statutory requirement in cases of deaths or convictions of crime assuring an accurate continuous record thereof which would be available in making up the election returns. It is notorious that the statutory requirements as to maintaining a record on the registration books of removals are seldom accurately complied with. And where the statute, as in the case in judgment, does not fix upon the machinery by which all these various matters are to be evidenced, the accuracy of the registration books and the treasurer's lists is open to question by the extraneous evidence, and is left at large and undetermined. There is no way of making such evidence complete short of gathering affirmative evidence of the age, residence, time of residence of every person whose name is on the registration books, and also on the treasurer's list and on the list of those exempt from the requisite of the prepayment of poll taxes, the identity of the persons so named, also affirmative evidence sufficient to prove that no person who is registered and fails to vote has been omitted from the list of those

exempt from the prerequisite of payment of poll taxes, also affirmative evidence sufficient to prove that none, or, if any, which of the persons ascertained to have been in all other respects qualified electors subsequently and before the election died, or was convicted of such crime, or had removed, so as to disqualify him from voting at the election in question, and evidence of other details which we need not here mention. This would be a difficult and burdensome task to impose as a ministerial duty upon any one; and often the vote may be so close that absolute accuracy is essential to determine the result of the election. Of course, in some cases the vote one way or the other may be so large that there would be little practical difficulty in ascertaining the correct result. It would be only in such cases that the elective method under consideration would be free of the practical difficulties and burdensomeness of administration aforesaid.

In the case of the ordering of the election, the statute avoids the detailed investigation aforesaid by providing that the petitioners shall equal in number "at least" the percentage designated of the total electorate at the time of the next preceding general election mentioned, so that the judge ordering the election need only require that the number of petitioners be sufficiently large to render all existing uncertainty aforesaid as to the exact total of the electorate immaterial. Hence the situation at an election is practically very different from that existing at the mere ordering of an election.

The difference in the situation at the mere ordering of the election from that existing at the election itself, as requiring the detailed allunde investigation aforesaid, is well illustrated by what occurred in the case in judgment in the proceeding in which the election was ordered, as set forth in the statement preceding this opinion. There the number of petitioners for the election was so large that it appeared that the statutory and constitutional requirement on the subject had been complied with, even if the total electorate had been as large as 6,000; whereas there was sufficient evidence adduced, without going into matters of detail, to satisfactorily establish the fact that after allowing for all existing uncertainty affecting the total of the electorate, due to death, convictions of crime, removals, etc., such total could have been at most not in excess of 4,000, and the percentage of petitioners of even that extreme number exceeded the statutory requirement 50 per cent. Thus any need of the detailed investigation aforesaid was obviated; and a court or judge in vacation, on application for the ordering of such an election, under the peculiar language of the statute on that subject aforesaid, may properly require so large a number of petitioners that he will be relieved from entering upon the detailed investigation aforesaid before he enters the order. But he has no such control of the situation which develops "at an

election." In the latter case the count of the number of the votes cast may inescapably impose the duty of detailed investigation aforesaid, if the Constitution or statute requires a majority vote of the total electorate in order to adopt the proposition being voted upon.

Now it is true that, notwithstanding the aforesaid difficulties growing out of the failure to provide practical machinery to ascertain the definite number of qualified voters at an election if the constitutional or statutory provision plainly requires such ascertainment, the burden would be upon the administrative officer charged with the duty of declaring the result to undertake to ascertain such result by such means as may be available; but in cases where the majority vote in the affirmative or negative is not sufficiently large to overcome any existing uncertainty aforesaid as to the total of the electorate the task would be attended with the burden and practical difficulties aforesaid. Hence many of the cases hold that, if the Constitution or statute, which, of course, is designed to be operative in elections which have a close vote as well as in all others, intended to prescribe such an elective method, it would provide in itself a machinery for the ascertainment of the total electorate and give to such machinery the effect of definite evidence on the subject.

Accordingly we find that the conclusion aforesaid of the great weight of authority on the subject rests upon the principle that, if the constitutional or statutory intent on the subject of majority, or other proportionate vote stipulated, is not "clearly expressed" so as to require to the contrary, the language will be construed to refer to the vote of the class mentioned which is in fact cast at the election; that is to say, if the language of the Constitution or statute on the subject leaves its meaning in doubt, it will be construed as last stated. See, in addition to above cited authorities, *Cass County v. Johnston*, 95 U. S. 360, 24 L. Ed. 416.

We are of opinion that the language of the Virginia Constitution aforesaid which we have under construction is substantially the same as that involved in the authorities above cited; and especially is this true of the language involved in the *Carroll County Case*, 111 U. S. 556, 4 Sup. Ct. 539, 28 L. Ed. 517, being "of the qualified voters of said county"; in the *Richardson v. McReynolds Case*, 114 Mo. 641, 21 S. W. 901, being "of the legal voters of said district"; in *Shearer v. Bay County Supervisors*, 128 Mich. 552, 556, 87 N. W. 789, 790, being "majority vote of the electors of said county"; and in *Pickett v. Russell*, 42 Fla. 116, 128, 28 South. 764, 768, being "a majority of the qualified electors [of a school district] that pay a tax on real or personal property." There may, under certain circumstances, be a difference between the meaning of "voters" and "electors," but we perceive no difference between the meaning of "qualified voters" and "legal voters" of a county or municipi-

pality, and "electors" or "qualified electors" of a county or municipality.

Only the cases of *Chalmers v. Funk*, 76 Va. 717, 719, 720, *Green v. Village of Rienzi*, 87 Miss. 463, 40 South. 17, 112 Am. St. Rep. 449; *Duke v. Brown, Collector*, 96 N. C. 127, 1 S. E. 873, *Rigsbee v. Town of Durham*, 98 N. C. 81, 3 S. E. 749, *Wood v. Commissioners*, 97 N. C. 227, 2 S. E. 653, and *State v. Brooks*, 17 Wyo. 344, 99 Pac. 874, 22 L. R. A. (N. S.) 478, are cited in argument before us as authorities containing a holding contrary to the conclusion we have above reached on the question under consideration.

In *Chalmers v. Funk*, 76 Va. 717, 719, 720, the statute involved authorized Roanoke county to vote upon the question of granting licenses for the sale of liquors therein or in any magisterial district thereof. An election was held at which 491 votes were cast, of which 101 were for and 389 against granting license in the county. A majority of the votes cast in each magisterial district was also against the granting of the licenses. The number of registered voters in the county exceeded 2,000. Section 4 of the statute (Acts 1881-82, pp. 120, 121) provides as follows:

"If it appear from the abstracts and returns of any such election, that in the said county a majority of the registered votes have been cast against license for the sale of intoxicating liquors, then no license shall be granted to any person for the sale of such liquors."

The opinion of the court, delivered by Judge Staples, says:

"\* \* \* The word 'registered,' in its popular acceptance, has several definitions, according to the connection in which it is employed. When used in our statutes relating to elections, it has a well-defined, well-understood signification. When these statutes speak of registered voters, they uniformly refer to the persons whose names are placed upon the registration books provided by law as the sole record or memorial of the duly qualified voters of the state. It must be obvious that a mere change of phraseology in a statute from the words 'registered voters' to the words 'registered votes' does not indicate a difference of legislative intent. It is believed that no statute can be found, general or special, in which the word 'registered' has been used in any other sense, or for any other purpose, than that now suggested.

"When, therefore, the Legislature requires that a majority of the registered votes shall be given in order to the accomplishment of a particular end, it does not mean simply a majority of the votes entered on the pollbooks, but a majority of those whose names are registered as voters in the proper registration books kept for that purpose. That this is the proper construction and meaning of the act in this case is shown by the history of the act itself. As the bill originally passed the House of Delegates, the word 'registered' was omitted. When, however, it reached the Senate, ineffectual efforts were made to defeat it; several amendments were offered and rejected. Finally a

motion was made by the Senator from Halifax to amend the bill by inserting after the words 'majority of' in the second line of the fourth section the words 'the registered,' so as to read 'a majority of the registered votes,' and this amendment was adopted by the Senate, and the bill as thus amended passed both houses of the Legislature. That the object of this amendment was to require a majority of the registered voters of the county, instead of a mere majority of the votes cast, is too clear for argument. This object would have been effected more accurately perhaps by an entire change of the phraseology of the section. But the legislative intent is manifest, and the terms used are sufficiently plain to express it. Although the act makes no provision for it, there is no difficulty in ascertaining the number of registered voters in the county. The registration books are always accessible, and were in fact used without objection on the hearing in the court below. The act itself contemplates the use of these books in order to determine the result of the election."

No allusion is made in the opinion just quoted to the long line of decisions or to the text-writers from which the great weight of authority holding as above adverted to is disclosed. Many of these decisions had been then made, and plainly the opinion was not intended to contain a holding at variance to such authority without reference to a single one of them; and it is manifest from the opinion that its holding is for the most part based on the peculiar fact appearing in evidence in the case touching the amendment of the bill while the statute was in process of enactment, inserting the word "registered." Hence we do not consider the case last cited as in conflict with the conclusion aforesaid which has been reached by us.

The case of *Green v. Village of Rienzi*, 87 Miss. 463, 40 South. 17, 112 Am. St. Rep. 449, 451, so far as it approaches the question under consideration, decides merely that the word "elector," when used in a statute relating to the issuance of bonds by a municipality and providing that they shall not issue unless authorized by a majority of the "electors," means not only voters who have registered, but those who have both registered and have the other qualifications entitling them to vote. Hence the case is not in point.

Of the three North Carolina cases last above mentioned we need say only this: As appears from 10 Am. & Eng. Encyc. Law, p. 754, that state is among the few states which have taken a contrary view to that of the weight of authority aforesaid.

The case of *State v. Brooks*, 17 Wyo. 344, 99 Pac. 874, 22 L. R. A. (N. S.) 478, involves the following constitutional provision, namely:

"Any amendment or amendments to this Constitution may be proposed," etc., "and it shall be the duty of the Legislature to submit such amendment or amendments to the electors of the state at the next general election, \* \* \* and, if a majority of the electors shall ratify



the same, such amendment or amendments shall become a part of this Constitution."

It is not held in such case, however, that such provision requires for the adoption of the constitutional amendment voted upon a majority vote of all of the electors entitled to vote thereon, but merely that, the election being a general election, such provision requires for the adoption of the amendment voted upon a majority of the electors actually voting at the general election on all questions voted upon, and not simply a majority of the electors actually voting on the proposed amendment, as, by the weight of authority, would have been the case had the election been a special election at which one proposition only was voted upon.

Such holding is in accord with many other cases (Dillon on Mun. Corp. § 383, pp. 657-663; 10 Am. & Eng. Encyc. Law, p. 754), and is not at all in conflict with the conclusion we have reached above, since the case in judgment involves a special election at which only the one proposition was voted upon. Many of the authorities, however, hold that even at a general election such language in the Constitution or statute as that involved in the case last considered requires only a majority vote on the particular proposition in order that it may be adopted; and the latter is stated by the learned author of Dillon on Mun. Corp. as being, in his opinion, the correct view. 1 Dillon on Mun. Corp. supra, p. 663.

[8] It is urged in argument before us that, in section 196 of the Virginia Constitution, providing for ratification of any proposed amendment thereof and permitting it to be done by a majority vote of those actually voting at the election, the phrase "voting thereon" is added to the provision requiring the amendment to be approved and ratified by "a majority vote of the electors qualified to vote for members of the General Assembly," and that in section 197 of the same Constitution, providing for the calling of a convention to revise the Constitution, which permits that to be done by a majority vote of those actually voting on the proposition, the same phrase "voting thereon" is added to the provision requiring for the adoption of such a proposition a vote for the convention of "a majority of the electors so qualified," and that, if the meaning of section 117 of the Constitution had been intended to be as we have construed it above, the phrase "voting thereon" would have been inserted therein. But we think the added phrase "voting thereon," as used in sections 196 and 197 of the Constitution, serves no other function than to expressly state a meaning which under the weight of authority aforesaid would be implied from the preceding language, even if it had not been so expressly stated, certainly in cases involving a special election at which only a single proposition is voted upon.

And at most, even in cases involving a general election, such added phrases would serve no other function than to make the meaning plain, which otherwise might have been left in doubt, that the majority vote of the electors required is only of those voting on the particular proposition, and not of all of those voting at the general election on that and other propositions. See 1 Dillon on Mun. Corp. § 383, p. 662.

[9] Further, as said in *State v. Blaisdell*, 18 N. D. 41, 119 N. W. 360, 365:

"It is also urged that the fact that in different sections of the Constitution, relating to different subjects which are to be submitted to a vote, the language is not uniform, and in some of them it is specified explicitly that the vote referred to is the vote cast upon the question in hand. \* \* \* It is well known that in the constitutional convention various committees were appointed, each having jurisdiction over a subject differing from those being considered by the other committees. They did not act in concert on questions of this character. One might copy a provision from the Constitution of one state, and another from some other state. This undoubtedly accounts for the varying phraseology of the different provisions for submitting questions to a vote and necessitates considering each one independently of the others."

These considerations apply with yet greater force where, as in the case in judgment, the language of the amendment to the Constitution involved is that of a legislative body, distinct from that of the convention which framed the language of the other sections of the Constitution with which comparison is sought to be made. Little or no aid in ascertaining the constitutional or statutory meaning of an ordinance or enactment on a subject can be derived from the mere fact that other independent (not amendatory) statutory expressions of meaning on the same subject are not uniform; and especially is this true where the latter expression is at a different time and by a different body of men, and in connection with another and different object.

[10] What is said in the two paragraphs next above also applies mutatis mutandis to the phrase "voting upon the question" contained in the statute (section 944a, cl. 39, of Pollard's Code) authorizing the issue of county bonds, "If it shall appear \* \* \* that three-fifths of the qualified voters of the county voting upon the question are in favor of issuing bonds," etc., and to the phrase "ballots cast upon the question" in section 1038e, clause 7, of the Code, allowing towns to issue bonds "If a majority of the ballots cast upon the question so submitted be in favor of such bond issue"—which are other instances urged in argument before us as indicating that the omission of the phrase "voting thereon," or of some like express phrase, from section 117 of the Constitution as amended, evidences that the language therein used

should receive a contrary construction from that which we have given to it.

[11] The following is also urged upon our consideration, namely: The aforesaid statute providing for the submission of such a proposed change in form of municipal government as aforesaid to a vote of the municipal electorate as first enacted in 1914 (Acts 1914, p. 165), and as again enacted in 1916 (Acts 1916, p. 672), contained the provisions, "and if it shall appear that *a majority of the qualified voters authorized to vote* at such election shall not vote for such proposed change, an order shall be entered of record accordingly, \* \* \* but if *a majority of the electors qualified to vote* at such election, shall vote in favor of such proposed change in the form of government, the court or judge thereof shall enter an order accordingly. \* \* \*" (Italics supplied.) Whereas the same statute as amended in 1918 (Acts 1918, p. 402) in both of such provisions as to the order to be entered in case of a negative, as well as of an affirmative vote, contains the language, "a majority vote of the qualified electors," which is practically the precise language of section 117 of the Constitution as amended in 1912, instead of the language which we have italicized in the quotations next above. Of these variations in expression we deem it sufficient to say that we are of opinion that it appears from the face of the statutes themselves that these are but different forms used by the different legislative bodies for the purpose of expressing but one and the same, and not a different, meaning.

[12] The further circumstance is also urged that the Legislature at the same session of 1918 at which it amended the said statute of 1914 passed a joint resolution (Acts 1918, p. 784) for the submission to a vote of the people of an amendment to said section 117 of the Constitution so as to make that part of it above quoted, which concerns the adoption of the changed form of government aforesaid, require that the same shall be adopted by "a majority vote of those qualified voters of any such city or town voting in an election," etc. It is contended that this action evidences that the Legislature of 1918 construed section 117 of the Constitution as amended in 1912 to have a meaning contrary to what we have held above to be its true meaning. While such construction from such a source would

be entitled to great consideration and respect, we cannot consider it as controlling upon us. The judicial department of the government is especially charged with responsibility of construing the constitutional provision in question, and, because of the principle and the considerations above adverted to, and of the great weight of authority on the subject aforesaid, we are constrained to take the view we have above expressed.

In conclusion we feel that we should say that we are confirmed in the opinion that the view we have taken of the subject in hand is correct, because the fact stands out, as a result of the able and exhaustive argument of eminent counsel in the case, that throughout the Constitution and statute law of this state, in its provisions for the election of all officers, for bond issues, for changes of any and all provisions of the Constitution, including those of at least as much importance as a change in municipal form of government here and there in the state, and even for the calling of a constitutional convention which may change the form of government of the very state itself, so long as such change does not violate what would now seem to be the somewhat elastic guarantee of a republican form of government which is contained in our federal Constitution, that in this state the principle and the considerations of practical convenience aforesaid are allowed to control, with the result that subjects of the most momentous importance are submitted to a decision of the majority, or other stipulated proportion, of the qualified electors or voters of the electorate who may vote at the election, although they may in fact constitute but a small minority of those entitled to vote at the election; and this is done uniformly on all subjects, unless indeed the subject of a change in a municipal form of government under section 117 of the Constitution as amended in 1912 furnishes an exception to such policy of the state. For the reasons which we have outlined above, and which need not be repeated here, we find nothing in the language of that section as it stands, or in the history of the legislation putting that constitutional provision into effect, to satisfy us that such constitutional provision was intended to furnish such an exception.

The writ of mandamus will therefore be denied.

**Mandamus denied.**

(86 W. Va. 46)

**KITTLE v. KITTLE (No. 3828.)**(Supreme Court of Appeals of West Virginia.  
March 23, 1920.)*(Syllabus by the Court.)***1. DIVORCE §155—AFTER DESERTION FOR THREE YEARS, PLAINTIFF MAY ELECT TO SUE FOR DIVORCE FROM BED AND BOARD ONLY.**

Although our statute makes desertion for three years ground for absolute divorce, plaintiff is not bound after that period to sue for all the relief to which he or she may be entitled, but may elect to sue for divorce from bed and board only.

**2. DIVORCE §67—GENERAL STATUTE OF LIMITATIONS HAS NO APPLICATION TO DIVORCE SUITS.**

Section 12 of chapter 104 of the Code, our general statute of limitations, has no application to suits for divorce. Suits for divorce being cognizable only in equity, are controlled solely by principles of equity, and the general statute of limitations does not apply.

**3. DIVORCE §213—TRIVIAL INDISCRETIONS OF WIFE, AFTER DESERTION BY HUSBAND, DO NOT JUSTIFY DENIAL OF ALIMONY, ETC.**

Indiscretions of the wife after desertion of her by the husband of a trivial character, or which would not entitle the husband to a decree of divorce from bed and board against her, will not justify the court, in a suit by her against him for divorce, in denying her temporary or permanent alimony and suit money.

**4. DIVORCE §171, 172—DEFENDANT ESTOPPED BY PRIOR DECREE AGAINST DEFENSIVE MATTERS; RECORD OF PRIOR DECREE MAY BE PLEADED.**

In a subsequent suit by the wife against her husband for divorce, the defendant is concluded and estopped by a prior decree of the same or another court, from setting up the same matter or matters of the same character in defense of the suit or as justifying desertion, on which he was denied relief in his suit against her, and the record of such prior decree may be pleaded and relied on as evidence of his abandonment of plaintiff without good cause.

**5. DIVORCE §213—THAT WIFE HAS UNPRODUCTIVE ESTATE DOES NOT WARRANT DENIAL OF ALIMONY.**

The fact that the wife has real and personal estate, but practically no income therefrom, from which she can derive support, will not warrant the court, in a suit by her, in denying her temporary or permanent alimony or suit money. The husband is bound to support his wife, according to his financial ability, out of his income, which is the proper basis of any decree against him, and the wife's capacity to earn a living, or her ownership of such separate estate, cannot be properly taken into consideration.

**6. DIVORCE §213—WIFE NEED NOT USE HER SEPARATE ESTATE TO PROSECUTE OR DEFEND A SUIT.**

A wife is not bound to invade the corpus of her separate estate to prosecute or defend a

suit for divorce when the husband has ample income from which he can supply her with the necessities of life and protect her against his wrongdoing.

**7. DIVORCE §251—COURT CANNOT DEPRIVE PLAINTIFF WIFE OF DOWER OR MARITAL RIGHTS.**

Where a wife is decreed a divorce a mensa, the court pronouncing such decree cannot lawfully deprive her of her dower or other marital rights in the husband's estate. So long as the bonds of matrimony remain unbroken, she cannot be deprived of such marital rights in her husband's property.

Appeal from Circuit Court, Barbour County.

Bill for divorce by Lillie Bishop Kittle against G. Bruce Kittle, with answer and cross-bill for divorce a vinculo and from bed and board. From a decree denying allowance of alimony pendente lite and attorney's fees, from the overruling of her demurrer to the matter of the cross-bill and her exceptions to sufficiency of the answer to her bill, and from a final decree awarding her a divorce from bed and board, without alimony or suit money, complainant appeals. Reversed in part, affirmed in part, and remanded.

Walker & Byrer, of Martinsburg, for appellant.

J. Blackburn Ware and Frank G. Kittle, both of Phillips, and Ira E. Robinson, of Charleston, for appellee.

MILLER, J. Divorce from bed and board was the subject-matter of plaintiff's bill; and in the defendant's answer he not only controverted the grounds of divorce relied on by plaintiff, but undertook to set up against her matter for affirmative relief and for a decree a vinculo and from bed and board. Defendant demurred to the plaintiff's bill; and plaintiff excepted to and demurred to the defendant's answer, as not constituting a good defense nor pleading matter justifying the affirmative relief sought. Defendant's demurrer to plaintiff's bill was overruled. Her exception to his answer was also overruled. But the court sustained her demurrer to the matter of the cross-bill in so far as it sought, on the grounds alleged, a decree a vinculo against her. After the issues were made up on these pleadings by general replications and special reply of the plaintiff to the defendant's cross-answer, the cause was referred to a commissioner, who took the testimony of witnesses and made certain findings of fact and omitted to make certain other findings, to which report the defendant excepted on certain grounds, mainly that the commissioner had omitted to find certain facts which it was conceived were justified by the evidence.

Plaintiff's appeal involves three decrees:

The first of March 7, 1918, entered shortly after the institution of her suit, denying her an allowance of alimony pendente lite, suit money and attorney's fees; the second, entered March 5, 1919, overruling her demurrer to the matter of the defendant's cross-answer, and also her exceptions to the sufficiency of his answer to the matter of her bill; third, the final decree upon the merits, whereby she was awarded against defendant a divorce from bed and board, but was denied alimony, either temporary or permanent, and suit money for the prosecution of her suit in the circuit court and also for the prosecution of her appeal to this court then applied for.

Plaintiff seeks to reverse the decrees below only in so far as they deny her temporary and permanent alimony, counsel fees and suit money, and undertook to deprive her of her marital rights in the defendant's property. It is manifest that the errors in the two prior decrees were all carried into the final decree, and being so involved, we need not consider separately the errors in the interlocutory decrees, for disposition of the errors assigned in the final decree will dispose of them.

So the main question to be considered in the plaintiff's appeal is whether she was entitled to temporary alimony, suit money and counsel fees, and on final decree to permanent alimony. It is conceded by counsel for appellant that the circuit court may in its discretion withhold such allowances, at least until the case has been so far developed as to disclose the rights of the parties; but counsel contend that on final decree the court has no right, except for good cause, not presented by the record here, to deny alimony, temporary or permanent, and suit money or counsel fees. Defendant cross-assigns error and seeks not only reversal of the decree a mensa in favor of plaintiff, but justifies the denial of alimony, temporary or permanent, and suit money, upon the following comprehensive grounds: First, for want of equity in the bill; second, upon the ground that the commissioner found and the court decreed that the plaintiff was not free from blame for the desertion of her by her husband; third, because the plaintiff failed to sustain by proof the allegations of her bill that defendant had deserted her without justifiable cause; fourth, that the plaintiff was possessed of a substantial amount of property, real and personal, and was shown to have earning capacity as a seamstress, by which she could maintain herself; fifth, that the defendant on the matter of his cross-bill was himself entitled to a divorce from plaintiff, denied him by the final decree.

The alleged want of equity in the bill is founded upon two theories: (a) That as the alleged desertion by defendant occurred more than three years before suit brought, divorce

a vinculo, warranted by the statute, only could be decreed plaintiff; and (b) that as more than five years had elapsed before suit brought, she was barred by the general statute of limitations, section 12 of chapter 104 of the Code (Code 1913, § 4425).

[1] The first point, we think, is wholly unfounded in law. It is true our statute makes desertion for three years ground for divorce a vinculo, but it does not require the injured spouse to sue for full relief or none. The policy of our law is to discourage divorce. By providing for divorce a mensa, it encourages reconciliation. To construe the statute as counsel for defendant construes it, would result in encouraging collusive practices by the parties to obtain divorces. Then all the offending party would have to do to obtain a complete divorce would be to absent himself for the required period. It does not matter that desertion for three years is cause for divorce a vinculo, if properly construed the statute gives the complaining party right of election to sue for the one or the other kind of relief. We are cited by counsel to 2 Nelson on Divorce, § 1022, who for his text cites *Burlage v. Burlage*, 65 Mich. 624, 32 N. W. 866. In the Michigan Case the wife sued and was decreed a divorce from bed and board. She did not appeal, but the husband did. The court said if she had appealed, as the grounds alleged and proven justified it, the court would not have hesitated to grant an absolute divorce. The court chose to modify the decree notwithstanding the failure of plaintiff to appeal, basing its action on the statute of that state authorizing the court on application to decree an absolute divorce when it appeared proper to do so. In Michigan it appears that the statute relied upon by the court evinces a public policy different from our state. We have no statute doing so, nor is there any decision of this court justifying us in giving to the injured spouse relief not sought by the pleadings. So far as we have indicated an opinion upon this question by dictum or otherwise we have held that the injured party has the right of election whether he will apply for the whole relief to which he or she may be entitled, and if he is denied relief a mensa, he is not by such a decree precluded or estopped from maintaining a suit for a divorce a vinculo upon good grounds justifying the same. *Lang v. Lang*, 70 W. Va. 205, 208, 209, 73 S. E. 716, 38 L. R. A. (N. S.) 950, Ann. Cas. 1913D, 1129; *Maxwell v. Maxwell*, 75 W. Va. 521, 84 S. E. 251; *Crouch v. Crouch*, 78 W. Va. 708, 713, 90 S. E. 235.

[2] On the second proposition, that the general statute of limitations bars plaintiff's right, our answer is that the statute has no application whatsoever. We have no statute of limitations relating to divorce. The remedy for divorce is in equity, not at law, and it is plainly apparent that section 12 of chap-

ter 104 of the Code, our general statute of limitations, does not in any way cover divorce. That section applies only to such actions as would survive in case a party die. If it did apply, the answer to the defendant's plea is complete in section 18 of the same chapter. The bill shows on its face desertion, the acquisition by defendant of a residence in Nevada immediately after his desertion, and that he continued to maintain his residence there up to the time of this suit. Said section 18 eliminates from the period of limitations the time of his absence. Divorce being the subject of equity cognizance, in the absence of any statute only principles of delay or laches in the bringing of the suit could apply. That the general statute of limitations has no application in cases of divorce is well settled by the authorities. 1 Nelson on Divorce, § 517; 2 Bishop on Marriage, Divorce and Separation, §§ 426, 639. We have not overlooked section 10 of chapter 64 of the Code (Code Supp. 1918, § 3645), relating to adultery as grounds of divorce, denying to the courts right to decree a divorce on that ground occurring more than three years before the institution of the suit.

[3] Our next subject of inquiry is, Was the decree denying alimony and suit money justified on the theory that plaintiff was not wholly without fault in bringing about the separation? Regardless of the finding of the commissioner and the decree, the court awarded the plaintiff a decree a mensa, which would be inconsistent with the theory of fault on her part; for if she was at fault, she would not be entitled to relief. We have carefully considered the evidence on which the commissioner and the court found plaintiff not without fault. In our opinion these findings are not justified by the evidence, and so far as the defendant is not concluded by the decree of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, which denied to him a decree of divorce against plaintiff, the evidence relates solely to the supposed indiscretions of the plaintiff in being seen on the streets of her native town, after the separation, with a prominent business man residing there and boarding at the same restaurant or boarding houses where the plaintiff after the separation had secured board. It is conceded that the commissioner found that there was not the slightest evidence of criminality between these persons; and both explain the circumstances of their being together on the street on the way to and from their boarding house, and once accidentally meeting each other on a train, the plaintiff having been on a visit to her sister at Clarksburg, and the other party returning home after an absence on business, and also the fact that they exchanged small gifts of flowers and handkerchiefs at Christmas time, when boarding at a boarding house kept by

Mrs. Robinson, with whom they also exchanged small gifts. We think these facts and circumstances too trivial to justify the inference of wrongdoing. After defendant's desertion of plaintiff she was deprived of a home by the deaths of her father and mother, and the circumstances under which she was placed thereafter were mainly due to the desertion of her by the defendant.

[4] The third ground relied upon to support the decree denying alimony and suit money, that the plaintiff failed in the burden of showing the desertion was without her fault, is met, in part at least, by the plea of former adjudication by the court in Nevada and by the record of the proceedings in that court introduced in evidence. Practically every ground set up in the answer of defendant to defeat the plaintiff in this cause, with perhaps the one exception covered by paragraph 4 (e) of the cross-bill, were those relied upon by defendant in the Nevada court, where the plaintiff here appeared and made her defense, and where the defendant here failed to obtain a decree of divorce against her. To justify abandonment the conduct relied on must be such as to afford grounds for divorce from bed and board. Reynolds v. Reynolds, 68 W. Va. 15, 69 S. E. 381, Ann. Cas. 1912A, 889; Alkire v. Alkire, 33 W. Va. 517, 11 S. E. 11; Martin v. Martin, 33 W. Va. 695, 11 S. E. 12. At most the allegations of the answer to the present bill, with the exception noted, substantially the same as the allegations of his bill of complaint in the Nevada court, amount to nothing more than criticisms of plaintiff for having disagreed with him on their wedding trip, as to a loan of money about to be made by defendant to his cousin in another state without taking a note or other security therefor; her expressions of dissatisfaction with him, a traveling salesman, absent from home a greater part of the time, in spending his time with his parents, and neglecting her residing with her parents in the same town; to the criticism of defendant's brothers and sisters, and of her alleged quarrelsome disposition, and other complaints of this character; all of which were denied by plaintiff or explained in her testimony, and as to which, unless it be the subject-matter of paragraph 4 (e) of defendant's answer, the defendant is concluded by the adjudication against him in the Nevada court.

The next subject of inquiry presented to us is, Can the decree denying alimony and suit money be sustained on the new matter of paragraph 4 (e) relied on? The commissioner found as a fact that the allegations therein, of unnatural and disgusting desires and propensities on the part of plaintiff were not sustained by the proof, and one of the exceptions of defendant to the report related to this subject, which, with his other exceptions, was overruled. We think the finding of the com-

missioner was fully justified, and the action of the court in overruling his exceptions was right. But if it were true as alleged in the answer, the fact, as we decided in *Huff v. Huff*, 73 W. Va. 330, 80 S. E. 846, 51 L. R. A. (N. S.) 282, where the allegations of defendant's answer were substantially the same as defendant's allegations in this case, constituted no good ground for the breaking off of the marital relation. The plaintiff, in her replication to defendant's answer and in her testimony, flatly denies the truth of this allegation, although the defendant in his testimony as vigorously affirms the truth thereof. The defendant, as corroborating his testimony, relies upon a letter which he wrote plaintiff after the institution of his suit against her in the State of Nevada, wherein he referred in an indefinite way to matters supposed to be known to her, which out of consideration for her he had omitted from his bill, but said if she wished to go into those matters he would amend his bill and give them an airing; and it is his contention that she replied to this letter, admitting the accusation but saying that what she had done was done in a fit of love or passion. Unfortunately for him she denies writing such a letter. The letter was not produced. He attempts to account for its absence by saying that it was lost by his attorneys in Nevada, but the existence of such a letter is not attempted to be established by anyone except the defendant. As corroborating the plaintiff she introduced two letters written by defendant to her immediately after he abandoned her in August 1912, and before she was made aware of the fact of the abandonment, in which he made the most fervent protestations of his love and affection for her, and made no reference to his intent to abandon her. If he had been offended by her recent unnatural desires and propensities as he alleges in his answer, naturally he would not have left her embraces, as the evidence shows he did, so soon afterwards, and written her these affectionate letters. He attempted to explain these letters by saying that he thought it necessary to deceive her. But why deceive her, when she was so soon to be undeceived by his actions? But whatever was his purpose, they constitute plain evidence in support of plaintiff and against defendant, justifying at least the finding of the commissioner and court that the new matter of the answer, if material and defensive, was not sustained. Moreover, the evidence shows that after reaching Nevada and taking up his residence there, defendant continued for several months to send plaintiff twenty dollars per month for her support and maintenance. If she had offended him in the way he now represents, giving him cause, as he alleges for abandonment, it is unlikely that he would have volunteered this support. But is not the defendant concluded by the decree against him in Nevada? If the charges in the bill or complaint in the Nevada court amount-

ed to anything, as grounds of divorce their effect was cruel and inhuman treatment, and we think the new matter charged in the answer in this case was matter of the same general character, which he could have pleaded, and threatened to plead but did not. If the matter of the cross-bill had been adultery or some other cause, of course defendant would not have been precluded by the adjudication in Nevada. *Crouch v. Crouch*, supra. Relying on cruel and inhuman treatment in the Nevada court, defendant was bound to allege acts of that character. He could not withhold some grounds of the same character known to him, and after being denied relief rely on them in a new suit by him or in defense of a suit by his spouse against him, as acts justifying abandonment. *Crouch v. Crouch*, supra, 78 W. Va. 708, 713, 90 S. E. 235. 1 Nelson on Divorce, pp. 514, 515.

[5] Next we have presented the question, whether the fact that the plaintiff owned real and personal estate valued at the sum of seven or eight thousand dollars, and had a net income therefrom of less than one hundred dollars per year, justified the court in denying her alimony and suit money. The evidence shows that defendant had an income of about \$250.00 per month, or \$3,000.00 per year. He was in good health and had large earning powers. In our opinion the decree denying alimony and suit money can find no just lodgment in the fact that plaintiff owned this property. It was an inheritance from her father's estate, coming to her after the plaintiff deserted her. Under these conditions defendant could not be excused from performing his marital duties to support and maintain his wife out of his income. As a general rule the basis for all decrees for alimony is the income of the husband, and the amount decreed should be in some just proportion to his ability to earn money and as will enable the wife to maintain herself comfortably in her station in life. *Reynolds v. Reynolds*, supra; *Id.*, 72 W. Va. 349, 78 S. E. 360; *Henrie v. Henrie*, 71 W. Va. 131, 76 S. E. 837; *Goff v. Goff*, 60 W. Va. 9, 21, 53 S. E. 769, 9 Ann. Cas. 1083; *Coger v. Coger*, 48 W. Va. 135, 35 S. E. 823; *Wass v. Wass*, 42 W. Va. 460, 464, 28 S. E. 440. Ordinarily the wife's estate and capacity to earn money, where the husband's income is ample and sufficient to make provisions for her, are not questions for consideration. *Sperry v. Sperry*, 80 W. Va. 142, 156, 92 S. E. 574; *Cralle v. Cralle*, 84 Va. 198, 200, 6 S. E. 12; *Miller v. Miller*, 92 Va. 198, 23 S. E. 232; *Harris v. Harris*, 31 Grat. (Va.) 13, 17; *McKinney v. McKinney*, 80 W. Va. 745, 93 S. E. 831.

[6, 7] What we have just said on the question of alimony is particularly applicable to the right of the wife to permanent alimony, but the principles involved are applicable also, but in a limited sense, to temporary alimony and suit money. It is contended by counsel for defendant that our statute, sec-

(102 S.E.)

tion 9 of chapter 64 of the Code (Code 1913, § 3644), limits the court in awarding temporary alimony and suit money to such sum or sums as may be necessary for the maintenance of the wife and to enable her to carry on her suit, etc., and in as much as the record shows plaintiff had estate, though no adequate income therefrom, the necessity contemplated by the statute for such allowance does not appear in this case. Numerous authorities are cited, which it is assumed support this contention; but whatever may be the law elsewhere, such is certainly not the rule in this State. A wife is not bound to go into the corpus of her estate to maintain herself or to prosecute or defend a suit for divorce. If she has ample income from her estate, to maintain herself and prosecute her suit, the court might within its discretion deny her temporary alimony and suit money; but where her income is inadequate for these purposes, the necessity which the statute contemplates is present. It is necessary for her to have money, to enable her to prosecute or defend the suit. In *Peck v. Marling's Admr.*, 22 W. Va. 708, this court held the husband to be liable to the counsel for his wife where the suit was for divorce a mensa because of the husband's cruelty or because of apprehension on her part of bodily harm, and she succeeded in the suit. This was based on the common-law liability of the husband to anyone who might furnish the wife with the necessities of life. In 2 *Bishop on Marriage, Divorce and Separation*, § 976, the liability of the husband to provide the wife with suit money where she is without means is said to be a part of the same doctrine on which allowance of temporary alimony is justified. It is only where the income of the wife from her estate is ample to maintain her and enable her to prosecute her suit that courts have discretion to withhold temporary alimony and suit money. 1 R. C. L. pp. 894, 910. As the facts are presented in this case we think they not only justified, but in justice and equity demanded, a decree not only for permanent alimony but for a sum sufficient to have maintained the plaintiff pending the suit in the court below and upon appeal in this court and for a reasonable sum for counsel fees and other suit expenses, and that the decree below must be reversed for denying her this relief.

This fifth point urged by defendant in support of the decree, namely, that he and not plaintiff was entitled to a decree a mensa upon the new matter in his answer, has already been disposed of, justifying the conclusion already indicated.

Inasmuch as the court below denied alimony, temporary and permanent, and suit money, and also denied plaintiff any allowance for either maintenance or expenses pending this appeal, her counsel say we

should proceed to pronounce such decree in her favor as the facts appearing on the record will justly warrant. The practice observed here in such cases is to refer the matter of such allowances to the circuit court subject to review here if they be too small or too large. We think this is the better practice and that it ought to be followed as heretofore.

The last point of error relied upon by appellant is that the decree undertook to deprive her of any interest as doweress, distributess or otherwise in the property, real or personal, of defendant. We think this point is well founded and that the decree in this particular also should be reversed. A decree a mensa is not a dissolution of the marriage bonds, and so long as the marital relationship exists, the wife can not be deprived of her marital rights which the law gives her in her husband's property. The decree against a husband for a divorce a mensa, by section 16 of chapter 65 of the Code (Code 1913, § 3664), would operate to deprive him of curtesy in his wife's estate. Section 11 of chapter 64 (sec. 3646) does not authorize the court on decreeing a divorce to the wife, to deprive her of her marital rights.

For the errors in the decree, in the particulars indicated, the same will be reversed, and in all other respects affirmed, and the cause will be remanded to the circuit court for further proceedings to be had therein in accordance with the principles herein enunciated and further according to the rules and principles governing courts of equity.

(86 W. Va. 34)

MICHAEL v. DONOHUE et al. (No. 8965.)

(Supreme Court of Appeals of West Virginia.  
March 23, 1920.)

(Syllabus by the Court.)

1. PLEADING §=106(1)—DEFENSE THAT SUIT IS PREMATURE MAY BE MADE BY PLEA IN ABATEMENT.

The defense that a suit upon a promissory note is prematurely brought, for the reason that a condition, upon the performance of which the right to sue depends, has not been performed, may be made by a plea in abatement, even though advantage might be taken thereof in other ways.

2. PLEADING §=306—OPPOSITE PARTY HELD NOT ENTITLED TO OYER OF DECREES IN SAME COURT REFERRED TO IN A PLEA IN ABATEMENT.

Where a plea in abatement refers to certain decrees entered in a cause in the same court in which the suit is pending, and alleges that certain facts will appear therefrom, the opposite party is not entitled to have oyer of such decrees, upon demurring to such plea, for the purpose of showing that they do not support the allegations of fact contained in the plea.

### 3. WORDS AND PHRASES—"SETTLEMENT."

The term "settlement" may be used in the sense of payment, or it may be used in the sense of adjustment or ascertainment of a balance between contending parties, depending upon the circumstances under which, and the connection in which use of the term is made (citing Words and Phrases, First and Second Series, Settle).

### 4. PARTNERSHIP — 347 — NOTE PAYABLE WHEN PARTNERSHIP BUSINESS HAS BEEN SETTLED IS MATURED BY DECREE ASCERTAINING AMOUNT.

Where one partner sells his interest in a stock of merchandise to another and takes the note of such other for the amount agreed upon as the value of such interest, but stipulates in such note that the same shall not be payable until the partnership business has been settled, either amicably or by a decree of court, such condition has been met when suit has been brought for the purpose of settling such partnership affairs, and a decree entered therein ascertaining that one party is indebted to the other upon such settlement, and the amount thereof.

Error to Circuit Court, Randolph County.

Action by J. C. Michael against M. E. Donohoe and others. From a judgment abating the action, plaintiff brings error. Reversed, finding for plaintiff on matters set up in plea of abatement, and judgment rendered accordingly, and cause remanded.

W. B. & E. L. Maxwell, of Elkins, for plaintiff in error.

A. M. Cunningham, of Parsons, for defendants in error.

RITZ, J. On the 1st of September, 1913, the defendant M. E. Donohoe, who was at that time M. E. Durkin, and one Jessie E. Michael, the assignor of the plaintiff, were partners in business. On that day the defendant Mrs. Durkin, now Mrs. Donohoe, bought the interest of Mrs. Michael in the stock of goods, and executed to her in payment therefor the note sued on in this case, which is in the words and figures following:

"\$772.50.

Sept. 1, 1913.

"When the partnership heretofore existing between Mrs. M. E. Durkin and Mrs. Jessie E. Michael, under the firm name and style of M. E. Durkin & Co., has been settled, that is all partnership business has been settled whether amicably or by the decree of court, then on demand, we promise to pay to Mrs. Jessie E. Michael the sum of seven hundred and seventy-two 50/100 dollars, with interest from this date.

"This note is given for one-half of the stock of merchandise belonging to said firm in acceptance of a written proposition made this day by said Mrs. Michael, and to the payment of this note we bind ourselves jointly and severally.

M. E. Durkin.  
"M. C. King."

It will be observed that this transaction disposed of the stock of merchandise, Mrs. Durkin acquiring the interest of Mrs. Michael therein. The parties did not settle their partnership affairs amicably, but shortly after the transaction above referred to Mrs. Michael instituted a suit in the circuit court of Barbour county for the purpose of having settlement thereof. This cause was referred to a commissioner and accounts taken. A number of exceptions were made to his report, which were disposed of by the court, and a decree thereupon entered, determining that Mrs. Durkin had withdrawn from the partnership \$754.25 more than had been withdrawn by Mrs. Michael, and decreed in favor of Mrs. Michael against Mrs. Durkin for one-half thereof, \$377.12. All of the record of the chancery proceeding is not in this case, but presumably all of the debts of the concern were taken care of before this decree was entered. It appears further that there were some unpaid accounts due the firm, amounting in the aggregate to something over \$400, some of which it was hoped might be collected, and with a view of collecting them Mrs. Durkin was appointed a special receiver for the purpose on the motion of Mrs. Michael. She has collected some small amounts of these accounts from time to time, and has made reports of these collections. After the entry of the decree ascertaining the indebtedness of Mrs. Donohoe to Mrs. Michael, the plaintiff, assignee of Mrs. Michael, brought this action at law upon the note above set out, alleging in his declaration that the partnership affairs had been settled, and that the note was therefore due and remained unpaid. The defendants filed their plea in abatement at rules upon the ground that the suit was prematurely brought. In this plea the note was set out in *hæc verba*, and it was alleged that the partnership affairs of the parties had not been settled in accordance with the stipulations contained in the note, and that the plaintiff was not entitled to maintain a suit thereon until such settlement had been had, wherefore the plaintiff's suit should be abated, and in this plea reference was made to the decrees entered in the chancery cause by their date, and the style of the cause, as supporting the allegations of fact contained in the plea. The plaintiff demurred to this plea in abatement, at the same time craving oyer of the decrees referred to in the plea, the demurrer being based upon two grounds: First, that the matter set up in the plea is not proper matter of abatement; and, second, that even though it is, a reading of the decrees shows that the partnership affairs in fact had been settled, and contradicts the allegations of the plea in that regard. This demurrer was by the court overruled, and trial had upon the plea. Upon this trial the decrees entered in the chancery cause were introduced in evi-



dence, but not all of the record, and the facts appearing are as above delineated. Upon this showing the circuit court found that the plea in abatement was sustained, and entered judgment, abating the plaintiff's suit, to review which judgment this writ of error is prosecuted.

[1, 2] The first proposition relied upon by the plaintiff is that the court erred in overruling his demurrer to the plea in abatement. He contends: First, that the matters set up in said plea are not proper matters of abatement; and, second, that even though they are proper matters of abatement, the facts alleged are not sufficient to produce that result. Authorities are cited by the plaintiff to the effect that where a note provides that its payment is conditioned upon the performance of some stipulation therein contained, advantage can be taken of the failure to perform this stipulation or condition under the plea of nil debit, or by demurrer if it appears from the declaration that it has not been performed. But does this mean that it is not proper matter of abatement? It may be that a defendant has a number of matters of defense, all of which are provable under the general issue of nil debit, including the matter of premature institution of the suit. May he not limit the inquiry to the one matter which would abate the suit, without going to the merits, rather than go to a trial upon the plea of nil debit, and present all the matters of defense, and at the end have the court hold that the action must abate because prematurely brought, making the labor and time spent in presenting the other matters of defense entirely futile. It seems to be that a plea in abatement is a proper method of raising the question that a suit has been prematurely brought. It does not go to the merits of the case, but simply denies the plaintiff's right to recover in that particular suit because the time has not yet arrived when such a suit might be maintained. This is the doctrine laid down in 1 Chitty on Pleading, 454. We therefore think the demurrer was properly overruled upon this ground.

Should the demurrer have been sustained upon the ground that the decrees relied on in the plea show a settlement of the partnership affairs? As before stated, this plea does not set out these decrees in it, but it says that by these decrees it will appear that the partnership matters have not been settled, and the plaintiff attempted to get these decrees in the record by craving oyer of them in his demurrer. Was he entitled to have oyer of these decrees upon the demurrer to the plea in abatement, and for the purposes thereof? In 1 Chitty on Pleading, 481, it is said that where a party makes profert of any deed, probate, letters of administration, or other instrument under seal, the other party may have oyer thereof, but where the matter referred to in the declaration or plea is simply a record or some instrument not under seal, the opposing party has no right to have oyer

thereof in order that a demurrer or objection to the plea may thus be supported. The proper method of getting these decrees into the record would be to put them in as evidence upon an issue joined on the plea, as was subsequently done. There was no error, therefore, in overruling the demurrer upon this ground.

[3, 4] The only remaining question is whether or not the record shows that the partnership affairs were settled within the meaning of this expression used in the note. The evident purpose of putting this condition or stipulation in the note was to protect the makers thereof in case it should turn out that the plaintiff's assignor should be largely indebted to the defendant, Mrs. Donohoe, on a settlement of the partnership. In other words, they agreed on what the stock of goods was worth, and Mrs. Donohoe gave Mrs. Michael a note for this amount, but Mrs. Michael agreed not to collect this note until it was determined whether, upon a settlement of their partnership affairs, she owed Mrs. Donohoe, or Mrs. Donohoe owed her, and in case it was found that she was indebted to Mrs. Donohoe upon such settlement, then the note would be abated to the extent of such indebtedness. The words "settle" and "settlement" mean different things in different connections. Sometimes we use the word "settle" to mean to adjust or determine the status of affairs between parties. At other times it is used in the sense of to pay or satisfy. 7 Words and Phrases, p. 6446; 4 Words and Phrases (Second Series) p. 549. In this case it is quite clear that the term was used to mean to adjust, to determine, the status of the affairs between the parties. But it is said that this has not entirely been done, inasmuch as there are still some accounts of the partnership uncollected and outstanding. This is quite true, but does this alter the situation? The interest of each of the parties in the partnership assets has been fixed and determined. In the accounts each of the parties is entitled to have one-half of the amount collected, and Mrs. Michael is entitled to recover from Mrs. Donohoe \$377.12, because of moneys withdrawn by Mrs. Donohoe in excess of that withdrawn by Mrs. Michael. There is nothing left for the court to do except in the way of administration. No question of law or fact is left open for determination. The matters in controversy between the parties are fully settled within the meaning of this expression in the note. Abe Block & Co. v. Largent (Tex. Civ. App.) 135 S. W. 1078; Toombs v. Stockwell, 131 Mich. 633, 92 N. W. 288; Fort v. Gooding, 9 Barb. (N. Y.) 371-377; Jackson v. Ely, 57 Ohio St. 450, 49 N. E. 792; Phipps v. Willis, 53 Or. 190, 96 Pac. 866, 99 Pac. 935, 18 Ann. Cas. 119; Baxter v. State, 9 Wis. 38; Beall v. Water Co. (C. C.) 185 Fed. 179.

Our conclusion is therefore that the circuit court erred in its finding for the defendants

on the plea in abatement, and in its judgment that the plaintiff's suit be abated. We therefore reverse that judgment, find for the plaintiff upon the matters set up in the plea in abatement, and render judgment here accordingly, and remand the cause to be tried in the circuit court upon the plea of nil debit there filed.

(86 W. Va. 79)

**KIRKHART v. UNITED FUEL GAS CO.**  
(No. 3667.)

(Supreme Court of Appeals of West Virginia.  
March 30, 1920.)

*(Syllabus by the Court.)*

1. EVIDENCE  $\S$ 159, 165(1)—ON QUESTION OF MERE EXISTENCE OF WRITTEN CONTRACT IT NEED NOT BE OFFERED IN EVIDENCE, BUT WHERE ITS CONSTRUCTION IS INVOLVED IT MUST BE PUT IN EVIDENCE UNLESS LOST.

Where for the purpose of an inquiry it becomes material to prove the existence of a contract which is in writing, the same need not be produced and offered in evidence if it is only necessary to prove that it exists, and its general tenor and effect; but, if a consideration of its contents and a construction of its terms are necessary in order to a determination of the question involved, the writing must be introduced in evidence, unless it appears that it has been lost.

2. EVIDENCE  $\S$ 184—TESTIMONY OF CUSTODIAN OF A WRITING HELD NOT TO JUSTIFY PAROL PROOF OF ITS CONTENTS.

Evidence by the custodian of a writing that it was in existence on the day before the evidence is being heard, and that he had phoned to his assistant in another city to send him such writing, and such assistant advised him that he had forwarded the same by special delivery mail, and that the same had not arrived, does not satisfactorily account for the absence of the writing so as to justify proof of its contents by parol evidence.

3. MASTER AND SERVANT  $\S$ 330(1)—EMPLOYER HAS BURDEN OF PROVING RELATION OF INDEPENDENT CONTRACTOR.

Where the plaintiff in a suit to recover damages for a personal injury proves that the work in which he was engaged at the time of the injury was being conducted upon the premises of the defendant for its benefit, and that the services rendered by him were paid for by the defendant, he has made out a prima facie case showing the existence of the relation of master and servant between the defendant, on the one hand, and him and his coemployees, on the other; and, if the defendant would defeat liability for the injury upon the ground that such defendant and his coemployees were employees of an independent contractor, the burden is upon him to show such fact.

4. MASTER AND SERVANT  $\S$ 330(3)—REQUISITES OF PROOF THAT ONE IS CONTRACTOR.

The determination of the question of whether a person performing work or doing business

for another is a contractor for whose negligence the employer is not liable, or a servant for whose acts the employer is responsible, depends upon a consideration of the contract of employment, the nature of the business, and the circumstances under which the parties contracted and the work was being done; and, where such defense is interposed in a suit to recover damages for personal injuries received, it cannot be sustained, unless the defendant proves the contract under which the work is being done and shows the circumstances and conditions in connection therewith, so that the court may determine therefrom the relation existing between such defendant and the party doing the work, as well as the injured plaintiff.

5. MASTER AND SERVANT  $\S$ 330(1)—FACTS SHOWING RELATION OF INDEPENDENT CONTRACTOR MUST BE PROVED.

An employer who seeks to bring himself within the rule excusing him from liability for injury to an employé, upon the ground that the work is being done by an independent contractor, in a case which shows prima facie the relation of master and servant, must by proof establish the facts essential to the applicability of such rule.

*(Additional Syllabus by Editorial Staff.)*

6. MASTER AND SERVANT  $\S$ 316(1)—"INDEPENDENT CONTRACTOR" AND "SERVANT" DISTINGUISHED.

Whether a person is a servant or an independent contractor depends on various circumstances, such as the method of payment for the work, the furnishing of tools and equipment, the right to supervise and direct the method of doing the work, the extent to which it shall proceed, when it shall cease, and the control the respective parties have over the work; a person not being "independent contractor," but a "servant," if he had the right to control the doing of the work.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Independent Contractor; Servant.]

**Error to Circuit Court, Roane County.**

Action by A. L. Kirkhart against the United Fuel Gas Company. Judgment for plaintiff, and defendant brings error. Affirmed.

R. G. Altizer, of Charleston, G. C. Douthitt, and Pendleton, Mathews & Bell, of Point Pleasant, for plaintiff in error.

Thos. P. Ryan, of Spencer, and Hogg & Hogg, of Point Pleasant, for defendant in error.

RITZ, J. At the time of the injury to plaintiff to recover damages for which this suit is brought, he was engaged with others in unloading from a wagon pipe which was intended to be used in the construction of a pipe line for the defendant, extending from Clendennin, Kanawha county, to Cedarville, in Gilmer county. The injury to the plaintiff was caused by a section of the pipe being

thrown from the wagon and striking him in the back, from which he claims to have sustained serious permanent injury. The accident resulted from the negligence or carelessness of his fellow servants in throwing the pipe from the wagon upon the plaintiff, but, inasmuch as the defendant has not complied with the provisions of the Workmen's Compensation Law (Laws 1915, c. 9, as amended by Laws 1915 [Ex. Sess.] c. 1), it cannot excuse itself from liability because the injury was caused by plaintiff's fellow servants, if it is otherwise liable. The plaintiff showed in support of his case that he was employed by the foreman in charge of the work of hauling and unloading the pipe; that he had only been at work about a week at the time of the injury, and at that time had not yet received any pay for his services; that after the injury he continued in the same service for a while, and was then placed in another employment of cutting roads, and still another employment as subforeman on a ditch that was being dug in order to receive the pipe; and that for all of his services he was paid by the checks of the defendant. The defendant admits that it is the owner of the pipe line, and that the same was being constructed for it, that it furnished the pipe, and that it excavated the ditch and laid the pipe in it; but it contends that it is not liable to the plaintiff because it had made a contract with another to haul the pipe and distribute it along the right of way of the pipe line, and that the plaintiff was the employé of this contractor at the time of his injury. This is the sole defense made in this case.

The defendant attempted to substantiate its defense by showing that it had a contract with one F. H. Mays for hauling the pipe and distributing it along the pipe line right of way, and proved by two of its superintendents that in the doing of this work they had no charge or control over Mays. As to what control other officers or agents of the defendant had over him does not appear. The contract itself, it appears, was in writing, and an officer of the company testified that it was in his custody at the office of the company, that he had telephoned to his subordinate, and that he was advised that the same had been forwarded to him by special delivery mail, but it had not been received at the time he was testifying. Upon this showing defendant offered to prove the contents of the contract in order that the court might determine whether Mays was an independent contractor, or simply an agent or employé of the defendant. The circuit court declined to allow this evidence of the contents of the contract to be admitted, and this is one of the assignments of error relied upon. The defendant insists that parol evidence of the contents of this contract should have been admitted upon the ground that it was only collaterally involved, in which event it was not necessary to produce the writing in order to prove its

contents; and, second, that its absence was satisfactorily accounted for, and proof of its contents should have been admitted upon the ground that it was a lost instrument.

[1, 2, 6] It is quite true that, where the contents of a written instrument are not sought to be proved, but simply the independent fact that the instrument is in existence and relates to a particular subject-matter, it is not necessary to produce the instrument for that purpose, but it is equally as well established that, where the contents of the instrument are required, as where the court must determine what the instrument itself means in order to a settlement of the matters involved in the controversy, the instrument itself must be introduced. 2 Jones on Evidence, § 203. So that we may say in this case, if the defense is made out by simply proving that a contract existed for the hauling and distribution of this pipe, then there was no necessity of producing the written contract. Its existence and the fact that it related to that subject-matter could be proved by parol. But is this sufficient to make out the defense? The fact that the defendant contracted for the hauling and distribution of this pipe to Mays does not of itself prove that Mays was an independent contractor. His relationship to the defendant depended upon the construction of his contract with the defendant. As to whether one engaged in doing work is a servant or an independent contractor depends upon many things, the most important, perhaps, being the control which the respective parties have over the work being done. If the owner has the right to control the doing of the work—that is, to determine when and in what manner it shall be done—then the one performing it is not an independent contractor, but a servant. The relation of the parties is also inferable from other circumstances, such as the method of payment for the work, the furnishing of the tools and equipment for the doing of the work, the right to supervise and direct the method in which the work shall be done, and the extent to which it shall proceed, or when it shall cease. 14 R. C. L. title "Independent Contractors," § 2 et seq.; *Kniceley v. Railway Co.*, 64 W. Va. 278, 61 S. E. 811, 17 L. R. A. (N. S.) 371; *Richmond v. Sitterding*, 101 Va. 354, 43 S. E. 562, 65 L. R. A. 445, 99 Am. St. Rep. 879, and authorities cited in the monographic note.

It will thus be seen that in order to determine the relation existing between the parties it is necessary for the court to have before it the contract. It cannot determine simply from the fact that the work was being done under a contract different from that by which men are ordinarily employed that the contractor is independent, or is not independent, and it is the duty of the court, when this question arises, to determine from a consideration of the provisions of the contract what

this relationship is. Ordinarily this is a matter for the determination of the court, and not a question for the jury. Of course, where the contract is oral, and there is a controversy as to its terms, it would become a question for the jury to determine what the contract was, and for the court to give it effect, but where the contract is in writing, and there is no dispute as to its terms, it is for the court to determine the effect of it. 14 R. C. L. title "Independent Contractor," § 16; *Richmond v. Sitterding*, 101 Va. 354, 43 S. E. 562, 65 L. R. A. and note at page 508, 99 Am. St. Rep. 879; *Lannehan v. Rollins*, 137 Mass. 123, 50 Am. Rep. 287; *Pioneer Fireproof Construction Co. v. Hansen*, 176 Ill. 100, 52 N. E. 17; *Foster v. City of Chicago*, 197 Ill. 264, 64 N. E. 322. It will thus be seen that the defense of independent contractor in this case cannot be made out simply by proving that the defendant had a contract with Mays for the hauling and distribution of this pipe. As to whether or not this defense exists depends upon the proper construction of the contract itself, and for this purpose the whole contents of the instrument are required, and, as laid down by the authority above cited, where this is the case, secondary evidence cannot be introduced as to the contents of the writing, unless it be shown that the writing is lost, or is beyond the control of the party seeking to introduce the evidence. The defendant insists, however, that it was entitled to introduce this evidence upon the ground that the paper was lost. This contention is not well taken. It appears that the officer of the company in whose custody the contract was, was present at the trial, and he testified that he had left it in his office, and had telephoned to his assistant to send it to him, and the assistant advised him that he had sent the same to him by special delivery mail, and that it had not arrived at the time he was testifying. It appears that it was mailed only the afternoon before the testimony was being given. There is no presumption from this testimony that the instrument had been lost. In fact, it is not made to appear that it could have reached the place of trial in the ordinary course of mail at the time the witness was giving his testimony, nor is it shown by anything but hearsay evidence that it had ever in fact been mailed.

[3-5] Another question presented for decision is: Does it devolve upon the plaintiff or upon the defendant to show the relationship existing between the defendant and the party who was hauling and unloading the pipe? If the defendant's defense is made out by simply showing that there was such a contract, then that has been done. If, on the other hand, after the plaintiff has shown such a state of facts as prove *prima facie*

that he, as well as his fellow servants, were employes of the defendant, it then devolves upon the defendant to prove this defense of independent contractor, it has failed in this regard. There is no doubt that the plaintiff proved sufficient facts to show *prima facie* that he and his coemployes were servants of the defendant. He showed that they were working upon a pipe line being constructed by the defendant for its use, and that for all the work that he did thereon he was paid by the defendant. This was entirely sufficient to justify the conclusion that he was a servant of the defendant, in the absence of any proof showing a different relation. The defendant does not deny these facts, but, on the contrary admits them. It attempts to show, however, a different relation existing between it and the plaintiff and his coemployes by proving that the party who employed them, and under whom they were working, was not its employe, but was an independent contractor. When it seeks to make this defense it must make it completely. Proving that the work was being done under a contract does not constitute the defense of independent contractor. In order to exculpate itself from liability it must show what its contract was in order that the court may determine what the real relations were, whether of master and servant, or contractor and contractee. The burden is upon the defendant setting up this defense to prove all of the facts necessary to constitute it. See note to *Richmond v. Sitterding*, 65 L. R. A. at page 459; 14 R. C. L. title "Independent Contractors," § 15; *Messmer v. Bell & Coggeshall Co.*, 133 Ky. 19, 117 S. W. 346, 19 Ann. Cas. 1, and note at page 6; *McCamus v. Gaslight Co.*, 40 Barb. (N. Y.) 380; *Redstrake v. Swayze*, 52 N. J. Law, 129, 18 Atl. 697. The proof introduced by the defendant was not sufficient to overcome the *prima facie* case made by the plaintiff. In fact, the relations existing between the defendant and Mays, who, it asserts, was an independent contractor, are not shown at all. The terms of the contract are not proved, and it is impossible for the court to determine that any different relation existed than that shown by the evidence introduced upon the part of the plaintiff. This being true, the defense interposed entirely failed, and there was really no question to be submitted to the jury except the extent of the plaintiff's injury and the amount of compensation to which he was entitled therefor. This conclusion renders unnecessary the consideration of the instructions given and refused. It is not claimed that the amount found by the jury is at all excessive, nor does it appear from the evidence to be so.

Our conclusion is therefore to affirm the judgment complained of.

(86 W. Va. 90)

**MILLER et al. v. STARCHER.** (No. 3761.)(Supreme Court of Appeals of West Virginia.  
March 30, 1920.)*(Syllabus by the Court.)*

- 1. APPEAL AND ERROR**  $\S$ 518(6)—WHERE DEFENDANT EXCEPTS TO STRIKING OF A SPECIAL PLEA IT IS PART OF RECORD REVIEWABLE ON WRIT OF ERROR.

When a special plea, regularly filed at rules, is at a subsequent term of the court on motion struck out, and the order of the court shows an exception by defendant to this action, such plea thereby becomes a part of the record, and the action of the court thereon may be reviewed here on writ of error.

- 2. ASSIGNMENTS**  $\S$ 24(3), 117—ASSIGNOR OF CAUSE OF ACTION FOR FRAUD MAY SUE FOR ASSIGNEE'S USE; CAUSE OF ACTION FOR GRANTOR'S FRAUD IS ASSIGNABLE.

A cause of action for fraud and deceit by the grantor respecting the acreage in the sale and conveyance of land is assignable, and the assignor, notwithstanding section 14 of chapter 99 of the Code (sec. 4373) may in his own name maintain an action against the grantor in such deed for the use and benefit of his assignee.

- 3. APPEAL AND ERROR**  $\S$ 536—BILL OF EXCEPTIONS CONTAINING CERTIFICATE OF THE EVIDENCE CANNOT BE CONSIDERED WHERE SIGNED IN VACATION.

A bill of exceptions containing a certificate of the evidence, though signed by the trial judge, does not become a part of the record so as to be considered upon a writ of error, if done in vacation, without an order signed by the judge within thirty days after the adjournment of the term at which final judgment was entered.

**Error to Circuit Court, Jackson County.**

Action by Pearl Miller and others for the use of their assignees, Henry Harbin and Emma Harbin, against C. W. Starcher. Judgment for plaintiffs, and defendant brings error. Affirmed.

J. L. Wolfe, of Ripley, for plaintiff in error.

Warren Miller, of Ripley, and Chas. E. Hogg, of Point Pleasant, for defendants in error.

**MILLER, J.** This is an action for fraud and deceit brought by plaintiffs for the use and benefit of their assignees, Henry and Emma Harbin, and on which, a jury being waived, plaintiffs obtained judgment against defendant for the sum of \$197.03, to which judgment defendant was awarded the present writ of error. The fraud and deceit alleged pertains to the acreage in a tract of land sold and conveyed by defendant to plaintiffs by deed of November 20, 1907.

In this court three points of error are assigned and relied on by defendant: First, the striking out of his special plea No. 1;

second, in finding against defendant on his plea of the statute of limitations; third, the rendering of the judgment in favor of plaintiffs for the use and benefit of Henry and Emma Harbin against him, to which the writ relates.

[1] The only defense interposed here by defendants in error is a motion to dismiss the writ, predicated on two grounds: First, that defendant's plea No. 1, stricken out, is no part of the record, not having been made so by bill of exceptions or order preserving the same, and that this court can not consider the error, if any, in striking out said plea; second, that the evidence on the issues joined on defendant's plea of the statute of limitations is no part of the record and can not be considered, either upon that plea or upon the merits of the case, because not made part of the record by bill of exceptions, and that though the certificate of the judge thereof is copied into the record, not having been made part of the record by any order, it is a mere fugitive paper which the court can not consider.

So far as the motion to dismiss depends on the action of the court below upon defendant's special plea No. 1, we think the motion must be overruled. This plea, with the other pleas of defendant, according to the record, was filed at rules. It was not merely tendered and the tender rejected by the court; it was actually filed and became a part of the record. By the filing of this plea, and the exception of defendant to the ruling of the court thereon, the plea remained a part of the record for the purposes of this writ. *National Valley Bank v. Houston*, 66 W. Va. 336, 339, 66 S. E. 465, and cases cited.

[2] The correctness of the ruling of the court below on the plea is therefore properly before us for review. The issue sought to be raised by the plea was that this action for fraud and deceit could not be maintained in the name of plaintiffs for the use and benefit of their assignees, but if maintainable at all, could only be prosecuted by Henry and Emma Harbin, assignees, in their own right, and not by plaintiffs, for want of privity of contract between them and defendant. On this proposition defendant is clearly in error. Section 14 of chapter 99 of the Code (sec. 4373) relied on, does enable an assignee of any note, bond, account or writing, not negotiable, to maintain an action thereon in his own name. The present action is not founded on any of the cases described in the statute. Besides, the statute does not take away the common-law right theretofore existing, which permitted the assignee of a chose in action to sue in the name of his assignor for his use and benefit. This court held in *Bentley v. Standard Fire Insurance Co.*, 40 W. Va. 729, 23 S. E. 584, that as the assignment of the chose vests in the assignee equitable title, the assignee,

under the provisions of the Code alluded to, may sue in his own name or in the name of the assignor for his benefit. See also, *Watkins v. Angotti*, 65 W. Va. 193, 63 S. E. 969. Wherefore, because of the subject matter of the plea, it was properly rejected by the trial court, and this point of error has no merit.

[3] But should the motion to dismiss, predicated on the theory that the evidence certified by the judge below is no part of the record, prevail? It is not sufficient that the judge of the trial court should have certified the evidence. To make it a part of the record requires an order signed by him within thirty days from the end of the term at which final judgment was entered. Without such order a bill of exceptions though signed does not become a part of the record and can not be considered. Section 9, chapter 131, Code (sec. 4913); *State v. Yoes*, 67 W. Va. 546, 68 S. E. 181, 140 Am. St. Rep. 978; *De Froschia v. Norfolk & Western Railway Co.*, 68 W. Va. 136, 69 S. E. 1008.

However, as the case is properly before us on the ruling of the court on defendant's special plea No. 1, the motion to dismiss can not prevail, but for want of error appearing therein the judgment below must be affirmed with costs to defendant in error.

(36 W. Va. 96)

**HERSMAN v. ROANE COUNTY COURT.**  
(No. 3685.)

(Supreme Court of Appeals of West Virginia.  
March 30, 1920.)

*(Syllabus by the Court.)*

**1. HIGHWAYS — 204 — LIABILITY FOR INJURY NOT DEFEATED BY SHOWING THAT PLAINTIFF'S AUTOMOBILE WAS NOT LICENSED.**

That plaintiff was operating his automobile on the public highway without having obtained a license to do so, as required by section 130, c. 43, Code 1918 (Code Supp. 1918, § 1940—129), is no defense to an action for damages against the county for allowing the highway to become and remain obstructed with a massive road presser machine, with which plaintiff's automobile collided in the nighttime, thereby injuring it and himself.

**2. HIGHWAYS — 213(4) — CONTRIBUTORY NEGLIGENCE HELD FOR JURY.**

Where plaintiff's alleged contributory negligence is a mixed question of law and fact, depending upon facts concerning the force of which, to prove negligence, reasonable minds may differ, the question of negligence is one for jury determination, upon proper instructions by the court.

Error to Circuit Court, Roane County.

Action by M. E. Hersman against the County Court of Roane County. Verdict and judg-

ment for defendant, and plaintiff brings error. Reversed and remanded for a new trial.

Thos. P. Ryan, of Spencer, and Chas. E. Hogg, of Point Pleasant, for plaintiff in error.  
H. C. Ferguson, of Spencer, for defendant in error.

**WILLIAMS, P. Plaintiff, M. E. Hersman,** brought this action against the county court of Roane county to recover damages for a personal injury and injury to his automobile, caused by colliding with a heavy road presser alleged to have been negligently left standing in the public road. The trial resulted in a verdict and judgment for the defendant, and plaintiff brings the case here on writ of error.

About 9 o'clock on the evening of June 29, 1917, plaintiff and the chauffeur, in company with three young ladies, were driving on the public road leading south from the town of Spencer, and collided with the presser, which had been left standing on the paved surface of the road and within about 2 inches of the edge thereof to plaintiff's right. The road presser was about 6 feet in width, 10 feet in height, and weighed about 10 tons. The road was paved, and had been traveled by the public for several months prior to the accident. The chief defense relied on is plaintiff's alleged contributory negligence. The road, at the point of the accident, is 16 feet wide, leaving a clear space of 10 feet to the left of the presser, over which plaintiff could have driven and thus have avoided the collision. The testimony of plaintiff's witnesses proves that the chauffeur was competent and experienced; that he was driving carefully at the time, at a speed variously estimated by the different witnesses at from 6 to 15 miles per hour; that he had his lights on full until he saw two or three automobiles approaching him from the opposite direction; that on approaching the one nearest to him he dimmed his lights, according to the custom when passing other automobiles, because a glaring light in the face of the driver blinds him, and renders it more difficult to estimate distances correctly than by the use of a dimmer light; that, seeing another car coming toward him, after he passed the first one, he continued to use his dimmer for a distance of about 200 feet farther, and at the end of this distance ran against the road presser, and just as he struck it the automobile that was approaching passed him. It is proven that the dimmer cast a light enabling the driver to see only about 14 feet. Neither plaintiff nor the chauffeur knew the presser was in the road near the point where they collided with it. It had been moved to that place on the evening of the accident.

[1] The automobile was a new one and carried no license tag, nor had a license to operate it been applied for, as required by sections 130, 131, and 141 of chapter 43, Code

1918 (Code Supp. 1918, §§ 1940—129, 1940—130, 1940—140), and on defendant's request the court gave the jury the following instruction, which is the principal error assigned:

"The court instructs you that although you may believe that the defendant caused, permitted, or allowed the road presser or roller described in the evidence to be in a public road in this county, and that plaintiff was riding in an automobile and sustained injury by the same being accidentally driven against said road presser or roller, and that the same was without lights or signals thereon, and that the plaintiff and the driver of said automobile had no warning of the presence of said presser or roller, yet if you believe said automobile was at that time owned by J. P. Price, and that said J. P. Price had neither applied for nor received any license to operate said automobile, then you shall find for the defendant, unless you further believe that the defendant caused, permitted, or allowed said road presser or roller to be in said road, with the intention or design that it might thereby cause injury to some person or his property, or was placed there under such circumstances as to show such intention or design. In other words, before plaintiff can recover, if you believe he was riding in an unlicensed automobile, you must believe that he was injured by reason of some unlawfully reckless or wanton act of the defendant. And you are further instructed that if you believe from the evidence that the person who had said road presser or roller in his immediate charge placed the same in the public road for the purpose of more conveniently using or operating the same, and without any design or intention of causing injury to another or his property, and that said presser or roller was not, at the time of the accident, being operated by any one, then you cannot find that the defendant was guilty of doing a reckless or wanton injury."

This instruction is erroneous, and should not have been given. It is almost uniformly held by the courts of this country that a person is not precluded from recovering damages for an injury caused by the negligence of another, even though he is himself, at the time of the injury, doing some unlawful act, unless such unlawful act has some causal connection with or contributes in some way to the injury. Plaintiff's failure to have his car registered and a license to operate it has no apparent connection with or relation to his injury. It is in no sense a contributing cause thereto. 1 *Shearman & Redfield on Negligence* (8th Ed.) § 104. The author there states the law to be as follows:

"If the plaintiff is acting in violation of a statute or ordinance at the time of the accident, and such violation proximately contributes to his injury, he is guilty of contributory fault, and is as much debarred from recovery as in other cases of contributory negligence. But if such violation did not so contribute to the injury it is no defense."

Cooley on Torts (3d Ed.) vol. 1, p. 273, says:

"The fact that a party injured was at that time violating the law does not put him out

of protection of the law; he is never put by the law at the mercy of others. If he is negligently injured in the highway, he may have redress, notwithstanding at the time he was on the wrong side of the way, provided this fact did not contribute to the injury. So, where one is injured by reason of a defect in the highway, it is no defense that he was at the time driving at an unlawful speed, provided the latter fact did not contribute to the injury."

The doctrine laid down by these text-writers is upheld by the great weight of the decisions. *Southern Ry. Co. v. Vaughan's Adm'r*, 118 Va. 692, 88 S. E. 305, L. R. A. 1916E, 1222, Ann. Cas. 1918D, and cases collocated in note at page 847; *Lockridge v. Railway Co.*, 161 Iowa, 75, 140 N. W. 834, Ann. Cas. 1916A, 158; *Black v. Moree*, 135 Tenn. 73, 185 S. W. 682, L. R. A. 1916E, 1216; *Cent. Ind. Ry. Co. v. Wishard* (Ind. App.) 104 N. E. 593; *Brown v. Green & Fling, Inc.*, 6 Boyce (Del.) 449, 100 Atl. 475; *Dervin v. Frenier*, 91 Vt. 398, 100 Atl. 760; *Bir. Ry. Light & Power Co. v. Etna Accident & Liability Co.*, 184 Ala. 601, 64 South. 44; *Mohney v. Cook*, 26 Pa. 342, 67 Am. Dec. 419.

The converse of this rule is likewise true, that the mere failure of the driver of an automobile to have procured the statutory license at the time his machine injured another on the highway will not render him liable for the injury, unless such failure had some causal relation to the injury. *Lindsay v. Cecchi*, 3 Boyce (Del.) 133, 80 Atl. 523, 35 L. R. A. (N. S.) 699, and numerous cases collected in the note.

Somewhat analogous to the question here presented is the right of a stock or other broker, buying or selling stock or other property for a commission, to recover on a contract when it appears that he has not procured the license required by our statute to engage in that business. The statute imposes a penalty for engaging in the business without a license. But we have held that the failure to procure a license does not avoid the contract, nor preclude the broker from recovering for services performed. *Ober v. Stephens*, 54 W. Va. 354, 46 S. E. 195. This case has been followed in later decisions. *Cobb v. Dunlevie*, 63 W. Va. 398, 60 S. E. 384; and *Linton v. Johnson*, 81 W. Va. 569, 94 S. E. 945. These cases hold that the penalty fixed by the statute for failure to comply with the license law is all the penalty to which the violator is exposed.

The Supreme Judicial Court of Massachusetts makes a distinction between the case of an individual who has failed to comply with the law by procuring an individual license to operate automobiles and the case of a person who has failed to register his car and pay the license required to operate it on the public highways, and, in the former case, holds that the absence of a chauffeur's license is only a circumstance tending to prove negligence, and in the latter that the presence

of the automobile upon the public highway, without being registered, is an unlawful act, inseparable from the movement of the automobile, "and that in such movement the automobile is an outlaw." *Bourne v. Whitman*, 209 Mass. 155, 95 N. E. 404, 35 L. R. A. (N. S.) 701; *Berry on Automobiles* (2d Ed.) § 195.

It is not denied that the road presser had no light upon it to warn travelers, and that it was an obstruction of the highway, rendering it out of repair, within the meaning of section 154, c. 43, Code 1918 (Code Supp. 1918, § 1940-153), there can be no question. That the county court is liable in such case, in the event of injury to any one who is without fault on his part, is well settled by our decisions. *Arthur v. City of Charleston*, 51 W. Va. 133, 41 S. E. 171; *Stanton v. City of Parkersburg*, 66 W. Va. 393, 66 S. E. 514. The negligence rendering defendant liable consisted in failing to keep signal lights upon the road presser at night. The fact that the roadbed was smooth at this point rendered the huge steam presser even more dangerous than if it had been located on rough road, because in traveling by automobile people invariably drive faster over smooth than over rough roads, and in passing other automobiles a driver might find it necessary to lower or extinguish his lights at the moment he would be approaching the danger and thus not be able to discover it in time to avoid the injury.

Counsel for defendant insist, however, that plaintiff was not prejudiced by this instruction, for the reason that the evidence so clearly establishes his contributory negligence, as a matter of law, that he cannot recover. We cannot accede to this view. Whether plaintiff was guilty of negligence which contributed to his injury, under the circumstances disclosed by the evidence, is a mixed question of law and fact, and therefore for the jury to determine. Plaintiff's evidence tends to show that the chauffeur was not running at a dangerous rate of speed, that he failed to see the presser because his lights were dimmed at the time, and that he dimmed his lights because he was meeting another automobile. It cannot be said, as a matter of law, that, seeing another automobile approaching, it was negligence to drive the automobile with the dimmers on for 200 feet; that being the distance from where he passed the last automobile before colliding with the presser.

Defendant's instructions 1 and 2 are also erroneous; No. 1 because it emphasizes the fact that plaintiff was using the road for a pleasure ride. Such use of it was not unlawful, and does not affect his right of action. It is erroneous for the further reason that it, in effect, places the burden upon plaintiff to prove he and his chauffeur were not negligent. This is not the rule in this state. Contrib-

utory negligence is a defense, and defendant bears the burden of proving it, although it may appear, and sometimes does appear, from plaintiff's evidence, and when it does so appear the defendant can take advantage of it. It also improperly tells the jury they could consider the fact that the road was being repaired, and that machinery and tools were permitted to remain in and along the road, near the point of the accident, in determining whether or not plaintiff was negligent in not seeing the steam presser; whereas it is shown that plaintiff knew the road was being repaired at a point, he says, nearly a quarter of a mile beyond where he collided with the presser. Evan McKown, the man who operated the steam road presser, testified that he brought it to the point where it was when plaintiff ran into it, from the quarry about a quarter of a mile beyond, on that same evening, and this testimony is not denied. There is no evidence to show that plaintiff had any reason to suspect any danger at the point where the machine stood. Its presence in the road was the only thing which could have given him any warning of the danger, and his negligence, if any, consisted in his failure to observe it in time to avoid the collision. But he explains why he did not see it, and we have said already that his failure to see it, under the circumstances disclosed, was not necessarily negligence, and it was for the jury to say whether or not he was negligent in running his car, with his dimmer lights on, over what appeared to him to be a smooth piece of unobstructed, paved road.

[2] No. 2 is bad because it told the jury it was plaintiff's duty to have his automobile sufficiently lighted—

"to enable him at all times to see any obstruction on the public highway, and to run the same at such a rate of speed that he can stop it or otherwise avoid collision with any such obstruction."

This would relieve county courts from liability for injury to the driver or occupants of automobiles on the public highway, occasioned by almost any kind of obstruction, which is certainly not the law. The proximate cause of plaintiff's injury was defendant's negligence in failing to maintain a warning light upon the steam presser in the nighttime. But if plaintiff was also guilty of negligence, which contributed to his injury, he cannot recover, even though defendant was guilty of negligence, and whether he was negligent depends upon the degree of care and caution he used for his own safety. If he used such caution and care as a reasonably prudent man would have used under the circumstances, he was not negligent; but the jury must decide this question.

We reverse the judgment, and remand the case for a new trial.

Reversed and remanded.



(150 Ga. 111)

(102 S.E.)

**BROWN v. SMITH. (No. 1695.)**

(Supreme Court of Georgia. April 14, 1920.)

*(Syllabus by the Court.)***1. DIVORCE ¶302—COURT CANNOT GRANT PERMANENT INJUNCTION ON HEARING PRELIMINARY TO DIVORCE ACTION.**

A wife sued her husband for a total divorce, and alleged that there was a girl child, the issue of the marriage, about 22 months old, and set forth in her petition that the husband, from whom she was then living in a bona fide state of separation, had declared that the wife should not retain the custody of the child, and that she feared that the husband would do bodily harm to her and the child in his efforts to regain its custody, and, among other things, prayed that the husband "be enjoined from in any manner interfering with the petitioner in the custody and control of said child, or molesting her in any way relative to the custody of the child." Upon presentation of the petition the judge granted an order which, among other things, enjoined and restrained the husband as prayed. On a preliminary hearing the judge granted temporary alimony and attorney's fees, and ordered that "the defendant is enjoined as prayed." Two verdicts having been rendered, finding a total divorce for both parties, and removing their disabilities, a decree was entered in accordance with such verdicts, and the custody of the child was awarded to the wife. The decree made no reference to an injunction against the husband. Nearly 9 years thereafter, when the child was more than 12 years old, her father took her in custody without the knowledge or consent of her mother. The mother sought to recover the child's custody from her father, by writ of habeas corpus issued by the ordinary of the county. Upon a hearing of the habeas corpus proceeding, the ordinary awarded the custody of the child to her mother; but, on notice by the father of his intention to take the case by certiorari to the superior court, the ordinary gave to the father the temporary custody of the child on conditions stated. The record does not disclose what was done in reference to the certiorari. Subsequently, the mother sought to have the father of the child attached for contempt for violating the judgment of the court enjoining him from interfering with the mother's custody of the child; the act of contempt alleged being that the father had surreptitiously taken charge of the child and brought her away from the home of the mother without her knowledge or consent. Upon a hearing in the contempt proceeding the judge adjudged the father of the child to be in contempt of court "for violating said decree" rendered in the divorce suit, and that he be committed to the jail of the county until he should surrender, restore, and place the child into the custody and control of her mother. This order was subsequently modified, in view of a contemplated writ of error to be sued out by the defendant therein. *Held*, the temporary restraining order granted in the rule nisi, and the interlocutory injunction, granted on the preliminary hearing, continued only until the final termination of the divorce suit which resulted in the decree grant-

ing a total divorce to both parties, and awarding the custody of the child to the mother. On a preliminary hearing the judge could not grant a permanent injunction. *Payton v. Ford*, 134 Ga. 587, 68 S. E. 300; *Southern Cotton Oil Co. v. Overby*, 136 Ga. 69, 70 S. E. 664. The decree did not purport to continue the interlocutory injunction, nor did its rendition operate to do so.

**2. DIVORCE ¶302—TAKING BY FATHER OF CUSTODY OF CHILD HELD NOT IN CONTEMPT OF PRELIMINARY INJUNCTION.**

There being no injunction inhibiting the father from taking the custody of the child after the rendition of the decree, his so doing without the knowledge or consent of the mother was not an act in contempt of any existing order or decree of the court; and it was therefore error to hold the father to be in contempt of the court.

Error from Superior Court, Cobb County; N. A. Morris, Judge.

Proceeding between D. A. Brown and Mrs. Nola T. Smith. Judgment for the latter, and the former brings error. Reversed.

G. B. Gann and Joe Abbott, both of Marietta, for plaintiff in error.

H. B. Moss, of Marietta, for defendant in error.

FISH, C. J. Judgment reversed. All the Justices concur, except GILBERT, J., absent for providential cause.

(150 Ga. 121)

**GREEN v. STATE. (No. 1655.)**

(Supreme Court of Georgia. April 15, 1920.)

*(Syllabus by the Court.)***1. CRIMINAL LAW ¶1064(7)—FAILURE TO CHARGE APPLICABLE LAW SHOULD BE MADE DISTINCT GROUND FOR NEW TRIAL.**

It is not a good ground of criticism upon a portion of the court's charge to say that some other principle of law involved under the facts of the case should have been given in the charge. If the court omits to charge the law applicable to the material issues of the case, that should be made a distinct ground of the motion for a new trial, in order to avail the plaintiff in error.

**2. CRIMINAL LAW ¶20—NO GUILT WHERE ACT COMMITTED BY MISFORTUNE OR ACCIDENT WITHOUT EVIL DESIGN OR CULPABLE NEGLIGENCE.**

The court did not err in charging the jury: "The court instructs you further that a person shall not be found guilty of any crime or misdemeanor committed by misfortune or accident, and where it satisfactorily appears there was no evil design or intention or culpable neglect." This charge was applicable to the issues made under the defendant's statement and the evidence in the case.

**3. HOMICIDE  $\Leftrightarrow$ 309(6)—CHARGE AS TO INVOLUNTARY MANSLAUGHTER PROPERLY REFUSED, WHERE PART THEREOF NOT APPLICABLE TO EVIDENCE.**

The court did not err in refusing a written request to give in charge section 67, Penal Code 1910. A part of this section was not applicable to any of the evidence adduced on the trial; and, the request being that the section in its entirety be given, it was properly refused.

**4. ASSIGNMENTS OF ERROR.**

None of the assignments of error show cause for the grant of a new trial, nor do any of them raise questions that are novel or which require discussion.

Error from Superior Court, Colquitt County; W. E. Thomas, Judge.

Sami Green was convicted of an offense, and he brings error. Affirmed.

John R. Cooper and W. O. Cooper, Jr., both of Macon, and John T. Coyle, of Moultrie, for plaintiff in error.

Clifford E. Hay, Sol. Gen., of Thomasville, Clifford Walker, Atty. Gen., and M. C. Bennet, of Atlanta, for the State.

BECK, P. J. Judgment affirmed. All the Justices concur, except GILBERT, J., absent for providential cause.

(150 Ga. 122)

**BROWN LOAN & ABSTRACT CO. v. WILLIS et al. (No. 1663.)**

(Supreme Court of Georgia. April 15, 1920.)

*(Syllabus by the Court.)*

**1. VENDOR AND PURCHASER  $\Leftrightarrow$ 89, 98—VENDOR CANNOT RESCIND WITHOUT TENDERING BACK PRICE RECEIVED; AFTER REASONABLE TIME FOR PERFORMANCE, VENDOR MAY RESCIND.**

Where the owner of land enters into a written contract accepting an offer made in writing for the purchase of the land, and the party making the offer makes a substantial payment upon the purchase price, and where time is given for the investigation of the title and the clearing up and removal of defects therein, the owner of the property cannot rescind such a trade by his own act or declaration, even after a reasonable time for compliance with his undertaking by the purchaser has elapsed, without tendering to the purchaser the money paid and accepted. But the owner, under the circumstances stated, after the lapse of a reasonable time, may, upon tendering the money paid by the purchaser back to him, declare the contract at an end, and thus be relieved of its binding force; or he may have appropriate relief, under the circumstances, upon petition to the proper court.

**2. VENDOR AND PURCHASER  $\Leftrightarrow$ 212—PURCHASER WITH KNOWLEDGE TAKES SUBJECT TO EQUITIES OF FORMER PURCHASER.**

Where an owner of land and a proposed purchaser entered into a contract for a sale and purchase of the land, and where with notice of the existence of such contract a third person purchased the land, taking a bond for title, such latter purchaser took subject to the equities of the former purchaser.

**3. INJUNCTION  $\Leftrightarrow$ 188(2)—REFUSAL OF INTERLOCUTORY INJUNCTION HELD IMPROPER.**

Under the evidence, the court erred in not granting an interlocutory injunction, thereby preserving the status until the final trial, when the rights of the complainant to the equitable relief sought can be determined and adjudicated.

Error from Superior Court, Pulaski County; E. D. Graham, Judge.

Action by the Brown Loan & Abstract Company against I. A. Willis and others for injunction, decree for specific performance, and other relief. Injunction refused on interlocutory hearing, and plaintiff brings error. Reversed.

Jno. R. L. Smith and Grady O. Harris, both of Macon, for plaintiff in error.

H. McWhorter, of Cochran, Hall & Grice and Chas. J. Bloch, both of Macon, Etheridge & Sams, of Atlanta, and H. E. Coates, of Hawkinsville, for defendants in error.

BECK, P. J. Brown Loan & Abstract Company (hereinafter called the Brown Company, and the plaintiff) brought a petition against Mrs. Pauline Rudich, I. A. Willis, and certain other parties, seeking injunction, a decree for specific performance, and other equitable relief. Upon interlocutory hearing the court refused an injunction, and the plaintiff sued out its bill of exceptions to the Supreme Court.

[1] 1. The plaintiff bases its claim of right to the relief sought upon a written contract for the sale and purchase of a tract of land of which Mrs. Rudich was the owner, and upon negotiations between the parties to the contract with reference to the subject-matter of the same. The contract, omitting the description of the tract of land, is as follows:

"The undersigned hereby agrees to buy through Turman & Calhoun, agents, the following described property, to wit, \* \* \* for the sum of twenty-thousand (\$20,000) dollars, to be paid as follows: \$8,000 cash, assume loan of \$8,000 at 8 per cent. now on property, with interest from date of sale, \$4,000 on or before December 1, 1919, and \$4,000 on or before December 1, 1920, which two last-named deferred payments bear interest at the rate of 7 per cent. payable annually. It is agreed that the vendor shall furnish good and marketable title to said property, and purchaser shall have a reasonable time in which to investigate the same. In the event the title is objected to, the vendor

shall be furnished with a written statement of all objections and be allowed a reasonable time thereafter in which to furnish valid title. It is agreed that such papers as may be legally necessary to carry out the terms of this contract shall be executed and delivered by the parties at interest as soon as the validity of the title to said property has been established.

"Special Stipulations. It being agreed that this trade is being made subject to examination of title. Should there be found any defects or uncanceled liens which might interfere with giving a good negotiable title, a list of same will be furnished by the purchaser to the seller, and reasonable length of time allowed in which to clear and remove same.

"This proposition is open for acceptance until the end of the 7th day of December, 1918.

"[Signed] Brown Loan & Abstract Co.,

"By W. L. Brown, Prest., Eastman, Ga.

"Conditional Earnest Money Receipt. Received of Brown Loan & Abstract Co. the sum of five hundred (\$500) dollars as earnest money and part payment of purchase price of property, as described in the above copy of original proposition. Said earnest money is to remain with Turman & Calhoun during the term of said proposition, and is subject to the acceptance by the owner of said proposition, and is to be returned to purchaser in the event proposition is declined. This the 8d day of December, 1918.

"[Signed] Mrs. Pauline Rudich,

"By H. Rudich, Agt.

"I hereby acknowledge receipt of the above amount of earnest money, and ratify the within contract. This March 21, 1919.

"[Signed] Mrs. Pauline Rudich."

It will be observed that this contract may be divided into three parts. The first is an offer by the plaintiff to buy the land, with certain special stipulations annexed; the next part is the receipt of \$500 paid as earnest money and part payment of the purchase price of the property; and the concluding portion of the contract is signed by Mrs. Rudich herself, and is an acknowledgment of the receipt of the earnest money, and contains an express ratification of the contract. The offer first made was open for acceptance until the 7th day of December, 1918. But there were subsequent negotiations, and the offer remained open; the receipt for the part payment continued outstanding; and the ratification of the contract was signed by Mrs. Rudich on March 21, 1919. This writing, or these writings taken together, constitute a contract for the sale of the land in question. It provided for the examination, consideration, clearing up, or removal of defects in the title, so that the vendor might be able to furnish good and marketable title to the property which the plaintiff had proposed to buy. That instrument, after the signature of Mrs. Rudich was attached to the clause ratifying the contract, was no longer a mere offer to buy nor an option, but it became a binding contract (subject, of course, to certain conditions in it

as to the investigation and removal of defects in the title) for the sale and purchase of the land comprised in the instrument. The plaintiff could not withdraw the offer, and Mrs. Rudich could not refuse to perform her undertaking.

It is urged in the brief of counsel for defendants in error that the written instrument is an option to purchase land; and that if the written acknowledgment of the receipt of the amount paid by the plaintiff and the ratification of the contract signed on March 21, 1919, by Mrs. Rudich, should be held to extend the option, it only extended it for a reasonable time, as it fixed no time limit; and that consequently, under the evidence in the case, it was for the trial judge to say, upon conflicting evidence, whether or not a reasonable time for the extension of the option had expired; that the judge was authorized to find that it had expired before the 27th of June, 1919; and that consequently the execution of a bond for title by Mrs. Rudich to another party, who is one of the defendants in this case, was not a breach of her contract, but that it was executed in the exercise of the right which remained in her after the expiration of a reasonable time from the giving of the option. But, as we have indicated above, these views of counsel for the defendants are not coincident with ours, after a careful consideration of the contract. The written contract, when Mrs. Rudich ratified it on the 21st of March, 1919, was a binding contract of sale and purchase.

Omitting the stipulations as to having time to investigate and clear up defects in the title, the contract could be summed up in a few words, and amounts to an offer by the Brown Company to pay an agreed sum for the described property, a payment of \$500 of the purchase price, and a written acceptance of the offer by Mrs. Rudich, the owner. The written offer made by the plaintiff became, upon written acceptance by the owner, binding upon both parties. It is said by counsel for the defendants that under the contract the Brown Company was not given an indefinite period in which to comply with the contract; that the only time it was given at all was reasonable time in which to satisfy itself as to title, and not time in which to pay over the money; and that, as no date was fixed for this, the law would supply the omitted term of the contract and would read into it the provision for a "reasonable time." And numerous decisions are cited by counsel laying down and elaborating the doctrine that, where an agreement is silent as to the time within which an act is to be begun or completed, the law implies that a reasonable time is to be allowed therefor; and that what is a reasonable time is a matter of fact to be determined by a jury under all the circumstances of the case; and that, in a hear-

ing like that had before the trial judge, an interlocutory hearing, the question of fact is to be determined by the judge.

We have not reached the same conclusion in this case as the counsel who urge the cases cited as authority here; but we do not in any way impinge upon the doctrine of those cases just referred to. Nor do we deny that the question of reasonable time was to some extent involved in this case. But the expiration of a reasonable time after the negotiations were entered upon, and after the alleged defects in the title were cleared up, did not authorize Mrs. Rudich, of her own volition and without reference to the status of the plaintiff as a party to the contract for the sale of the land, simply to declare the contract at an end and then to execute another contract with other parties for the sale of the land, as if she had not executed the contract to sell to the Brown Company. The negotiations with reference to this trade and the correspondence between the plaintiff and Mrs. Rudich's agents, Turman & Calhoun, who conducted the negotiations for Mrs. Rudich, continued through several months; evidently for a while, in perfect good faith, each trying to meet the requirements of the other, one making bona fide objections to certain defects in the title, and the other, with equal bona fides, endeavoring to remove those objections. And it may be conceded that towards the close of the correspondence between Turman & Calhoun and W. L. Brown, who conducted the negotiations and the correspondence for the Brown Company, it began to appear that Brown was not able, even after his objections to the title had been removed, to comply with his undertaking as to the payment of the money.

It seems quite clear that in the month of May or the first part of June all objections to the title had been cleared up, and the time for the payment of the money and the closing of the contract had arrived. It may be conceded, also, that Brown then began to make excuses and to employ what seem, upon the face of the correspondence, dilatory tactics. It is possible that counsel for the defendants are authorized to complain that at this period in the progress of the negotiations the plaintiff was "playing with the contract." We say that all this may be conceded for the sake of the argument. Nevertheless the indestructible fact remains that there was still outstanding a contract for the sale and purchase of the land between Mrs. Rudich and the Brown Company. If, as urged by the defendants, a reasonable time for performance on Brown's part had elapsed, the mere lapse of this time did not destroy the contract, but it would have given to Mrs. Rudich the right to terminate the contract—to remove that fact which stood in the way of her conveying this land to a third party. If the reasonable time had elapsed,

she could have tendered back the money that had been paid on the purchase price and declared the contract at an end. This might have effected a rescission. Or she might have had recourse to the proper court to have rescission of the contract declared. If a petition to a court of equity she might have shown the lapse of a reasonable time and the fact that the plaintiff was pursuing dilatory tactics, and have asked that a rescission be decreed upon her repaying the earnest money; or, she might possibly even have alleged reasons why she could not repay the money, and have asked the court to declare the contract at an end and that the plaintiff be given a judgment for the amount it had paid, and that such judgment be a lien upon the property. Such are some of the remedies which were open to Mrs. Rudich had she desired to end the contract. Powell on Actions for Land, 502 et seq; Buck v. Duvall, 9 Ga. App. 656, 72 S. E. 44; Bryant v. Booze, 55 Ga. 438. But, without taking some such steps as we have indicated in the courts, Mrs. Rudich could not by her own action, or after declaration of her intentions made to Brown, destroy the contract in question or impair its validity, unless at the time of declaring the contract at an end she tendered back the part payment of the purchase price which had been paid.

We have given careful weight to a letter written by the plaintiff on the 26th day of June, the day before Mrs. Rudich executed the bond for title to Willis, which was a breach of her contract unless it had been terminated before that time. This letter last referred to is written to the real estate agents, Turman & Calhoun, with whom the negotiations had been conducted. In it Brown, the president of the plaintiff company, after having failed to keep an engagement on the 17th and on the 20th of June, appointed to carry out and complete the contract, made certain excuses for his failure to meet Turman as he had engaged to do for the purpose of concluding the transaction between them involving the purchase of this land. Brown stated in this letter that he did not get the money which had been promised his company, and with which it had expected to make the cash payments according to the terms of the contract. He stated further that the money with which his company expected to make the payments had for a long time remained in a certain bank, and that the person to whom the money belonged, and who had agreed to furnish the same to Brown, had, in consequence of the long delay in bringing the matter to a satisfactory conclusion, invested the money in cotton, and that he was then, for reasons set out at length in the letter, unwilling to withdraw the money from that investment to let Brown have it so that he could conclude the trade. In the same communication he dealt at length with several

matters that are apparently irrelevant to the subject of the trade for the land, and pointed out the difficulty of borrowing money from the banks, because of the fact that they had so much cotton on hand which they were carrying for their customers. He expressed the opinion that the condition just mentioned would not last longer than 80 to 90 days, stated that he wished to secure by personal indorsement a note for the balance of the cash payment that was to be made under the contract, suggested to the agents the apparent advisability of accepting his suggestion, and pointed out the advantages they would have by taking a note for the balance of the cash payment specified in the contract.

We have given the contents of this letter careful consideration, in order to decide whether or not it evinced such an intention on the part of the plaintiff to abandon the contract as made and to substitute therefor such an entirely new contract as would authorize the defendants' claim that the plaintiff had itself ended the contract, or at least placed itself in such a position that Mrs. Rudich might declare the contract rescinded and terminated. After careful consideration, we have concluded that this letter did not put an end to the contract, without some action being taken upon it by Mrs. Rudich herself and communicated to the plaintiff. Moreover, there is nothing to show that Mrs. Rudich or her agents had received this letter when she declared the contract to be at an end; because, on the date of this letter from Brown, Turman & Calhoun wrote Brown declaring the contract at an end. Both of these letters are dated June 26th, and they are apparently without reference to the contents of each other, though there is a suggestion they followed a conversation, whether by telephone or not we do not know, between Brown and Mrs. Rudich's agents, Turman & Calhoun.

[2] 2. On the 27th of June, 1919, the day after the letter to which we have made extended reference was written, Mrs. Rudich executed a bond for title to the land in controversy to Willis, one of the parties defendant; and Willis contends that, having paid a substantial part of the purchase money, he was an innocent purchaser, not having notice of the Brown Company's equities in the land. The facts of the case do not bear him out in this contention. While the bond for title is made to Willis individually, the other parties defendant in this case were jointly interested with him in the purchase. They entered into an agreement with Willis to make the purchase of the land, there being stipulation as to the interest of each. This agreement made them either partners or a form of association in the nature of a partnership for the purchase of the land. It may be true that there can be no partnership in land, but a partnership or an asso-

ciation in the nature of a partnership may be formed for the purchase of land; and, though the partners become tenants in common after they are vested with title, we think notice to one would be notice to the others of matters affecting the title. But even if this were not true, Willis had an attorney at law to look into the matter of the title, and this attorney came to Atlanta and talked with Turman & Calhoun, the agents through whom the negotiations for the sale of the land by Mrs. Rudich to the Brown Company were conducted. This attorney knew of the existence of the trade between Mrs. Rudich and Brown. He may not have known of the exact character of the trade, but he knew that there had been an agreement between Mrs. Rudich and the Brown Company; and, though he might have concluded that that trade did not affect the title and interest of another purchaser, he was as a matter of fact put upon notice of all the essential facts, and could easily, by inquiry, have ascertained the exact nature of the transaction. This attorney saw most of the correspondence between Turman & Calhoun and Brown for the Brown Company. He saw a copy of the contract for the sale of the land, and, as stated above, he saw a great part of the correspondence "down to about June 24th or 25th." Certainly this was ample notice to the attorney at law. As to the scope of his employment, Willis testified:

"I employed him for an attorney at law to represent me in this matter in the way of everything. I took his recommendation. I did not make any examination of title. I guess he made one. \* \* \* He told me the titles were all right after he came back from Atlanta. I don't know whether he examined the titles in Atlanta. He found sufficient impression up there for him to make a recommendation that the titles were all right."

It seems that there can be no question that Willis was put upon notice of the contract, that is, as it existed at one time; and, knowing that it existed at one time, his clients cannot be held to be innocent purchasers if they assumed that the contract was terminated or took the word of any party other than Brown, or were not misled by anything that Brown did or said.

But even if these parties had not had notice, it could not be held that they occupied the favorite position of an innocent purchaser without notice. They had paid a part of the purchase money and had a bond for title. If they had had no notice of Brown's equities, it was a case of one equity against another, and the prior equity in point of time was the superior equity. If as a matter of fact Willis, or his associates or transferees, had paid a part of the purchase money without notice of the equities of the Brown Company, it would then become a

question whether or not, under proper pleadings, they might obtain a judgment for the money innocently paid over.

[3] It appears that several hundred acres of land are covered with valuable timber, and certain of the defendants are cutting and removing this timber. That being the case, the plaintiffs were entitled to an injunction to prevent the destruction of the substance of the freehold. It is unnecessary to cite authorities upon this proposition, which has been discussed in several cases decided by this court of comparatively recent date. We think therefore the court erred, under the evidence, in refusing the injunction, thereby preserving the status quo until the final trial of the case, when the rights of the plaintiff, under all the evidence and circumstances of the case, to the equitable relief of specific performance upon compliance with the terms of the contract can be finally adjudicated.

Judgment reversed.

All the Justices concur, except GILBERT, J., absent for providential cause.

(150 Ga. 38)

**BROWN v. WILCOX et al.** (No. 1602.)

(Supreme Court of Georgia. April 13, 1920.)

*(Syllabus by the Court.)*

1. EVIDENCE  $\S$ 208(5)—CARBON COPY OF PROPOSED PLEA, NOT SIGNED BY DEFENDANT OR FILED, WAS INADMISSIBLE.

A carbon copy of a proposed plea, prepared by the attorney for the defendant, which has not been filed or signed by the defendant, or exhibited to him, was not admissible in evidence at the instance of the other party, although counsel for the defendant had stated to opposing counsel that such a plea would be filed.

2. DEEDS  $\S$ 45—REFUSAL OF REQUEST AS TO EFFECT OF SIGNATURE TO DEED PRODUCED TO PURPORTED WITNESSES HELD ERROR UNDER THE PLEADINGS AND EVIDENCE.

The court erred in refusing to charge the jury the following, on written request duly presented: "If you find from the evidence that the instrument purporting to be a deed from Mrs. Jane Brown to R. P. Brown was produced to the purported witnesses, J. D. Maynard and W. J. Hancock, by Mrs. Brown herself, and that she stated to the witnesses in substance that she wanted them to witness the deed and that was her signature, or that she had already signed it, or words substantially to that effect, then I charge you that it is not material whether Mrs. Brown did in fact herself make the actual signature of the purported maker of the deed or not; if she acknowledged it as her signature, or as her deed, and asked them to witness it as such, then I charge you that would be in law her deed, and you should so find." Under the pleadings and the evidence, the requested instruction was pertinent.

3. TRIAL  $\S$ 260(1) — REQUESTED CHARGES, SUBSTANTIALLY COVERED, ARE PROPERLY REFUSED.

The other requests for instruction to the jury, in so far as they were pertinent and legal, were substantially covered in the general charge. None of the remaining assignments of error show cause for reversal, nor are they of such character as to require special mention.

Error from Superior Court, Telfair County; E. D. Graham, Judge.

Action between R. P. Brown and Anne Wilcox and others. Judgment for the latter, and the former brings error. Reversed.

M. B. Cannon, of Abbeville, W. B. Smith, of McRae, and Eldridge Cutts, of Fitzgerald, for plaintiff in error.

Hal Lawson, of Abbeville, for defendants in error.

GILBERT, J. Judgment reversed. All the Justices concur.

(150 Ga. 118)

**OETTER v. OETTER.** (No. 1798.)

(Supreme Court of Georgia. April 15, 1920.)

*(Syllabus by the Court.)*

1. HABEAS CORPUS  $\S$ 85(1)—DECREE IN DIVORCE SUIT AWARDING CUSTODY OF CHILD SUCCESSIVELY TO PARENTS WAS NOT CONCLUSIVE IN SUBSEQUENT HABEAS CORPUS BY FATHER TO RECOVER CUSTODY.

A decree in a divorce suit awarding the custody of a minor child of the marriage to the mother until he shall attain the age of ten years, when the custody shall be given to the father, is prima facie evidence of the respective rights of the parties to the child's custody as decreed; but it is not conclusive on habeas corpus brought by the father against the mother for the custody after the child arrives at the age of ten years, where the circumstances and conditions of the parents, or either of them, arising since the rendition of the decree, make it to the best interest and welfare of the child that the decree be modified in respect to such custody. *Milner v. Gatlin*, 143 Ga. 816, 85 S. E. 1045, L. R. A. 1916B, 977 (4).

2. HABEAS CORPUS  $\S$ 90(2)—ON AWARDING CUSTODY OF MINOR SON TO FATHER HELD NOT AN ABUSE OF DISCRETION TO ORDER THAT HE BE SENT FOR OCCASIONAL VISITS TO MOTHER.

When it appeared on the hearing of such habeas corpus case that since the decree was rendered the father had married another woman, by whom he had a child then living, and resided with them in a city other than that where the first wife was domiciled and where the divorce decree was rendered, and when there was evidence as to the good character of the mother of the child whose custody was in issue, of their mutual affection, and of the ability and desire of the mother to properly care for and rear the child, it was not an abuse of the legal dis-

cretion of the judge trying the issue, in view of all the evidence submitted, after awarding the child to the custody of the father, to further order that the "child be sent to visit its mother for one week during the Christmas holidays and two weeks during the summer vacation."

3. HABEAS CORPUS  $\S$  112, 113(1/2)—COURT IN AWARDING CUSTODY MIGHT RETAIN JURISDICTION TO ORDER FURTHER CUSTODY; POINT NOT MADE IN ASSIGNMENT OF ERROR CANNOT BE MADE ON APPEAL.

Whilst it may not have been necessary, it was not error to include in the judgment the following: "This court reserves the right in this case, if the child is not properly treated and cared for, to exercise jurisdiction to further consider and order the custody of said child." In the brief for the plaintiff (the father) it is sought to raise the point that jurisdiction over him could not be retained, because he resided in another circuit. Even if there could be merit in the point, he having submitted himself to the court's jurisdiction by instituting the habeas corpus proceeding, no such question was made in any assignment of error.

4. PROPER REFUSAL TO STRIKE ANSWER AND SUPPORTING EVIDENCE.

Nor was it error to refuse to strike the answer of the mother, nor to refuse to exclude evidence of her good character tending to sustain the answer.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Habeas corpus by Rudolph Oetter against M. O. Oetter to obtain custody of a minor child. Judgment for petitioner on condition and with reservation of jurisdiction to make further orders, and he brings error. Affirmed.

Moore & Pomeroy, of Atlanta, for plaintiff in error.

Branch & Howard, Otey McClellan, and Bond Almand, all of Atlanta, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur, except GILBERT, J., absent for providential cause.

(150 Ga. 88)

DARLEY et al. v. STARR. (No. 1643.)  
(Supreme Court of Georgia. April 13, 1920.)

(Syllabus by the Court.)

1. DISMISSAL AND NONSUIT  $\S$  68—EJECTMENT  $\S$  75—SUFFICIENCY OF DESCRIPTION IN DECLARATION MAY BE RAISED BY GENERAL DEMURRER; ORAL MOTION TO DISMISS MAY BE MADE AFTER PLEADING.

The question of sufficiency of description in a declaration in ejectment may be raised by general demurrer. An oral motion to dismiss is in the nature of a general demurrer, and may be made after pleading.

2. EJECTMENT  $\S$  64—DESCRIPTION IN DECLARATION SHOULD ENABLE SHERIFF TO EXECUTE WRIT OF POSSESSION.

A declaration in ejectment should describe the premises in dispute with such definiteness that, in the event of a recovery by the plaintiff, the sheriff could execute the writ of possession from the description given.

3. EJECTMENT  $\S$  64—DECLARATION SHOWING PATENT AMBIGUITY IS SUBJECT TO GENERAL DEMURRER.

A declaration in ejectment, which upon its face discloses a patent ambiguity, is subject to general demurrer.

4. EVIDENCE  $\S$  23(2)—COURT JUDICIALLY KNOWS THAT SIXTH LAND DISTRICT OF WHEELER COUNTY IS DIVIDED INTO LOTS.

Judicial cognizance is taken of the fact that the sixth land district of originally Wilkinson (then Montgomery, but now Wheeler) county is divided into duly numbered land lots of 202 1/2 acres each, in the shape of a square, and that the lines of the lots are run at an angle of 45 degrees, and not north and south and east and west.

5. EJECTMENT  $\S$  64—DESCRIPTION IN DECLARATION HELD TOO INDEFINITE TO ENABLE SHERIFF TO EXECUTE WRIT OF POSSESSION.

A declaration in ejectment, which described the land in dispute as "fifty acres of lot of land No. 17 in the sixth district of formerly Montgomery, now Wheeler, county, Georgia, more particularly described as being fifty acres lying in a square in the southeast corner of said lot," does not describe the premises with such definiteness that, in the event of a recovery by the plaintiff, the sheriff could execute the writ of possession from the description given.

Error from Superior Court, Wheeler County; J. P. Highsmith, Judge.

Suit in ejectment by J. N. Starr against W. W. Darley and others. Defendants' motion to dismiss the declaration overruled, and they bring error. Reversed.

Eschol Graham, of McRae, and Hardeman, Jones, Park & Johnston, of Macon, for plaintiffs in error.

GEORGE, J. A suit in ejectment was commenced to recover "fifty acres of lot of land No. 17 in the sixth district of formerly Montgomery, now Wheeler, county, Georgia, more particularly described as being fifty acres lying in a square in the southeast corner of said lot." At the trial the defendants moved to dismiss the declaration, upon the ground that the land in dispute was not described with such definiteness that, in the event of a recovery by the plaintiff, the sheriff could execute the writ of possession from the description given. The court was asked to judicially recognize that the sixth land district of originally Wilkinson, then Montgomery, but now Wheeler, county is divided into duly numbered lots of 202 1/2 acres, each in the shape

of a square, and that the lines of the lots are run at an angle of 40 degrees, and that the lines of the lots are not run north and south and east and west. The court overruled the motion, and the case is now before this court on exceptions to that ruling and to the refusal of the trial court to dismiss the declaration.

[1] 1. The question of sufficiency of description may be raised by general demurrer. *Clark v. Knowles*, 129 Ga. 291, 58 S. E. 841; *Scoville v. Lamar*, 149 Ga. 333, 100 S. E. 96. The oral motion to dismiss is in the nature of a general demurrer, and may be made after pleading. *Crosby v. McGraw*, 133 Ga. 561, 68 S. E. 897.

[2, 3] 2, 3. It is of course settled that the declaration in ejectment should describe the premises in dispute with such definiteness that, in the event of a recovery by the plaintiff, the sheriff could execute the writ of possession from the description given. *Powell on Actions for Land*, § 25; *Harwell v. Foster*, 97 Ga. 285, 22 S. E. 994; *Clark v. Knowles*, *Scoville v. Lamar*, supra. It is equally well settled that a patent ambiguity in the description cannot be removed by extrinsic evidence. A declaration in ejectment, which upon its face discloses a patent ambiguity, is subject to general demurrer. Unless the ambiguity is patent, and appears on the face of the declaration, the suit cannot be dismissed for uncertainty in the description. See *Campbell v. Johnson*, 44 Mo. 247; *Johnson v. Ashland Lumber Co.*, 52 Wis. 458, 9 N. W. 464; *Dickens v. Barnes*, 79 N. C. 490; 2 *Devlin on Real Estate* (3d Ed.) § 1010.

[4, 5] 4. This court will take judicial cognizance of the boundary lines of the counties originally laid off in accordance with the governmental survey, which divided the counties into districts designated by numbers and subdivided the territory embraced in these counties into original land lots, duly numbered. The original plats showing the boundary lines and relative locations of the districts and land lots in each county are of file in the office of the secretary of state. *Stanford v. Bailey*, 122 Ga. 404, 50 S. E. 161; *Huxford v. Southern Pine Co.*, 124 Ga. 181, 52 S. E. 439 (8); *McCaskill v. Stearns*, 138 Ga. 123, 74 S. E. 1032. An act of the General Assembly, assented to May 11, 1803, provided that the territory acquired from the Indians by treaty concluded near Ft. Wilkinson on the 16th day of June, 1802, should be laid off into three counties; that part of said territory lying south of the Altamaha river to form and constitute one county, to be called Wayne; and that part of said territory lying south of the Oconee river to be divided by a line to be run according to the true meridian from the Oconee river, at Ft. Wilkinson, south 45 degrees west, to the Indian boundary line, into two counties, the eastern to be called Wilkinson and the west-

ern to be called Baldwin. The act further provided that the counties of Wilkinson and Baldwin should be divided into five districts each, "as nearly equal in extent as circumstances will permit, by lines which shall run parallel with the dividing line between those counties," and "that the lands contained in the several districts shall be divided by lines running parallel with the dividing lines of districts, and by others crossing them at right angles, so as to form tracts of 45 chains square, containing 202½ acres each, plainly and distinctly marked, in a manner different from the ordinary mode heretofore pursued for marking lines in this state, to be pointed out by the surveyor general." Acts Ex. Sess. 1803, p. 3.

As appears from the map of survey adopted by the state and of file in the office of secretary of state, the land lying between the lower reaches of the Ocmulgee and Oconee rivers in originally Wilkinson, later Montgomery, now Wheeler, county, was laid off in accordance with the requirements of the act of 1803; that is to say, the lines of the lots are run at an angle of 45 degrees. In *Payton v. McPhaul*, 128 Ga. 511, 58 S. E. 50, 11 Ann. Cas. 163, it was held that "100 acres in the southeast corner" of a given lot of land, which contains 490 acres and is in the form of a square, is sufficient as a description. It was there said:

"The corner of the lot is to be taken as a base point from which two sides of the tract of land conveyed shall extend an equal distance, so as to inclose by parallel lines the quantity conveyed."

There, however, the lot lines run north and south and east and west; and the same is true of the lot of land referred to in *Osteen v. Wynn*, 131 Ga. 209, 62 S. E. 37, 127 Am. St. Rep. 212. Where the base line of the survey is a line running north and south or east and west, rulings in these cases apply; but in this case the base line is a line running at an angle of 45 degrees. Lot 17 in the sixth district of Wheeler county has a north, an east a south, and a west corner, but no southeast corner. The land described in the declaration is "fifty acres in a square." If the plaintiff should recover, to what corner of the lot would the sheriff proceed, in accordance with the mandate of the writ, to admeasure the 50 acres in the form of a square? If he should proceed to the east corner, the ambiguity is at once apparent, because 50 acres in the east corner of the lot, in the form of a square, may with equal propriety be designated either as the northeast or the southeast quarter of the lot. Should he measure off 50 acres in the form of a square in the south corner of the lot, the same ambiguity arises; that is to say, a tract of land lying in the form of a square in the south corner may with equal propriety be designated as



either the southwest or the southeast quarter of the lot. Our conclusion, therefore, is that a patent ambiguity in the description of the land is apparent upon the face of the declaration, and that the ambiguity is incapable of removal by extrinsic evidence. It is unnecessary to add that the declaration contained no descriptive terms other than those set out in the first sentence of this opinion. The plaintiff did not offer to amend the declaration.

Judgment reversed.

All the Justices concur.

(150 Ga. 114)

JOHNSON v. CANTRELL et al. (No. 1588.)

(Supreme Court of Georgia. April 15, 1920.)

*(Syllabus by the Court.)*

**INJUNCTION**  $\Leftrightarrow$  147—REFUSAL OF INTERLOCUTORY INJUNCTION ON CONFLICTING EVIDENCE HELD NOT ABUSE OF DISCRETION.

On a preliminary hearing, the only judgment made by the judge was the refusal of an interlocutory injunction. The evidence objected to was not immaterial, nor was it an abuse of discretion to refuse an interlocutory injunction on conflicting evidence.

Error from Superior Court, Carroll County; J. R. Terrell, Judge.

Action by injunction by Mae Johnson against Willie Cantrell and others. Interlocutory injunction denied, and plaintiff brings error. Affirmed.

Boykin & Boykin, of Carrollton, for plaintiff in error.

Smith & Smith, of Carrollton, for defendants in error.

HILL, J. Judgment affirmed. All the Justices concur, except GILBERT, J., absent for providential cause.

(150 Ga. 140)

WRIGHT, Comptroller General, v. ALABAMA GREAT SOUTHERN R. CO. (No. 1722.)

(Supreme Court of Georgia. April 15, 1920.)

*(Syllabus by the Court.)*

**1. HIGHWAYS**  $\Leftrightarrow$  121—ACT CREATING BOARD OF COMMISSIONERS HELD TO CONFER UPON IT EXCLUSIVE POWER TO LEVY TAX FOR MAINTENANCE OF ROADS.

The act of the General Assembly approved August 15, 1914 (Acts 1914, p. 246), entitled "An act to create a board of commissioners of roads and revenues for the county of Dade; to provide for the selection of said commissioners who shall constitute the board; to prescribe their

terms of office, their duties, fix their salaries, and for other purposes," confers upon the board of commissioners of roads and revenues the exclusive power, theretofore exercised by the ordinary, to levy a tax for the maintenance of the public roads of Dade county. See *Ralls County v. U. S.*, 105 U. S. 783, 28 L. Ed. 1220; *Pennington v. Gammon*, 67 Ga. 456; *Garrison v. Perkins*, 137 Ga. 751, 752, 74 S. E. 541; *Matthews v. Husey*, 148 Ga. 526, 97 S. E. 437.

**2. HIGHWAYS**  $\Leftrightarrow$  125—LEVY OF MAXIMUM RATE FOR MAINTENANCE UNDER ALTERNATIVE ROAD LAW HELD TO BAR ADDITIONAL OR SPECIAL TAX.

A county, after having adopted the alternative road law, as embodied in Civ. Code 1910, § 694 et seq., and after having levied the maximum rate of \$4 per thousand for the maintenance of the public roads of the county, cannot levy an additional or special tax for that purpose. See *Central of Georgia Railway Co. v. Meriwether County*, 148 Ga. 423, 96 S. E. 884.

Certified Questions from Court of Appeals.

Proceedings between W. A. Wright, Comptroller General, and the Alabama Great Southern Railroad Company. Judgment for the latter, and the former brings error. On questions certified by Court of Appeals. Questions answered.

This case came before the Supreme Court upon questions certified by the Court of Appeals, as follows:

"(1) Does the act of the General Assembly of the state of Georgia approved August 15, 1914 (Acts of 1914, p. 246), entitled 'An act to create a board of commissioners of roads and revenues for the county of Dade; to provide for the selection of said commissioners who shall constitute the board; to prescribe their terms of office, their duties, fix their salaries, and for other purposes,' confer exclusive authority upon the said commissioners to levy a tax for the maintenance of public roads of Dade county, or is that authority, under the provisions of this act, still vested in the ordinary of that county?"

"(2) Having levied the maximum tax of \$4 per thousand under the act of the General Assembly approved October 21, 1891, known as the alternative road law (Civil Code of 1910, § 694 et seq.), did either the ordinary or the board of commissioners of Dade county have the authority to levy a special or additional tax to maintain the public road in excess of \$4 per thousand?"

Martin G. Smith, of Chattanooga, Tenn., for plaintiff in error.

Maddox, McCamy & Shumate, of Dalton, and S. J. Hale, of Trenton, for defendant in error.

GEORGE, J. Questions answered as shown in headnotes. All the Justices concur, except GILBERT, J., absent for providential cause.

(150 Ga. 98)

**WALKER v. OLARKE**, Warden. (No. 1592.)

(Supreme Court of Georgia. April 14, 1920.)

*(Syllabus by the Court.)***HABEAS CORPUS**  $\S$ 85(1), 111(1)—**OVERRULING OF MOTION TO SET ASIDE JUDGMENT CONCLUSIVE AS TO VALIDITY.**

This is a case of habeas corpus, in which the petitioner attacks the judgment and sentence upon which his imprisonment is predicated, the grounds of attack being alleged want of jurisdiction of the court rendering the judgment and imposing the sentence; it not appearing, however, on the face of the record that the court was without jurisdiction. The alleged reasons of the illegality of the petitioner's imprisonment are the same as set up by him in his motion to set aside the same judgment, which motion was overruled in the trial court, and the trial court's judgment was affirmed by the Court of Appeals (*Walker v. State*, 24 Ga. App. —, 101 S. E. 591), holding that the court rendering the judgment had jurisdiction. The Supreme Court subsequently refused a writ of certiorari in that case to the Court of Appeals. The writ of habeas corpus was sued out, and a judgment rendered therein adverse to the petitioner pending the writ of error in the Court of Appeals as to the motion in arrest of judgment. *Held*, that the judgment of the trial court, rendered prior to the suing out of the writ of habeas corpus, overruling the motion to set aside the judgment and sentence, was conclusive upon the defendant as to the validity of the judgment; and the judgment overruling the motion to set aside being by a court of competent jurisdiction, and affirmed by the Court of Appeals on review, the defendant cannot be discharged upon habeas corpus. *Daniels v. Towers*, 79 Ga. 785, 7 S. E. 120.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Habeas corpus by Willie Walker against A. A. Clarke, Jr., Warden. Judgment for defendant, and plaintiff brings error. Affirmed.

S. C. Crane and Claud D. Rowe, both of Atlanta, for plaintiff in error.

**FISH, C. J.** Judgment affirmed. All the Justices concur.

(150 Ga. 115)

**WALL v. WALL** (No. 1595.)

(Supreme Court of Georgia. April 15, 1920.)

*(Syllabus by the Court.)***1. APPEAL AND ERROR**  $\S$ 303—**GENERAL GROUNDS OF A NEW TRIAL DO NOT REQUIRE VERIFICATION.**

"What are commonly called the general grounds of a motion for a new trial—that is, those complaining that the verdict is contrary

to the evidence, without evidence to support it, etc.—contain no recital of fact which requires a verification by the trial judge in order to authorize such grounds to be entertained." *Harris v. State*, 120 Ga. 196, 47 S. E. 578.

**2. APPEAL AND ERROR**  $\S$ 977(4)—**FIRST GRANT OF NEW TRIAL NOT DISTURBED.**

The evidence in the case did not demand the verdict, and, this being the first grant of a new trial, the judgment of the court below, sustaining the motion for a new trial, will not be disturbed here.

Error from Superior Court, Richmond County; J. C. C. Black, Jr., Judge.

Action between H. M. Wall and M. R. Wall. Judgment for the latter, new trial granted, and the former brings error. Affirmed.

Isaac S. Peebles, Jr., of Augusta, for plaintiff in error.

Wm. H. Fleming, of Augusta, for defendant in error.

**BECK, P. J.** Judgment affirmed. All the Justices concur, except GILBERT, J., absent for providential cause.

(150 Ga. 116)

**BRANTLEY v. ATWOOD et al.** (No. 1629.)

(Supreme Court of Georgia. April 15, 1920.)

*(Syllabus by the Court.)***1. EXECUTION**  $\S$ 194(3)—**EVIDENCE HELD TO SUSTAIN FINDING THAT LAND CLAIMED BY THIRD PERSON WAS SUBJECT TO EXECUTION.**

Several executions in favor of the defendants in error were levied upon a tract of land as the property of the defendant in *fi. fa.* A claim was interposed by the father-in-law of the defendant. The evidence of legal title introduced upon the trial by the claimant was a deed in due form, executed by the defendant in *fi. fa.* subsequently to the judgments and levies; but the claimant contended that he purchased the land from the defendant prior to the judgments against the defendant, gave his promissory notes for the purchase money, and had the deed conveying the land to the defendant in *fi. fa.* transferred to him. A considerable part of the purchase money alleged to have been paid on the notes was paid after the dates of the judgments against the defendant in *fi. fa.*, and a part of the purchase money was paid to the wife of the defendant, the daughter of the claimant. The land was not returned for taxes by the claimant for the year after his alleged purchase. The evidence tended to show that the claimant, prior to the trial, stated that he paid the entire purchase price of the land in cash on the date of his purchase. The defendant in *fi. fa.* was insolvent. *Held*, the verdict finding the land subject to the executions is supported by the evidence. See *Gregory v. Gray*, 88 Ga. 172, 14 S. E. 187.

## 2. MOTION FOR NEW TRIAL.

The court did not err in overruling the motion for new trial, which contained only the usual general grounds.

Error from Superior Court, Bulloch County; R. N. Hardeman, Judge.

Proceeding between J. M. Brantley and Lucy Atwood, administratrix, and others. Judgment for the latter, and the former brings error. Affirmed.

H. B. Strange, of Statesboro, for plaintiff in error.

H. M. Jones and Johnston & Cone, all of Statesboro, for defendants in error.

GEORGE, J. Judgment affirmed. All the Justices concur, except GILBERT, J., absent for providential cause.

(150 Ga. 109)

WHEELER v. ATLANTIC COAST LINE R. CO. et al. (No. 1645.)

(Supreme Court of Georgia. April 14, 1920.)

(Syllabus by the Court.)

## FOLLOWED CASE.

This case is controlled by the rulings made in Robinson v. Central of Georgia Railway Co., 102 S. E. 532, decided February 25, 1920.

Certified Questions from Court of Appeals.

Action by L. M. Wheeler against the Atlantic Coast Line Railroad Company and others. On certified questions from the Court of Appeals. Questions answered.

Titus, Dekle & Hopkins, of Thomasville, for plaintiff in error.

Bennet & Branch, of Quitman, and Merrill & Grantham, of Thomasville, for defendants in error.

GEORGE, J. This case is controlled by the rulings made in Robinson v. Central of Georgia Railway Co., 102 S. E. 532, decided February 25, 1920.

All the Justices concur, except GILBERT, J., absent for providential cause.

(150 Ga. 131)

JORDAN v. BARKSDALE et al. (No. 1665.)

(Supreme Court of Georgia. April 15, 1920.)

(Syllabus by the Court.)

CANCELLATION OF INSTRUMENTS  $\Leftrightarrow$  37(5)—PETITION TO CANCEL DEED HELD SUFFICIENT.

The petition in this case was sufficient to withstand a general demurrer.

Error from Superior Court, Washington County; R. N. Hardeman, Judge.

Suit by Mrs. Maud Barksdale and another against Mrs. S. L. Jordan. General demurrer to petition overruled, and defendant brings error. Affirmed.

Mrs. Pauline Page and Mrs. Maud Barksdale brought their equitable petition against Mrs. S. L. Jordan, and alleged substantially as follows: On November 2, 1916, they signed a deed which purported to convey to Mrs. Jordan a life estate in two certain tracts of land containing 275 acres, more or less, that were inherited by the plaintiffs from Zacharias Smith, deceased, their father. The defendant is their mother. The deed was obtained through fraud and misrepresentations; it was not freely and voluntarily executed by the plaintiffs, and they received no consideration whatsoever for the lands in controversy, but their signing of the deed was the result of fraud practiced upon them by their mother and their brother, Farris Smith, who, knowing that the husband of Mrs. Pauline Page had left home to go to his place of business, went to her home at a time when she was sick and in a highly nervous condition, and when she was under the treatment of a physician, just before the birth of her child, and when she was in no condition to transact business, and tried to induce her to sign the deed; whereupon she refused and referred the matter to her husband, C. A. Page. Farris Smith was acting for the defendant, Mrs. Jordan; and after the refusal by Mrs. Page to sign the deed he went away, but he shortly returned accompanied by Mrs. Jordan and two other persons who he said would serve as witnesses. Mrs. Page again declined to sign the deed; whereupon her mother, Mrs. Jordan, with tears and entreaties represented to Mrs. Page that if she did not sign the deed that Mrs. Jordan would be thrown out-of-doors and on the cold mercy of the world, and represented that all her other children had agreed to sign the deed, when as a matter of fact one of the heirs, Mrs. Maud Barksdale, had not so agreed. Mrs. Page, being thus imposed upon by the conduct of the defendant, and shrinking from the company of those who had been brought into her home without her consent, appealed to her mother to permit her to submit the paper to her husband, but Mrs. Jordan and Farris Smith pressed upon her the immediate necessity of signing the paper, and, taking advantage of her physical condition, forced her to sign the deed over her protest and against her will. The defendant, knowing Mrs. Page's condition and taking advantage of it when she refused to sign the deed, said that if she did not sign the deed the defendant would be thrown out of her home, and that she had nothing to live for

and would kill herself. Immediately after she signed the deed Mrs. Page sought to have her name erased, but the defendant refused to permit her to see it or to come near to her, and from that day to the time of the filing of the petition she has refused to visit Mrs. Page or to have anything to do with her. Immediately after thus securing the signature of Mrs. Page, the defendant went to the home of Mrs. Maud Barksdale, about 14 miles in the country, and represented to her that all of the children of Zacharias Smith, deceased, had freely and voluntarily signed the deed, and stated that it was also her duty to sign it, and said to her the same words and made the same representations, and her conduct was the same as when she induced Mrs. Page to sign the deed, which are set out above. The prayer of the petition was that the deed, so far as it related to the plaintiffs, be canceled. A general demurrer to the petition was filed by the defendant, which was overruled, and the defendant excepted.

A. R. Wright and Jordan & Harris, all of Sandersville, for plaintiff in error.

Evans & Evans, of Sandersville, for defendants in error.

HILL, J. (after stating the facts as above). The petition as amended contained allegations of fraud and duress. There was no special demurrer; and we think that as a whole, against a general demurrer, the petition set out a cause of action, and that the court did not err in overruling the general demurrer. Civil Code 1910, §§ 4116, 4152, 4255, 4629; Whitt v. Blount, 124 Ga. 671, 53 S. E. 205 (2). See, also, Dorsey v. Bryans, 143 Ga. 186, 84 S. E. 467, Ann. Cas. 1917A, 172.

Judgment affirmed.

All the Justices concur, except GILBERT, J., absent for providential cause.

(150 Ga. 106)

**GILLESPIE v. GILLESPIE et al.**  
(No. 1687.)

(Supreme Court of Georgia. April 14, 1920.)

(Syllabus by the Court.)

**SPECIFIC PERFORMANCE** — 123 — **TRUSTS** — 81(4), 111, 372 — **WHETHER PLAINTIFF ENTITLED TO RELIEF HELD FOR JURY; LAND BELONGING TO PLAINTIFF WITH TITLE IN DEFENDANTS HELD RESULTING TRUST; LACHES HELD QUESTION FOR JURY.**

Under the evidence in the case the court should have submitted the question of the plaintiff's right to the relief sought to the jury under proper instructions, and the grant of a nonsuit was error.

Error from Superior Court, Gordon County; M. C. Tarver, Judge.

Suit by Mrs. S. A. Gillespie against W. J. Gillespie and another. Decree for defendants granting a nonsuit, and plaintiff brings error. Reversed.

Mrs. S. A. Gillespie in the year 1918 brought her petition against W. J. and R. J. Gillespie, her sons (referred to in the testimony as Jim and Bob Gillespie), alleging that the sum of \$3,000, which was her property, was invested by the defendants in a certain described tract of land; that this land was bought by her sons, and a deed conveying the property to them was executed by the vendor; that it was understood between the petitioner and her sons that the sons could take a deed in their own names, "on the agreement that the land was to be hers, and when it was sold the money was to be hers; if the land was not sold a deed was to be made putting the title in her whenever she demanded"; that the defendants had not sold the land, had not repaid petitioner the money, and had not executed a deed to her, although she had demanded it. She does not know what arrangements defendants have made between themselves with regard to the land, but her understanding is that Jim has secured a deed from Bob to his pretended half interest in the land, and that Jim now claims title to the entire interest. Petitioner has insisted that Jim comply with his agreement to convey the land to her. He has promised to comply, but has sought to evade petitioner and put off her demand from time to time. At one time she agreed to accept a deed to 100 acres of the land on which the house is located, in order to avoid a lawsuit. Jim Gillespie has also borrowed certain money and given a deed to the property to secure the payment of the sum so borrowed, and he has conveyed 160 acres of the land to named persons. None of the vendees in these deeds were made parties to the petition. The plaintiff prays for injunction restraining the defendants from transferring, assigning, or collecting the notes given for the purchase money of the 160 acres of land sold; that she be decreed to have title to all the land described except this 160 acres; and for specific performance of the agreement to convey.

At the trial, after submission of evidence by the plaintiff, the court granted a nonsuit. To this judgment the plaintiff excepted.

Geo. A. Coffee and Lang & Lang, all of Calhoun, for plaintiff in error.

Starr & Paschall, of Calhoun, and M. B. Eubanks, of Rome, for defendants in error.

BECK, P. J. (after stating the facts as above). We are of the opinion that under all the evidence in the case the issues involved

should have been submitted to the jury with proper instructions, and the jury should have decided whether or not under the pleadings and the evidence the plaintiff was entitled to a verdict for at least a part of the relief sought. One of the plaintiff's prayers was that the court decree the title to the land to be in the plaintiff, and another was for specific performance. If \$3,000 of the plaintiff's money, as she contends, was used to purchase the land in question and the other was raised by loans, and the lender was secured by a mortgage or security deed, and it was the understanding that while a deed was to be taken from the vendor conveying to the defendants, the land was to be the property of the petitioner, then a resulting trust was created, and the beneficial interest in the property was in the plaintiff. Civil Code, §§ 3740, 3739; *Wilder v. Wilder*, 138 Ga. 573, 75 S. E. 654. The plaintiff herself testified at length in the case. She is nearly 80 years of age, and it is evident that her memory was not always perfectly clear as to a part of the transaction in regard to which she testified. But she does testify positively that one piece of realty, her property, was sold for a stated sum, and that \$3,000 of this money was invested in the land in controversy. There is some confusion in her statements as to what was done with other sums of money arising from other sources, but her testimony is direct as to the sum of \$3,000 belonging to her which was paid upon the land sought to be recovered in this action. And she attempted an explanation as to how the remainder of the purchase money was raised by a loan, and that a security deed conveying the property in controversy was given to the lender. There were other facts testified to corroborating her testimony.

The defendants in error contend that under the evidence, if petitioner was ever entitled to a deed conveying the property to her, or if there ever existed a resulting trust in her favor, she is now barred by laches from recovering. They point out that in her testimony in one place she says that nine years ago she demanded a deed of Jim Gillespie, and that he refused to give it; but it does not appear that he denied she had the beneficial interest in the property; and there is other language used in the testimony from which it might be inferred that subsequently to the time when Jim refused to execute the deed she had insisted in conversation with him that the property was hers; and, besides, she testified positively that she had been in possession of the property all the time, and that Jim lived there with her. In the opening sentence in her testimony it is true she used the expression that her son "is in possession of some land that I am in possession of," referring to the property in con-

troversy. But elsewhere in the testimony, although she states that Jim Gillespie was there on the property and his wife did part of the household work, such as cooking, etc., she said that she also did a part of the household work and the possession was hers. In view of the testimony upon this subject and the character of the testimony, it would be a question for the jury to decide, under the court's instructions, whether or not the plaintiff had been guilty of such laches as to bar her right to a recovery, if it should appear from other evidence that her money had purchased the land, as she contends. In this connection see *Teasley v. Bradley*, 110 Ga. 497, 35 S. E. 782, 78 Am. St. Rep. 113. The court was not authorized to decide as a matter of law either that plaintiff had not shown a resulting trust in her favor, or that she was barred from asserting her right to recover by reason of laches.

Accordingly the judgment of the court granting a nonsuit is reversed.

All the Justices concur, except GILBERT, J., absent for providential cause.

(150 Ga. 98)

#### KNIGHT v. BROWN. (No. 1568.)

(Supreme Court of Georgia. April 14, 1920.)

(Syllabus by the Court.)

APPEAL AND ERROR §1001(1)—VERDICT SUPPORTED BY EVIDENCE NOT DISTURBED.

The verdict is supported by evidence, and none of the assignments of error show cause for reversal.

Error from Superior Court, Sumter County; Z. A. Littlejohn, Judge.

Action between A. L. Knight, executrix, and Mary Brown. Judgment for the latter, and the former brings error. Affirmed.

Shipp & Sheppard and Maynard & Williams, all of Americus, for plaintiff in error.

Wallis & Fort, of Americus, for defendant in error.

HILL, J. Judgment affirmed. All the Justices concur.

(150 Ga. 119)

#### SIMPSON v. McMILLAN. (No. 1621.)

(Supreme Court of Georgia. April 15, 1920.)

(Syllabus by the Court.)

COURTS §217—COURT OF APPEALS HELD TO HAVE JURISDICTION WHERE PRAYER FOR CANCELLATION WAS NOT PERTINENT.

Where there was a suit upon a promissory note given for the purchase price of certain machinery and the defendant pleaded failure

of consideration and certain matters by way of recoupment, and a verdict was rendered for the plaintiff, the Court of Appeals of this state and not this court has jurisdiction of the case on appeal. The prayer for cancellation of the note sued on was not pertinent to the defense and cannot have the effect of conferring the suit into an equitable cause cognizable by this court on appeal.

Error from Superior Court, Cobb County; N. A. Morris, Judge.

Action by G. W. McMillan against M. M. Simpson. Judgment for plaintiff, a new trial was denied, and defendant brings error. Transferred to Court of Appeals.

G. W. McMillan brought suit upon a promissory note against M. M. Simpson. The defendant filed his plea and answer and set up as a defense to the suit that the promissory note sued on, together with another note for a stated amount, had been given for the purchase price of a cotton gin, a cotton press, and certain other machinery. The note first falling due had been paid. The defendant pleaded failure of consideration, alleging that the machinery was not adapted to the purposes intended; that the plaintiff at the time of the sale knew this; and that he had induced the defendant, by certain fraudulent representations as to the value of the machinery, etc., to make the purchase and give the notes, one of which is now sued on. The defendant also pleaded certain matters by way of recoupment. The plea of recoupment was stricken, but the demurrer filed by the plaintiff to the plea of failure of consideration was overruled. Upon the trial the jury returned a verdict for the plaintiff for the amount sued for. A motion for a new trial was made by the defendant, which was overruled, and defendant excepted and brought the case to this court for review.

Neufville & Neufville, of Atlanta, for plaintiff in error.

Abbott & Wallace, of Marietta, for defendant in error.

BECK, P. J. (after stating the facts as above). This court is without jurisdiction to entertain this writ of error, and it must be transferred to the Court of Appeals. This was merely a suit upon a promissory note, and a plea of failure of consideration. The defenses are altogether legal in nature; the fraud alleged could be shown in defense to the note in a common-law action. The defense is not equitable in its nature. The mere fact that the defendant, after setting up matters cognizable in a court of law as defense, adds a prayer that the note be canceled, will not give this court jurisdiction on the ground that this is a case in equity. Appropriate matters of defense are pleaded to defeat the collection of the note. The

cancellation of the note sued on was not necessary to a complete defense. Parties cannot by a mere prayer for cancellation, under the circumstances here shown, divest the Court of Appeals of jurisdiction and confer jurisdiction upon this court.

The case will therefore be transferred to the Court of Appeals.

All the Justices concur, except GILBERT, J., absent for providential cause.

(150 Ga. 119)

### MEDLIN v. STATE. (No. 1615.)

(Supreme Court of Georgia. April 15, 1920.)

#### (Syllabus by the Court.)

#### RULING ON MOTION FOR NEW TRIAL.

There was no abuse of discretion on the part of the trial court in overruling the extraordinary motion for a new trial, based upon newly discovered evidence. *Norman v. Goode*, 121 Ga. 449, 49 S. E. 268.

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

W. B. Medlin was prosecuted for crime, and from the judgment he brings error. Affirmed.

See, also, 98 S. E. 551.

Julian F. Urquhart and Nottingham & Reitz, all of Macon, for plaintiff in error.

John P. Ross, Sol. Gen., of Macon, Clifford Walker, Atty. Gen., and M. C. Bennet, of Atlanta, for the State.

BECK, P. J. Judgment affirmed. All the Justices concur, except GILBERT, J., absent for providential cause.

(150 Ga. 139)

### HOGG v. C. V. TRUITT CO. (No. 1654.)

(Supreme Court of Georgia. April 15, 1920.)

#### (Syllabus by the Court.)

#### 1. EXECUTION $\Leftrightarrow$ 53—SALE WITHOUT RECORDING DEED CONVEYING LAND TO JUDGMENT DEBTOR WAS VOID.

Where a vendor of land who retained the title obtained against the vendee a judgment for the balance of the purchase money, and had the land levied on and sold under an execution issued upon such judgment, without first having recorded a deed conveying the land to the vendee, the sale was void, and the deed executed by the sheriff was ineffectual to convey legal title to the purchaser. *National Bank of Athens v. Danforth*, 80 Ga. 55, 7 S. E. 546(6); *McCord v. McGinty*, 99 Ga. 307, 25 S. E. 667; *Dedge v. Bennett*, 138 Ga. 787, 76 S. E. 52; *Coates v. Jones*, 142 Ga. 237, 82 S. E. 649(1); *Coleman v. Lancaster*, 148 Ga. 757, 98 S. E. 269(1).

**2. EXECUTION ~~¶~~245—DEBTOR PRESENT AT RESALE WITHOUT OBJECTION COULD NOT QUESTION ITS VALIDITY.**

The vendee may bar himself of his right to demand that the sale be set aside by acts of ratification on his part; and where the vendee, the defendant in execution, was present at the judicial sale of the property levied upon as his own, and bid off the same on November 7, 1916, but failed to pay for the same, and the land was readvertised under the same levy and again sold on the first Tuesday in December, 1916, at which sale the vendee was also present and did not object to the sale, although he did not again bid for the property, he is estopped and cannot question the validity of the sale. Civil Code 1910, § 6077; *Mock v. Stuckey*, 96 Ga. 187, 23 S. E. 307; *Ashley v. Cook*, 109 Ga. 653, 35 S. E. 89. The case of *Upchurch v. Lewis*, 53 Ga. 621, decided before the adoption of the Code of 1895, in which section 6077, *supra*, first appeared, is distinguishable on its facts from the present case. In that case the vendee did not by any act of his induce others to purchase.

**3. EXECUTION ~~¶~~256(2)—DEBTOR PRESENT AT RESALE UNDER ORIGINAL LEVY WITHOUT OBJECTION COULD NOT SET ASIDE THE RESALE.**

There was no error in admitting evidence to the effect that the defendant in execution had bid for the property at the November sale, had become the successful bidder therefor, and had failed to pay the amount of his bid, and that the land was readvertised under the original levy and again sold on the first Tuesday in December following, at which time the vendee was again present and had knowledge of the fact that the land was being sold under the original levy, and did not protest against it. The court did not err in granting a nonsuit.

Error from Superior Court, Troup County; J. R. Terrell, Judge.

Action by W. F. Hogg against the O. V. Truitt Company. Judgment of nonsuit, and plaintiff brings error. Affirmed.

B. J. Mayer, of West Point, for plaintiff in error.

A. H. Thompson and E. T. Moon, both of La Grange, for defendant in error.

GEORGE, J. Judgment affirmed. All the Justices concur, except GILBERT, J., absent for providential cause.

(150 Ga. 92)

JONES v. JONES. (No. 1674.)

(Supreme Court of Georgia. April 18, 1920.)

(Syllabus by the Court.)

**CUSTODY OF MINOR CHILD.**

The judge of the superior court did not err in overruling the certiorari to review the judgment of the ordinary awarding the custody of a minor child to the defendant on habeas corpus.

Error from Superior Court, Pulaski County; E. D. Graham, Judge.

Proceedings between Mollie Jones and Salie Jones. Judgment for the latter, and the former brings error. Affirmed.

M. S. Means and H. E. Coates, both of Hawkinsville, for plaintiff in error.

D. R. Pearce, of Hawkinsville, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(150 Ga. 103)

RAINES v. HARRIS. (No. 1630.)

(Supreme Court of Georgia. April 14, 1920.)

(Syllabus by the Court.)

**HABEAS CORPUS ~~¶~~99(2)—CUSTODY OF MINOR DAUGHTER TO MOTHER HELD, ON THE EVIDENCE, NOT ABUSE OF DISCRETION.**

Considering all the evidence in this case, which was a habeas corpus proceeding to obtain possession of a minor child, it does not appear that the court abused his discretion in awarding the custody of the child to the petitioner, who is the mother.

Error from Superior Court, Upson County; W. E. H. Searcy, Jr., Judge.

Habeas corpus by Martha J. Harris against William Raines, to secure possession and custody of petitioner's minor daughter. From a judgment awarding custody to petitioner, respondent brings error. Affirmed.

Martha J. Harris, the widow of Thomas J. Harris, brought habeas corpus against William Raines to secure possession and custody of Roxie Harris, her daughter, who was 15 years of age. Thomas J. Harris died in 1918, having been killed by parties unknown. Decedent left a will appointing William Raines as the testamentary guardian of his daughter, Roxie Harris. Thomas J. Harris and his wife were living in a state of separation at the time of his death, and had been so living for several years. At the hearing there was evidence to show that both the petitioner and the respondent were fit custodians of the minor child. The evidence in favor of the respondent was especially strong. An affidavit was submitted at the hearing, made by Roxie Harris, stating that she had been well treated from the time that she went to the home of her guardian, not only by the guardian, but by his father and his sisters with whom he lived; that she was satisfied with her home and did not desire to change it. She stated, further, that she had been charged with the killing of her father, was tried for it, and was acquitted; that before her trial she told her guardian how the killing

occurred, who was responsible for it, and who induced her to do the killing; that her guardian, William Raines, had never objected to her speaking to her mother and to her brothers and her sisters; and that she desired to remain in the custody and control of her guardian, and did not wish to go with her mother. There was other evidence relating to the confinement of Roxie Harris in jail, charged with the murder of her father, and of her guardian having cared for her and having employed lawyers to defend her, which defense was successful, she having been acquitted. The mother testified also that she tried to see her daughter while she was confined in jail, but was refused admission.

When the introduction of evidence was concluded the judge of the superior court, hearing the case, announced that he would award the custody of the girl to her guardian, William Raines. But before the judgment was signed by the court Roxie Harris, who was present in the court room, began to cry, and, being called forward by the judge and asked what was the matter, she told him that she wanted to go to her mother, as she thought her mother was the person who should have her; that she had signed the affidavit which had been read in evidence by the respondent, and that it was in part the truth, but that she would rather go with her mother; that she was not well treated by members of her guardian's family, his sisters, and that the affidavit in this respect was not true. The court then took the matter under advisement, and several weeks later rendered his judgment, awarding the custody of the minor child to the petitioner, the mother, stating in the judgment that it appeared from the evidence that the welfare of the child would be best promoted by leaving her in the custody of her mother until otherwise ordered by the court. To this judgment the respondent excepted.

James R. Davis, of Thomaston, for plaintiff in error.

W. Y. Allen, of Thomaston, for defendant in error.

BECK, P. J. (after stating the facts as above). While the evidence tending to show the fitness of the respondent for the custody of the minor involved in this controversy is quite strong, there is some evidence tending to show that the mother is also a fit person; and we cannot reach the conclusion under the evidence that the court abused his discretion in awarding the custody of the child to the petitioner. It is true that the mother and father had lived in a state of sep-

aration for quite a while before the father's death, and at the time of his decease a suit for divorce was pending; but no divorce had been granted. The minor whose custody is being considered here was more than 14 years of age, and her father had appointed the respondent testamentary guardian. But that is not conclusive as against the mother. It is declared in Civil Code, § 3022:

"Upon the death of the father, the mother is entitled to the possession of the child until his arrival at such age that his education requires the guardian to take possession of him. In cases of separation of the parents, or the subsequent marriage of the survivor, the court, upon writ of habeas corpus, may exercise a discretion as to the possession of the child, looking solely to his interest and welfare."

And if the law had remained unchanged by the act of 1913 (Acts 1913, p. 110) dealing with the subject of the custody of minor children, which is embodied in section 3022 (a) of Park's Code, we might have concluded that, under the provisions of section 3022 the minor in question here, having reached the age of 15 years, which is such an age that her "education requires the guardian to take possession," the court should have awarded the custody of the minor to the guardian, clearly shown to be a fit person to have the custody. But the act of 1913, just referred to, provides that—

"In all cases where the custody of any minor child or children is involved between the parents, there shall be no prima facie right to the custody of such child or children in the father, but the court hearing such issue of custody may exercise its sound discretion, taking into consideration all the circumstances of the case, as to whose custody such child or children shall be awarded, the duty of the court being in all such cases in exercising such discretion to look to and determine solely what is for the best interest of the child or children, and what will best promote their welfare and happiness, and make award accordingly."

And while in terms this statute just quoted relates to cases between parents where the custody of a minor child is involved, it is not inapplicable in a case like this, between the mother and a testamentary guardian appointed by the deceased father. And giving the statute the effect it would have if the controversy over the custody of the child were between the father and the mother, the disposition of the child under habeas corpus proceedings rested in the sound discretion of the court; and under all the facts it is not made to appear that the discretion of the court was abused.

Judgment affirmed.

All the Justices concur.



(150 Ga. 133)

## LEGG v. LEGG. (No. 1668.)

(Supreme Court of Georgia. April 15, 1920.)

*(Syllabus by the Court.)*1. DIVORCE  $\S$ 139½—AT CHAMBERS BEFORE RETURN TERM COURT COULD NOT DISMISS.

At chambers, before the return term, the court had no authority to dismiss the plaintiff's petition.

2. DIVORCE  $\S$ 214(4)—AWARD OF TEMPORARY ALIMONY AND ATTORNEY'S FEES HELD PROPER.

The trial judge did not err in awarding temporary alimony and attorney's fees, and in granting an interlocutory injunction restraining the defendant from disposing of certain property pending the determination of the issues of the case on final trial.

Error from Superior Court, Gordon County; M. O. Tarver, Judge.

Suit for divorce and alimony by Minnie Legg against L. N. Legg. Temporary alimony and attorney's fees awarded, with interlocutory injunction against disposition of defendant's property, and he brings error. Affirmed.

Starr & Paschall, of Calhoun, and Burreas & Dillard, of Atlanta, for plaintiff in error.

J. G. B. Erwin, Jr., of Calhoun, and Maddox, McCamy & Shumate, of Dalton, for defendant in error.

HILL, J. The suit for divorce and alimony was returnable to the February term, 1920, of the superior court. The judge of the superior court issued a rule nisi requiring the defendant to show cause on the 6th day of September, 1919, why temporary alimony and injunction should not be awarded as prayed. The defendant filed a plea to the jurisdiction of the court, and at the hearing at chambers in September, 1919, orally moved to dismiss the proceedings for alimony on the ground that no personal service of the defendant had been effected as required by law. The motion was overruled, and the court awarded temporary alimony, attorney's fees, and granted an interlocutory injunction restraining the defendant from disposing of certain property. The defendant excepted.

[1, 2] 1. At chambers, before the return term, the court had no authority to dismiss the petition. The appearance of the defendant at chambers was not in response to the process attached to the suit for divorce, etc., but was in response to the rule nisi issued by the judge to show cause why temporary alimony, etc., should not be granted. Hogan v. Hogan, 148 Ga. 151, 95 S. E. 972. The question of jurisdiction was a disputed issue in the case, and remained for determination in term time on the trial. Parker v.

Parker, 148 Ga. 196, 96 S. E. 211 (4). And see Brant v. Buckley, 147 Ga. 389, 94 S. E. 233; Tillman v. Peacock, 147 Ga. 391, 94 S. E. 234; Waycaster v. Waycaster, 150 Ga. —, 102 S. E. 353.

Temporary alimony is awarded, among other things, to the wife, for the purpose of enabling her to contest all of the issues between herself and her husband in a proceeding for divorce and alimony; and a plea to the jurisdiction in the present case is one of the issues raised and to be determined on final trial. Parker v. Parker, supra; Carnes v. Carnes, 138 Ga. 1, 3, 74 S. E. 785. As to the injunction features, see, also, Parker v. Parker, supra.

The court's authority to grant an injunction is dependent upon his jurisdiction in the divorce and alimony case; the injunction being ancillary to the main proceedings for divorce and alimony.

The trial judge did not err, under the facts of the case, in awarding temporary alimony and attorney's fees, and did not abuse his discretion as to the amount thereof, nor in granting an interlocutory injunction restraining the defendants from disposing of certain property pending the determination of the issues of the case on final trial.

Judgment affirmed.

All the Justices concur, except GILBERT, J., absent for providential cause.

(150 Ga. 116)

## LEGGETT v. PRIDGEN. (No. 1591.)

(Supreme Court of Georgia. April 15, 1920.)

*(Syllabus by the Court.)*1. APPEAL AND ERROR  $\S$ 522(1), 614—AGREED STATEMENT OF FACTS, SENT UP AS PART OF RECORD, BUT NOT APPROVED, CANNOT BE CONSIDERED.

"An alleged statement of facts not being set forth in the bill of exceptions, nor made a part of the same as an exhibit thereto and properly authenticated, what purports to be an agreed statement of facts, sent up as a part of the record, but not approved by the judge and ordered filed as such, cannot be considered by this court. Robinson v. Woodward, 134 Ga. 777 (68 S. E. 553); Blackman v. Garrett, 135 Ga. 226 (69 S. E. 110)."

2. APPEAL AND ERROR  $\S$ 1133—WHERE ERRORS CANNOT BE DETERMINED WITHOUT AGREED STATEMENT OF FACTS, JUDGMENT AFFIRMED.

"The errors assigned in the bill of exceptions being such as cannot be determined from the record without a consideration of such alleged agreed statement of facts so sent up, the judgment of the court below must be affirmed. Id." Silvey v. Brown, 137 Ga. 104, 72 S. E. 907; Scott v. Wage Earners' Loan & Investment Co., 147 Ga. 576, 94 S. E. 1021.

## 3. JUDGMENT AFFIRMED.

Applying the rulings above to the facts of this case, the judgment of the court below is affirmed.

Error from Superior Court, Coffee County; J. I. Summerall, Judge.

Action between Joe Leggett and J. D. Pridgen. Judgment for the latter, and the former brings error. Affirmed.

T. A. Wallace, of Douglas, for plaintiff in error.

L. E. Heath, of Douglas, for defendant in error.

HILL, J. Affirmed. All the Justices concur, except GILBERT, J., absent for providential cause.

(150 Ga. 111)

## JENKINS v. STATE. (No. 1694.)

(Supreme Court of Georgia. April 14, 1920.)

(*Syllabus by the Court.*)

1. HOMICIDE  $\S$  325—MOTION FOR NEW TRIAL FOR REFUSAL TO CHARGE ON MANSLAUGHTER SHOULD STATE THE GRADE, AND WHETHER VOLUNTARY OR NOT.

A ground of the motion for new trial, which complains that "the court failed to charge the law and [of] manslaughter," is not a good assignment of error, and cannot be considered by the Supreme Court. Each assignment must be complete within itself. If manslaughter should have been charged, it is necessary that the ground of the motion for new trial, complaining of the refusal to so charge, should state what grade of manslaughter, whether voluntary or involuntary. Knight v. State, 148 Ga. 40, 95 S. E. 679 (3).

2. OTHER ASSIGNMENTS.

Other assignments of error, where sufficient to raise a question for determination by the court, are without merit.

3. EVIDENCE SUPPORTING VERDICT.

The verdict is supported by evidence.

Error from Superior Court, Fulton County; John D. Humphries, Judge.

Will Jenkins was indicted for the offense of murder, and the jury trying him returned a verdict of guilty, with a recommendation to the mercy of the court. His motion for new trial being overruled, he excepted and brings error. Affirmed.

Thos. B. Brown and Chas. J. Graham, both of Atlanta, for plaintiff in error.

John A. Boykin, Sol. Gen., and E. A. Stephens, both of Atlanta, Clifford Walker, Atty. Gen., and M. O. Bennet, of Atlanta, for the State.

HILL, J. Judgment affirmed. All the Justices concur, except GILBERT, J., absent for providential cause.

(25 Ga. App. 173)

## ROBINSON v. STATE. (No. 11209.)

(Court of Appeals of Georgia, Division No. 1. April 13, 1920.)

(*Syllabus by the Court.*)

1. CHARGE OF COURT.

The excerpts from the charge of the court, complained of in the special grounds of the motion for a new trial, when considered in connection with the entire charge, contain no material error.

2. SUFFICIENCY OF EVIDENCE.

The evidence authorized the verdict, and the court did not err in refusing to grant a new trial.

Error from Superior Court, Bibb County; E. D. Graham, Judge.

Proceeding by the State against Cleveland Robinson. From the judgment, Robinson brings error. Affirmed.

John R. Cooper, W. O. Cooper, Jr., and J. A. Murray, all of Macon, for plaintiff in error.

Chas. H. Garrett, Sol. Gen., of Macon, for the State.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(25 Ga. App. 239)

## CUBA v. STATE. (No. 11237.)

(Court of Appeals of Georgia, Division No. 1. April 14, 1920.)

(*Syllabus by the Court.*)

1. GROUND OF MOTION WITHOUT MERIT.

There is no merit in the ground of the motion for a new trial in which it was contended that the defendant's right of cross-examination was unduly restricted by the court.

2. CHARGE OF COURT.

The court did not err in charging the jury on the law of shooting at another.

3. SUFFICIENCY OF EVIDENCE.

The evidence authorized the verdict.

Error from Superior Court, Fulton County; John D. Humphries, Judge.

Proceeding by the State against Charles Cuba. From the judgment and the denial of his motion for new trial, Cuba brings error. Affirmed.

H. A. Allen, of Atlanta, for plaintiff in error.

John A. Boykin, Sol. Gen., and E. A. Stephens, both of Atlanta, for the State.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(25 Ga. App. 130)

GILBERT v. DALTON COUNCIL NO. 30,  
J. O. U. A. M. (No. 11150.)(Court of Appeals of Georgia, Division No. 2.  
April 8, 1920.)*(Syllabus by the Court.)*

INSURANCE — 802, 815(1), 821—PETITION FOR DEATH BENEFITS HELD AGAINST A NATIONAL COUNCIL AND NOT THE LOCAL COUNCIL; WHERE LOCAL COUNCIL FAILED TO KEEP ITSELF IN GOOD STANDING TO MEMBER'S PREJUDICE ACTION BY DEPENDENT IS AGAINST IT FOR DAMAGES.

Mrs. J. J. Gilbert brought suit against the Dalton Council No. 30, Junior Order United American Mechanics, alleging substantially that her deceased husband was in good standing with the defendant at the time of his death, and that she was the widow and sole dependent of her deceased husband. To this petition was attached, as a part of the same, a copy of the policy or death benefit certificate, which provided that the National Council of Junior Order United American Mechanics of the United States of North America would pay to the Dalton Council of the legal dependent of J. J. Gilbert within 30 days from the receipt of the proof of his death the sum of \$500. The policy contained a condition that the Dalton Council should be at the time of the death of J. J. Gilbert in good standing with the national council, that is to say, that it had paid all assessments due to the funeral benefit department, and was otherwise in good standing with the national and state council having jurisdiction over the local council. It also contained the further condition that the member had not been received to membership or retained as a member in violation of the laws and decisions of the order, and that at the time of his death he was in good standing with the local council, and entitled to the death benefits in accordance with the constitution and laws of the local council as well as the state and national council. The plaintiff prayed for a judgment against the Dalton Council (the local council) for the amount of said policy. The defendant filed a general demurrer, upon the grounds: (1) That there was no cause of action set out in the petition; and (2) that the petition and the copy of the policy showed upon their face that the right of action, if any, was against the national council and not against the local council. The plaintiff then amended her petition, and in the amendment she alleged that her husband was in good standing as provided in the contract sued on; that proof of death had been made as provided in the policy; and that the defendant, the local council, had failed to pay to the funeral benefit department of the national council the premium necessary to keep her husband in good standing. To the petition as amended the general demurrer was renewed, and the court sustained the general demurrer and dismissed the petition. *Held*, that in the petition as amended the right of action, if any, in a suit upon the policy or contract of insurance, was against the national council and not against the local council. If the local council had failed and refused to

perform its duty to the member by failing to pay the premium due to the funeral benefit department of the national council, a right of action, if any, would arise in favor of the legal dependent against the local council for damages, and the legal measure of the damages would be the value of the policy. See *Woelfer v. Heyneman*, 2 N. Y. City Ct. R. 15; 7 Corpus Juris, 1110.

Error from Superior Court, Whitfield County; Moses Wright, Judge.

Action by Mrs. J. J. Gilbert against the Dalton Council No. 30, Junior Order United American Mechanics. Demurrer to amended petition sustained and petition dismissed, and plaintiff brings error. Affirmed.

Wm. E. & W. G. Mann, of Dalton, for plaintiff in error.

F. K. McCutchen, of Dalton, for defendant in error.

PER CURIAM. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

SMITH, J., disqualified.

(150 Ga. 121)

SIKES v. HART et al.

HART et al. v. SIKES.

(Nos. 1646, 1667.)

(Supreme Court of Georgia. April 15, 1920.)

*(Syllabus by the Court.)*

DAMAGES — 81—NOTE DEPOSITED AS LIQUIDATED DAMAGES FOR FAILURE TO DISCHARGE INCUMBRANCES FORFEITED ON BREACH.

The evidence in this case required the finding that under the contract between the parties, in accordance with which a certain rent note in controversy was delivered to one of the defendants, the note was given as liquidated damages in the event the other party to the suit (the plaintiff in error) should fail to perform his undertaking in accordance with the terms of the contract by paying off and discharging certain incumbrances, and further that he did fail in his performance of this undertaking. This being the case, the court did not err in directing a verdict. *Allison v. Dunwody*, 100 Ga. 51, 28 S. E. 651.

Error from Superior Court, Worth County; R. Eve, Judge.

Proceedings between J. B. Sikes and G. B. Hart and others. Judgment was entered, and both parties bring error. Affirmed on main bill of exceptions, and cross-bill dismissed.

Perry & Williamson, of Sylvester, for plaintiff in error.

Passmore & Forehand, of Sylvester, for defendants in error.

BECK, P. J. Judgment affirmed on the main bill of exceptions; cross-bill dismissed. All the Justices concur, except GILBERT, J., absent for providential cause.

(150 Ga. 121)

JONES et al. v. BOOTH. (No. 1651.)

(Supreme Court of Georgia. April 15, 1920.)

*(Syllabus by the Court.)*

1. TRIAL  $\S$ 139(1)—DIRECTED VERDICT IS PROPER, WHERE NO OTHER COULD HAVE BEEN RENDERED.

Under the evidence submitted no other verdict than the one directed could have been rendered. Accordingly, the judge did not err in directing the verdict for the plaintiff.

2. ISSUANCE OF ALIAS FI. FA.

There was a substantial compliance with the statute (Civ. Code 1910,  $\S$  5321) in regard to the issuance of an alias fi. fa. Ward v. Miller, 148 Ga. 164, 84 S. E. 480.

Error from Superior Court, Bulloch County; R. N. Hardeman, Judge.

Action by Hinton Booth against M. E. Jones and others. Judgment for plaintiff on a directed verdict, and defendants bring error. Affirmed.

Anderson & Jones, of Statesboro, for plaintiffs in error.

Brannen & Booth, of Statesboro, for defendant in error.

BECK, P. J. Judgment affirmed. All the Justices concur, except GILBERT, J., absent for providential cause.

(150 Ga. 88)

BURKHALTER v. ROACH.

ROACH v. BURKHALTER.

(Nos. 1573, 1574.)

(Supreme Court of Georgia. April 14, 1920.)

*(Syllabus by the Court.)*

ASSIGNMENTS OF ERROR.

This is the fourth appearance of this case in the Supreme Court. Burkhalter v. Roach, 142 Ga. 344, 82 S. E. 1059; Id., 145 Ga. 834, 90 S. E. 52; Id., 149 Ga. 565, 101 S. E. 123. In the main bill of exceptions no such errors are pointed out as having been committed by the trial court as will require a reversal. The general charge of the court covered the issues made in the case; and while there are some inaccuracies in the charge, they are not of such a nature as will cause the grant of a new trial. In so far as the requests to charge were pertinent and proper, they were covered by the main

charge. Other assignments of error are without substantial merit.

Error from Superior Court, Evans County; W. W. Sheppard, Judge.

Proceedings between G. V. Burkhalter and A. A. Roach. Judgment was rendered, and both parties bring error. Affirmed on main bill of exceptions, and cross-bill dismissed.

W. G. Warnell, of Savannah, J. S. Daniel, of Claxton, and W. T. Burkhalter, of Reidsville, for plaintiff in error.

Hines, Hardwick & Jordan, of Atlanta, John P. Moore, of Baker, Fla., and E. C. Elmore and P. M. Anderson, both of Claxton, for defendant in error.

HILL, J. Judgment affirmed on the main bill of exceptions. Cross-bill dismissed. All the Justices concur, except GILBERT, J., absent for providential cause.

(25 Ga. App. 122)

ALLEN et al. v. BROOKE. (No. 10995.)

(Court of Appeals of Georgia, Division No. 2. April 8, 1920.)

*(Syllabus by the Court.)*

1. ATTORNEY AND CLIENT  $\S$ 145—STIPULATED FEE RECOVERABLE, WHERE CLIENT PREVENTS PERFORMANCE BY SETTLEMENT.

Where an attorney at law accepts employment and agrees for a stipulated fee to handle certain litigation through the courts, and where the complete performance of such service is rendered impossible through no fault on his part, but by the act of his client in settling the case before trial, the attorney may recover the entire fee, where he remains in readiness to render complete performance.

2. ATTORNEY AND CLIENT  $\S$ 145—AGREEMENT TO HANDLE LITIGATION REQUIRES ATTORNEY TO DO GENERALLY ALL THAT IS NECESSARY TO SUCCESSFUL HANDLING OF CASE.

Such an agreement is not to do or perform certain specific services, such as looking up testimony, examining witnesses, consulting with client, etc., but is to do generally all that is necessary, including such specific services, when necessary to a successful handling of the litigation and achieving the desired result.

3. ATTORNEY AND CLIENT  $\S$ 145—WHERE PERFORMANCE OF SPECIFIC SERVICES WAS NOT NECESSARY TO SUCCESSFUL LITIGATION, ATTORNEY WAS NOT BOUND TO PERFORM THEM.

Even though the attorney may have stated his intention to perform such specific services mentioned, yet where it appears that he did, after employment, consult with the client with reference to the litigation, but where it does not appear that the performance of such services was necessary to the successful handling of the litigation under the general contract of employment, it cannot be said that the attorney has failed to comply with his obligation under the contract.

## 4. DIRECTED VERDICT.

The evidence demanding a finding of the facts as above stated, the verdict for the plaintiff for the stipulated attorney's fee agreed upon was properly directed.

Error from Superior Court, Forsyth County; N. A. Morris, Judge.

Action by J. P. Brooke against S. H. Allen and others. Verdict and judgment for plaintiff, and defendants bring error. Affirmed.

Geo. F. Gober, of Atlanta, and H. L. Patterson, of Cumming, for plaintiffs in error.

J. P. Brooke, of Alpharetta, for defendant in error.

STEPHENS, J. Judgment affirmed.

JENKINS, P. J., and SMITH, J., concur.

(25 Ga. App. 120)

**FOUNDATION CO. v. BRANNEN.**  
(No. 10736.)

(Court of Appeals of Georgia, Division No. 2.  
April 8, 1920.)

*(Syllabus by the Court.)*

**MASTER AND SERVANT**  $\S$  39(1)—**PETITION ON CONTRACT OF EMPLOYMENT HELD NOT DEMURRABLE.**

The petition alleged that on the 27th day of June, 1918, the plaintiff was employed by the defendant "at a salary of \$200 per month, by the month," and further alleged that "on the 28th day of December, 1918, defendant notified plaintiff that his services would terminate on the 1st day of January, 1919, but plaintiff, at request of defendant, continued to work for defendant until the 6th day of January, 1919, upon which date he was discharged by defendant and was paid the sum of \$39.54." Held, the petition declares upon a contract of employment by the month at a fixed monthly salary, the contract continuing for an indefinite period of time, with the right in either party to terminate it at the end of any month, and it was a question of fact for the jury whether or not the plaintiff, in continuing to work for the defendant, was acting under the original contract. The trial judge properly overruled the demurrer to the petition. See, in this connection, Civ. Code 1910, § 3133; Odom v. Bush, 125 Ga. 184, 53 S. E. 1013; Webb v. McCranie, 12 Ga. App. 269, 77 S. E. 175.

Error from City Court of Savannah; Davis Freeman, Judge.

Action by P. E. Brannen against the Foundation Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Stephens, Barrow & Heyward, of Savannah, for plaintiff in error.

Lee Cotton, of Savannah, for defendant in error.

STEPHENS, J. Judgment affirmed.

JENKINS, P. J., and SMITH, J., concur.

**COPE v. PETTIT.** (No. 11001.)

(Court of Appeals of Georgia, Division No. 2.  
April 8, 1920.)

*(Syllabus by the Court.)*

**1. SUFFICIENCY OF EVIDENCE.**

The verdict for \$150, recovered by the plaintiff in this case for injury to his crops and land, alleged to have been occasioned by the breaking of the defendant's dam, and the washing and overflowing of the land and crops with mud, was amply sustained by the evidence under the charge as given by the court.

**2. APPEAL AND ERROR**  $\S$  843(3)—**REFUSAL OF NONSUIT NOT CONSIDERED, WHERE INSUFFICIENCY OF EVIDENCE RAISED IN MOTION FOR NEW TRIAL.**

"An exception based upon the refusal of the court to award a nonsuit will not be considered, where, subsequently thereto, the case is submitted to the jury, and, a verdict being rendered against the defendant, a motion for a new trial is made, which presents the complaint that the verdict is contrary to the evidence and without evidence to support it." Trapnell v. Bird, 21 Ga. App. 21, 98 S. E. 498 (1), and the cases there cited.

**3. TRIAL**  $\S$  295(11)—**REFERENCE IN CHARGE TO AMOUNT OF DAMAGES CLAIMED HARMLESS, IN VIEW OF CHARGE AS A WHOLE.**

The reference in the charge to the amount of damages claimed by the plaintiff had manifest reference to the allegation made by the petition, which was stated to be without probative value, and while such reference was inapt, since the evidence for the plaintiff only authorized a recovery in a much lesser sum, still, since the charge as a whole clearly and correctly limited the jury to a finding in the amount of damages proved, such reference could not have been misleading, and will not justify setting the verdict aside.

**4. SUFFICIENCY OF EVIDENCE.**

The remaining grounds of the motion for a new trial, relating mainly to exceptions taken to the charge of the court, are all based upon the theory of the movant that the evidence fails to sustain the plaintiff's contentions, and none of them authorize this court to set the verdict aside.

Error from Superior Court, Bartow County; M. C. Tarver, Judge.

Action by G. L. Pettit against H. G. Cope. Judgment for plaintiff, and defendant brings error. Affirmed.

J. T. Norris, of Cartersville, for plaintiff in error.

A. W. Flte and J. R. Whitaker, both of Cartersville, for defendant in error.

JENKINS, P. J. Judgment affirmed.

STEPHENS and SMITH, JJ., concur.

(25 Ga. App. 234)

**THOMPSON v. STATE.** (No. 11213.)(Court of Appeals of Georgia, Division No. 1.  
April 14, 1920.)*(Syllabus by the Court.)***CRIMINAL LAW** §1160—**COURT OF APPEALS**  
CANNOT DISTURB APPROVED VERDICT SUP-  
PORTED BY SOME EVIDENCE.

The special grounds of the motion for a new trial in this case are but amplifications of the general grounds; there is some evidence to support the verdict, which has the approval of the trial judge; and under the uniform rulings of this court and of the Supreme Court this court is powerless to interfere.

Error from Superior Court, Randolph County; W. M. Harrell, Judge.

Proceeding by the State against John Thompson, and, from the judgment, Thompson brings error. Affirmed.

Chas. W. Worrill, of Outhbert, for plaintiff in error.

B. T. Castellow, Sol. Gen., of Outhbert, and R. R. Arnold, of Atlanta, for the State.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(25 Ga. App. 176)

**WRIGHT v. STATE.** (No. 11222.)(Court of Appeals of Georgia, Division No. 1.  
April 13, 1920.)*(Syllabus by the Court.)***INTOXICATING LIQUORS** §236(6½)—**EVI-**  
**DENCE HELD TO SUSTAIN CONVICTION OF UN-**  
**LAWFULLY POSSESSING INTOXICATING LIQ-**  
**UOR.**

The evidence did not authorize the verdict.

(a) The accused was indicted for possessing intoxicating liquors. The sheriff testified that he found "a still" (and it may be assumed, for present purposes, that it was a whisky still) on another person's land, from which a well-beaten path led to the home of the accused; that on approaching the house of the accused, who was a negro, he saw an unknown white man run from it; that, on entering it, the witness found that the accused was away from home, but his sister and another woman were present; that on searching the house he found a small quantity of whisky concealed between the mattresses on a bed, and "also found in an old tub, with some water in it, a suit of overalls, which had smut on them and stains that looked like they were caused by some one working around a still." The sister of the accused testified to the name of the white man and to his flight upon the sheriff's approach, and that he had come to the house only a few minutes before the sheriff came, during her brother's absence from home, and had brought the whisky with him,

and was about to make himself a toddy, when, seeing the sheriff approach, he hid the whisky where the sheriff found it, and then ran.

(b) The testimony of the state's witness, standing alone, did not demand a conviction. But the testimony of the defendant's witness, who was unimpeached, and whose testimony was uncontradicted and was corroborated in material particulars by the testimony of the state's witness, did, when considered alone, demand an acquittal. The evidence did not authorize the defendant's conviction. Penal Code 1910, § 1010; *Smith v. Atlanta*, 12 Ga. App. 816, 78 S. E. 472; *A. C. L. R. Co. v. Drake*, 21 Ga. App. 81, 94 S. E. 65 (4).

Error from Superior Court, Wilkes County; B. F. Walker, Judge.

Gus Wright was convicted of violating the Prohibition Laws, and he brings error. Reversed.

Clement E. Sutton, of Washington, Ga., for plaintiff in error.

R. C. Norman, Sol. Gen., of Washington, Ga., for the State.

LUKE, J. Judgment reversed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(25 Ga. App. 210)

**CRAWFORD v. HUNT.** (No. 10963.)(Court of Appeals of Georgia, Division No. 1.  
April 14, 1920.)*(Syllabus by the Court.)***1. BILLS AND NOTES** §108(1)—**ONE SIGNING**  
**NOTE WITHOUT READING CANNOT SET UP**  
**FRAUD.**

"One who signs an instrument written by the opposite party at interest therein, without reading it, when he is capable of doing so, cannot afterwards set up fraud in the procurement of his signature thereto, when no trick or artifice was resorted to for the purpose of inducing him to thus sign it, and it was not signed under any emergency requiring haste in its execution." *Rounsaville v. Leonard Mfg. Co.*, 127 Ga. 735, 56 S. E. 1080 (2).

**2. BILLS AND NOTES** §129(1)—**MATURITY OF**  
**NOTE PAYABLE IN ONE YEAR OR WHEN NAMED**  
**ESTATE IS WOUND UP STATED.**

A note payable one year after date, or as soon as a named estate is wound up, is due one year after the date of the note, or sooner if the estate is wound up prior to that time.

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by E. E. Hunt against Mrs. M. B. Crawford. Judgment for plaintiff, and defendant brings error. Affirmed.

Suit was filed on the 7th day of July, 1919, on a note dated June, 1917, and payable "one

year after date, or as soon as J. B. Crawford's estate is wound up." A demurrer was filed by the defendant as follows:

"She especially demurs to said petition because it does not allege whether or not 'J. B. Crawford's estate is wound up,' as suit cannot be maintained without such an allegation and proof thereof."

The demurrer was overruled. The defendant filed a plea, in which she admitted the signing of the note, but denied that it was due, for the reason that she called the attention of the attorney for the plaintiff to the fact that she could not pay the claim prior to the closing up of the Crawford estate, and that he agreed that the note should be so drawn, and when this agreement was reached "she left the wording to plaintiff's attorney, he being a lawyer and familiar with the construction of legal phraseology, and never doubted but that the wording used in the note meant just what they had agreed to, that the note should not become due until said estate was wound up." By amendment she alleged "that the estate of J. B. Crawford has not been wound up or closed, as was contemplated by the parties it should be before said note should be due." The presiding judge passed the following order:

"Upon motion of plaintiff's attorney, made in open court, the within plea and the amendment thereto is stricken, except the admissions contained therein, for the reason that the same sets up no legal defense to the note sued upon."

The defendant excepted to the overruling of the demurrer and to the order striking the plea as amended.

J. J. Barge, of Atlanta, for plaintiff in error.

McElreath & Scott, of Atlanta, for defendant in error.

BLOODWORTH, J. (after stating the facts as above). The court did not err in either of its rulings on the pleadings.

[1] 1. No emergency requiring haste in signing the note is alleged, and no confidential or fiduciary relation existed between the person who drew the contract and the defendant. Indeed the plea alleged that the note was drawn by the attorney for the plaintiff. "The parties were dealing at arm's length." "Where one who can read signs a contract without apprising himself of its contents, otherwise than by accepting representations made by the opposite party, with whom there exists no fiduciary or confidential relation, he cannot defend an action based on it, on the ground that it does not contain the contract actually made; unless it should appear that at the time he signed it some such emergency existed as would excuse his failure to read it, or that his failure to read it was brought about by some misleading artifice or

device perpetrated by the opposite party, amounting to actual fraud such as would reasonably prevent him from reading it." *Tinsley v. Gullett Gin Co.*, 21 Ga. App. 512, 94 S. E. 892 (2), and citations.

[2] 2. The court properly construed the words, "one year after date or as soon as J. B. Crawford's estate is wound up," to fix the maximum limit of the maturity of the note as one year after date. Contracts must be so construed, if possible, as to give effect to all the words and clauses thereof. The only way to give effect to the two clauses relating to the maturity of the note is to construe them to mean "one year after date, or as soon as J. B. Crawford's estate is wound up if prior to that time." Any other construction would render the words "one year after date" meaningless, and postpone the maturity of the note to some indefinite and uncertain time in the future.

Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(25 Ga. App. 106)

RYLE v. MACON NEWS PRINTING CO.  
(No. 10713.)

(Court of Appeals of Georgia, Division No. 2.  
April 7, 1920.)

(Syllabus by the Court.)

1. MASTER AND SERVANT  $\S$  236(3)—SERVANT RENDERED OBLIVIOUS OF KNOWN DEFECT BY ENGROSSING WORK MAY RECOVER.

While, in a suit by a servant against the master to recover for injuries alleged to have been caused from a defective machine operated by the master, it ordinarily must appear that the servant did not know of such defect in the machine, and by the exercise of ordinary care could not have known thereof, yet, as was held in the case of *King v. Seaboard Air Line Ry.*, 1 Ga. App. 88, 58 S. E. 252, "a servant may recover from his master for an injury occasioned by a dangerous instrumentality negligently maintained by the master, although it appear that the servant was not ignorant of the existence of such dangerous instrumentality, if it is shown that at the time of the injury the servant was rendered oblivious or otherwise incapable of exercising his information as to the existence of the dangerous thing, on account of the engrossing character of the work at hand."

2. MASTER AND SERVANT  $\S$  236(3)—ENGROSSING WORK HELD NOT TO EXCUSE INJURED SERVANT.

Where the engrossing work involves the use of the dangerous instrument itself, and it does not appear that the plaintiff had any duty to claim his care and attention, other than the doing of the very work by which he was injured, and that no other engrossing work claimed his attention, so as to distract it from an appreciation of what was involved in the act he was about to attempt, it cannot be said that

"the servant was rendered oblivious or otherwise incapable of exercising his information as to the existence of the dangerous thing." Moreover, in the King Case, supra, the "engrossing work" was such as diverted the servant's attention away from the danger, instead of, as in the instant case, fixed it upon the danger itself. See, in this connection, *Brown v. Rome Foundry Co.*, 5 Ga. App. 142, 62 S. E. 720.

**8. MASTER AND SERVANT** ¶236(3)—**SERVANT, FEEDING PRINTING PRESS KNOWN TO BE DEFECTIVE, HELD NOT ENTITLED TO RECOVER ON THEORY OF ENGROSSING CHARACTER OF WORK.**

It appearing from the petition in this case that the servant had actual knowledge of the defect alleged to have been the proximate cause of the injury, and it not appearing that the servant was rendered oblivious of the danger by reason of his work, the trial court properly dismissed the petition on general demurrer.

Error from City Court of Macon; Du Pont Guerry, Judge.

Action by S. G. Ryle against Macon News Printing Company. Judgment for defendant, and plaintiff brings error. Affirmed.

The material allegations in the petition are that the plaintiff was employed by the defendant as foreman in charge of its printing press, and, in case the web of the paper should break while running through the press, it was his duty to catch the end of the web and lead the web or feed it into the press until caught up by the rollers and carried by them through the press; that the operation of the press is controlled by a clutch, and when the clutch is engaged the press is in motion, and when disengaged the press is stationary; that on or about March 18, 1918, while he was working at the press, the web of the paper broke, and, in accordance with his custom and practice, he signaled to a fellow servant to stop the press, but, on account of a defective clutch, the press failed to stop, and in attempting to feed the broken switch into the press the plaintiff suffered an injury to his hand. The petition alleges that the "cause of said injury was a defect in the clutch," and that, "while petitioner had had brought to his notice, previous to his injury, that the clutch did not work properly, at the time he was injured his duty and work were so absorbing in the interest of the defendant that they required all of his undivided attention, and that he was prevented from being conscious of and from realizing and from noting the fact that occasionally prior thereto the clutch on said press had not worked perfectly."

Feagin & Hancock, of Macon, for plaintiff in error.

P. F. Brock, of Macon, for defendant in error.

STEPHENS, J. Judgment affirmed.

JENKINS, P. J., and SMITH, J., concur.

(25 Ga. App. 132)

**FIRST NAT. BANK OF BLAKELY v. WADE et al.** (No. 11160.)

(Court of Appeals of Georgia, Division No. 2. April 8, 1920.)

(Syllabus by the Court.)

**1. PARTNERSHIP** ¶142(2)—**RIGHT OF PARTNER TO INCUMBER UNDIVIDED INTEREST STATED.**

A partner may "not only \* \* \* incur his undivided interest to secure a partnership debt, but he may also incur such interest to secure his individual debt, subject, however, to the superior claim of the partnership creditors to be first paid." *Taylor v. McLaughlin*, 120 Ga. 703, 707, 48 S. E. 203, 205, and cases cited. Under the evidence in this case the claimants were creditors of the partnership.

**2. EVIDENCE** ¶266—**STATEMENT BY DEFENDANT IN FI. FA. AS TO INTEREST IN PARTNERSHIP PROPERTY HELD INADMISSIBLE.**

The court did not err, as contended in the fourth, fifth, and sixth grounds of the motion for a new trial, in excluding the evidence of J. S. Sherman, a witness for the plaintiff, to the effect that while he was acting as president of the plaintiff bank he took from P. H. Wade, the defendant in fi. fa., a mortgage in favor of the bank covering a fourth undivided interest in the property in controversy, and that Wade at that time told him that he owned a fourth interest in the Wade Company. The evidence shows that the bank took the mortgage a considerable length of time after P. H. Wade had sold out his interest in the partnership, and a statement by him after such sale that he owned an interest in the partnership property would not be admissible in evidence. All the other evidence the exclusion of which is complained of in these grounds of the motion for a new trial was properly ruled out by the lower court.

**3. PARTNERSHIP** ¶290—**NOTICE OF DISSOLUTION OR WITHDRAWAL NEED NOT BE GIVEN TO CREDITORS OF INDIVIDUAL PARTNER.**

The court did not err, as contended in the seventh, eighth, and ninth grounds of the motion for a new trial, in holding that there was no duty on the part of the partnership to give notice of the dissolution of the partnership or the withdrawal of one of the partners, so far as it related to the plaintiff, a creditor of an individual partner. The notice which the law requires to be given of the dissolution of a partnership or the withdrawal of a partner is intended to apply only to the creditors of the partnership, and not to the creditors of an individual partner. Under this ruling there is no estoppel as against the claimants.

**4. SUFFICIENCY OF INSTRUCTIONS.**

The excerpts from the charge of the court set out in the tenth and eleventh grounds of the motion for a new trial are not erroneous for any of the reasons assigned, but contain a correct statement of the law as applicable to the facts in this case.



**5. TRIAL §=250(1) — TIMELY WRITTEN REQUEST FOR INSTRUCTION NECESSARY.**

There was no error as contended in the twelfth ground of the motion for a new trial in the failure of the judge to charge the jury on the conflict in the evidence of T. W. Wade and J. S. Sherman. The charge of the court fully instructed the jury as to all the substantial issues in the case, and in the absence of a timely appropriate written request for further instructions the failure of the court to charge on this particular matter was not error.

**6. ADMISSIBILITY OF EVIDENCE.**

There is no merit in the contention contained in the thirteenth ground of the motion for a new trial, as the writing or bill of sale from P. H. Wade to the claimants was properly admitted in evidence.

**7. SUFFICIENCY OF EVIDENCE.**

There was ample evidence to support the verdict, and the court did not err in overruling the motion for a new trial.

Error from Superior Court, Early County;  
W. C. Worrill, Judge.

Action by the First National Bank of Blakely against T. W. Wade and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Glessner & Collins, of Blakely, for plaintiff in error.

A. H. Gray, of Blakely, for defendants in error.

SMITH, J. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(25 Ga. App. 322)

**CITIZENS' BANK OF ROME v. N. C. HOYT & CO. et al. (No. 11085.)**

(Court of Appeals of Georgia, Division No. 1.  
April 14, 1920.)

(Syllabus by the Court.)

**USURY §=76—NOTE TAINTED WITH USURY NOT VOID.**

Under the laws of Georgia a promissory note is not rendered void by the fact that it is tainted with usury. Such a note executed prior to the act of 1916 (Ga. L. 1916, p. 48) can be enforced for the principal and lawful interest.

Error from City Court of Floyd County;  
W. J. Nunnally, Judge.

Action by the Citizens' Bank of Rome against N. C. Hoyt & Co., and others. Directed verdict for defendants, and plaintiff excepts and brings error. Reversed.

On November 1, 1911, a note for \$2,544.01 principal, payable on demand, was given to the Citizens' Bank of Rome, Ga., signed by

N. C. Hoyt & Co., and by B. C. Yancey and N. C. Hoyt. On January 27, 1915, suit was brought on it for the amount then due thereon, against the signers, and it was alleged that "N. C. Hoyt & Co. is a partnership composed of N. C. Hoyt and Benjamin C. Yancey." Pleas were filed in behalf of all the defendants, in which they admitted the execution of the note, but alleged: That it was a part of a scheme to evade the usury law enacted in 1908, which made it a misdemeanor "for any one to charge, take or receive, in any manner, directly or indirectly, interest for the use of money at a greater rate than five per cent. per month." That "said note was prepared by the Citizens' Bank, through its president, Sproull Fouché, as part of a criminally usurious scheme, for the purpose of exacting and securing usury in certain money lending transactions hereinafter more fully described to the court. That the said note was taken by the said Citizens' Bank for the purpose of protecting itself from whatever losses it might suffer in the prosecution of its criminally usurious practices. That the said Citizens' Bank not only acted with full knowledge of this criminal scheme, but took active part in it, both by preparing the note sued on as a part of the evasive scheme, and by sharing liberally in the bountiful harvest of ill-gotten gains derived as is hereinafter more fully set out and described." That "by this criminal scheme it was arranged, and clearly understood both by the said Sproull Fouché, president, as aforesaid, and N. C. Hoyt & Co., that the said Hoyt & Co. should take notes and mortgages from the borrower, and indorse these notes and hand them to the said Citizens' Bank. The said bank was to furnish the money, Hoyt & Co. to charge the criminal usury, and the said Citizens' Bank and N. C. Hoyt & Co. were to share in the criminal usury and the proceeds of the criminal act. The usury charged by this evasive scheme ranged from 5 per cent. per month to 20 per cent. per month, according to the degree of misfortunes in which the borrower found himself when forced to resort to this source for funds." "That defendant cannot herein set forth the names of the makers of all notes handled from said 15th day of August, 1908, to November 1, 1911, nor the amounts of said notes or the interest so charged by said plaintiff, but that the books of plaintiff will show the sums charged and collected by said plaintiff, which this defendant charges and believes that the amount of interest charged and retained by said bank, and the amount of discount so charged by said bank, as alleged in the sixth paragraph of this answer, over and above the legal rate of eight per cent. per annum, was far larger than the amount claimed by plaintiff as due on said note, and

that, if said excess of interest and discount rate so charged and collected by said bank is applied as a credit on said note sued on, the said note would not only be fully paid, but largely overpaid, and defendant entitled to a judgment against said plaintiff for said excess." "That the exacting, reserving, and contracting for said illegal interest was criminal, and the contract so entered into and the note so taken and now sued on is absolutely void and cannot be enforced in the courts." Defendants prayed that they "be released from any and all liability which may attach to them under and by reason of this said note sued on, and that petitioner's suit be dismissed."

On the trial of the case plaintiff introduced the note and closed. The defendants introduced evidence to support the allegations in their plea that usurious interest had been charged, and then made the following motion, counsel stating:

"If there was a conflict in the evidence, there might be a matter for the jury; but we ask your honor to direct a verdict for the defendants sued here on this note. They offer the note and close, and the defendants attack the note, not only that it is usury, but it is absolutely a crime, illegal. All the evidence, except the mere introduction of the note, and there is no contradiction of the defendant, and he says they got together, the proposition was made and discussed, and the whole transaction was between him and the bank. In other words, he was a sort of go-between, between the bank and the borrower."

The court directed a verdict for the defendants, and the plaintiff excepted.

Denny & Wright, of Rome, for plaintiff in error.

Maddox & Doyal, C. J. Carey, and Claude H. Porter, all of Rome, for defendants in error.

**BLOODWORTH, J.** (after stating the facts as above). Under the rulings in *Croom v. Jordan*, 20 Ga. App. 802, 93 S. E. 538, and *West v. Atlanta Loan & Savings Co.*, 22 Ga. App. 184, 95 S. E. 721, the court erred in directing a verdict for the defendant. In the opinion in the *Croom Case*, Judge George said:

"It is insisted by the plaintiff in error that the mortgage executed by him is absolutely void. The uncontroverted evidence is to the effect that the mortgage contained an amount as interest in excess of five per cent. per month. Under the law of this state such a contract is unlawful, and the act of reserving,

taking, or charging a rate of interest greater than 5 per cent. per month for the loan or advance of money or forbearance to enforce the collection of money is made penal. Section 3444 of the Civil Code and section 700 of the Penal Code would have the effect (nothing further appearing) to sustain the contention made by the plaintiff in error, and defeat the mortgage in this case, manifestly made in the face of the plain provisions of the law of this state, referred to above. However, the statutes and the decided cases of the courts of last resort in this state on the subject of usury provide for the civil status of usurious contracts. As to contracts made prior to the acts of 1916, the excess interest, that is, the amount charged over and above the legal rate of interest, shall be forfeited. The status of a mortgage infected with usury, when the subject of an action in a civil court, as in this case, is thoroughly established by the decisions of this court and of the Supreme Court. Such a mortgage is not void, except as to the usury included therein, and may be enforced for the collection of the actual principal and the legal interest thereon."

In the *West Case*, supra, Judge Harwell said:

"That the note charged or reserved a rate of interest in excess of the legal rate would not make it void. If usurious, the effect is simply to forfeit the excess of interest above the legal rate; the note and contract having been made on May 25, 1916, prior to the act of the Legislature, approved August 18, 1916, which forfeits all interest in a usurious contract. Code, § 3444, which makes it a misdemeanor to charge more than a certain rate, does not attempt to annul the contract. The section following (3445) says: 'The preceding section shall not be construed as repealed or impairing the usury laws now existing, but as being cumulative thereto.' A contract is not rendered void under the laws of this state by the fact that it is tainted with usury."

The Civil Code (1910) § 4251, provides that—

"A contract to do an immoral or illegal thing is void. If the contract be severable, that which is legal will not be annulled by that which is illegal."

Usury can be severed from legal interest.

Applying to the facts of this case the principle announced in the foregoing decisions, the plaintiff would be entitled to recover the amount of the principal sued for and legal interest, after deducting the amount of usury incorporated therein; and this question should have been submitted to the jury.

Judgment reversed.

**BROYLES, C. J., and LUKE, J., concur.**

(25 Ga. App. 233)

**HENDERSON v. LEVITON.** (No. 11111.)(Court of Appeals of Georgia, Division No. 1.  
April 14, 1920.)*(Syllabus by the Court.)***APPEAL AND ERROR §1005(3)—APPROVED  
VERDICT ON CONFLICTING EVIDENCE NOT DIS-  
TURBED.**

There is no merit in any of the special grounds of the motion for new trial; the verdict was based on conflicting evidence, was satisfactory to the trial judge, and must be to this court.

Error from Superior Court, Echols County;  
W. E. Thomas, Judge.

Action between R. J. Henderson and B. Leviton. Judgment for the latter, and the former brings error. Affirmed.

J. B. Hicks, of Statenville, W. T. Dickerson, of Pearson, and S. Burkhalter, of Homerville, for plaintiff in error.

Franklin & Langdale and E. K. Wilcox, all of Valdosta, for defendant in error.

**BLOODWORTH, J.** Judgment affirmed.

**BROYLES, C. J., and LUKE, J.,** concur.

(25 Ga. App. 219)

**OTWELL v. HASKINS.** (No. 11018.)(Court of Appeals of Georgia, Division No. 1.  
April 14, 1920.)*(Syllabus by the Court.)***INSANE PERSONS §83(1)—PETITION FOR AP-  
POINTMENT OF GUARDIAN AMENDABLE BY  
ADDING THE WORDS "INCAPABLE OF MANAG-  
ING HER ESTATE."**

A petition for the appointment of a guardian which alleges that a certain person "is aged and infirm mentally and physically, and is subject to have a guardian appointed on account of mental incapacity," is amendable by adding, after the words "aged and infirm mentally," the words that said person is "imbecile from old age and incapable of managing her estate."

Error from Superior Court, Campbell County; C. W. Smith, Judge.

Proceeding by A. L. Otwell against Mary Haskins for the appointment of a guardian for defendant. Finding by jury in court of ordinary against defendant, amendment to petition, on appeal, disallowed, and petition dismissed, and petitioner brings error. Reversed.

Oscar Parker, of Fairburn, and Jno. H. Hudson, of Atlanta, for plaintiff in error.

Griffith & Matthews, of Buchanan, for defendant in error.

**BLOODWORTH, J.** This was a proceeding to have a guardian appointed under section 3069 of the Civil Code of 1910. The petition alleged that—

"Mrs. Mary Haskins of said county, is aged and infirm mentally [and?] physically, and is subject to have a guardian appointed on account of mental incapacity."

Mrs. Haskins filed a defense, denying the allegation of the petition, and adding that—

"She is not an imbecile; that she is physically able to attend to her business, and that there is no reason, legal or other reason, why a guardian should be appointed for her person or her property. She is as competent mentally and physically to attend to her affairs at the present time as she has ever been, and all the allegations to the contrary are untrue."

In the court of ordinary the jury found "Mrs. Mary Haskins to be aged and infirm mentally and physically, and subject to have a guardian appointed on account of mental incapacity to manage and control her estate." On appeal to the superior court the plaintiff offered to amend the petition for appointment of a guardian by "adding, after the words 'aged and infirm mentally,' that said Mrs. Haskins is a person imbecile from old age and incapable of managing her estate." This amendment was disallowed, and the petition dismissed.

Both of these rulings were erroneous. In our state the law relating to amendments is very liberal. In *Penn v. McGhee*, 6 Ga. App. 635, 65 S. E. 688, this court said:

"We think there can be no doubt that the plaintiff had the right to amend the affidavit upon which the attachment issued, by inserting a sufficient ground for attachment. Under Civil Code of 1895, § 5122 [Code of 1910, § 3069], 'all affidavits that are the foundation of legal proceedings, and all counter affidavits, shall be amendable to the same extent as ordinary declarations, and with only the restrictions, limitations, and consequences now obtaining in the case of ordinary declarations and pleas.' It is insisted, however, that the affidavit in the present case is not amendable, because there is not enough to amend by. As held in *Leffler v. Union Compress Co.*, 121 Ga. 44 (48 S. E. 710), the affidavit and bond upon which the attachment and the summons of garnishment are based, the attachment, the summons of garnishment, the answer of the garnishee, where one is made, and the judgment against the garnishee, constitute the record and pleadings in the garnishment proceedings. Considering the affidavit with the bond and attachment, there appears a party plaintiff and a party defendant, and plainly an attempt to proceed by attachment. And even though the attempt is a complete failure, if the shadow is distinct enough to identify a particular cause of action, flesh may be put upon the skeleton."

In *Hardy v. Luke*, 18 Ga. App. 423, 89 S. E. 540 (1a), it was held that—

"The provisions of section 5706 of the Civil Code, relative to the amendment of affidavits, are to be broadly and liberally construed."

In *Collins v. Taylor*, 128 Ga. 790, 58 S. E. 446, the Supreme Court said:

"All affidavits for the foreclosure of liens, or which are the foundation of legal proceedings, are amendable to the same extent as ordinary declarations. Civil Code, § 5122 [Code of 1910, § 5706]. This statute is remedial in its nature, and is therefore to be liberally construed and applied."

See, also, *Bainbridge Stock Co. v. Krause-McFarlin Co.*, 8 Ga. App. 220, 68 S. E. 1013 (1); *Levin v. American Furniture Co.*, 133 Ga. 670, 66 S. E. 888; *City of Columbus v. Anglin*, 120 Ga. 785, 48 S. E. 318 (5). In his celebrated opinion in the case of *Ellison v. Georgia Railroad Co.*, 87 Ga. 708, 13 S. E. 814, Chief Justice Bleckley said:

"The declaration must show what the design of the pleader was, and that his design was such that, if filled out and completed, a cause of action might appear. But in looking for his design by the light of the imperfect declaration, no test of full certainty, but only the test of probability, is to be applied. If enough is alleged to render it fairly and reasonably probable that the plaintiff claimed to have a cause of action of the kind indicated, and that it was his design or that of his pleader to declare upon it, this probability is to be accepted for the purpose of allowing amendment just as though his design were known with full certainty. For it is only when a party stops pleading and stands upon the result that certainty is the guide and measure of construction. So long as he proposes to amend, he is still endeavoring to plead, and if he reaches the requisite certainty by the amendment and the original pleading together, he will be excused for any want of certainty before, higher than that of reasonable probability. \* \* \* The pleader is a builder who has a right to go on and finish from any beginning whatever, provided he can show his original plan by what he has done and what he proposes to do, and provided he will confine himself to that plan, and provided the plan is one which, when fully executed, will result in a real edifice and not a mere castle in the air. \* \* \* From what has been said, it is apparent that nothing less is enough to amend by in matter of substance in respect to the cause of action than a plaintiff, a defendant, jurisdiction of the court, and facts enough to indicate and identify some particular cause of action as the one intended to be declared upon, so as to enable the court to determine whether the facts proposed to be introduced by the amendment are part and parcel of that same cause; and that when all these elements are in the declaration, there is enough to amend by. The least amount of substance in a declaration which will serve to show that what is offered to be added rightly belongs there, is enough to amend by if the addition proposed would make the cause of action complete. \* \* \* If the legal case which the pleader intended to make has been so far de-

veloped and differentiated in design that the court can recognize it as probably fit to become a member of the case family, though it may still be in the womb and deficient in vigor or not fully developed in some of the essential parts or organs which would enable it to live as an independent being, indeed, if it be little more than a mere germ, the law has quickened it, and it is within the reach of amendment. Life, in the law of amendment, means mere quickening, antenatal life, that which is sufficient to start with, though it may be much less than is requisite to support existence against the most feeble attack if the amending power be not invoked."

Applying the principle announced in the foregoing decisions, the court should have allowed the amendment to the petition, and this would have perfected it.

Judgment reversed.

BROYLES, C. J., and LUKE, J. concur.

(25 Ga. App. 117)  
**DAVISBORO FERTILIZER CO. v. WYATT.**  
(No. 10918.)

(Court of Appeals of Georgia, Division No. 2  
April 7, 1920.)

(Syllabus by the Court.)

#### REINSTATEMENT OF CLAIM.

There were sufficient facts, necessarily within the knowledge of the trial judge, to have justified the reinstatement of the claim of the defendant in error, and no abuse of discretion appears. See *Maddox Coffee Co. v. McHan*, 22 Ga. App. 198, 95 S. E. 736 (2).

Error from City Court of Sandersville;  
E. W. Jordan, Judge.

Proceedings between the Davisboro Fertilizer Company and H. H. Wyatt, agent. Judgment for the latter, and the former brings error. Affirmed.

A. R. Wright, of Sandersville, for plaintiff in error.

M. L. Gross, of Sandersville, for defendant in error.

JENKINS, P. J. Judgment affirmed.

STEPHENS and SMITH, JJ., concur.

(25 Ga. App. 31)  
**DAVIS v. STATE.** (No. 11170.)

(Court of Appeals of Georgia, Division No. 1  
March 3, 1920. Rehearing Denied April 13, 1920.)

(Syllabus by the Court.)

1. CRIMINAL LAW §1178—AMENDMENT TO MOTION FOR NEW TRIAL NOT ARGUED IS TREATED AS ABANDONED.

The amendment to the motion for a new trial, not having been argued in the brief of

counsel for the plaintiff in error, is treated as abandoned.

## 2. SUFFICIENCY OF EVIDENCE.

There was evidence which authorized the jury to find that the accused had made a free and voluntary confession of his guilt, and other corroborative evidence which, together with his confession, authorized his conviction.

Error from Superior Court, Fulton County; John D. Humphries, Judge.

Henry Davis was convicted of an offense, and he brings error. Affirmed.

Len B. Guillebeau, of Atlanta, for plaintiff in error.

John A. Boykin, Sol. Gen., and E. A. Stephens, both of Atlanta, for the State.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(25 Ga. App. 148)

NEWSOME v. SMITH et al. (No. 11280.)

(Court of Appeals of Georgia, Division No. 2.  
April 8, 1920.)

### (Syllabus by the Court.)

#### 1. APPEAL AND ERROR ¶78(1)—JUDGMENT SUSTAINING PLEA OF RES JUDICATA SUPPORTS WRIT OF ERROR.

The record in this case discloses that the plea designated a plea in abatement is in reality a plea of res judicata, and the judgment of the lower court sustaining the plea is a final disposition of the case. The motion to dismiss the writ of error on the ground that it was premature is therefore without merit, and must be denied.

#### 2. JUDGMENT ¶949(2)—PLEA THAT PLAINTIFF'S CLAIM COULD HAVE BEEN SET OFF IN A FORMER SUIT HELD NOT A PLEA OF RES JUDICATA.

A plea by the defendant that the matters set up by the plaintiff in the present suit could have been pleaded as a set-off to a former suit brought by the defendant against the plaintiff, on an account, in the same court, is not, without more, a good plea of res judicata. While the plaintiff in the present suit could have pleaded a set-off, he was not, under the law, compelled to do so, unless the claim or claims upon which the present suit was brought and the matters adjudicated in the other suit grew out of the same transaction. See *Johnson v. Reeves*, 112 Ga. 680, 691, 87 S. E. 980; *Ray v. Fleetwood*, 106 Ga. 253, 257, 32 S. E. 156.

## 3 SUFFICIENCY OF EVIDENCE.

There was no evidence to authorize the judgment sustaining the plea of res judicata.

Error from City Court of Statesboro; Remer Proctor, Judge.

Proceedings between J. H. Newsome and E. A. Smith and others. Judgment for the latter, and the former brings error. Reversed.

W. G. Neville and Anderson & Jones, all of Statesboro, for plaintiff in error.

Fred T. Lanier, of Statesboro, for defendants in error.

SMITH, J. Judgment reversed.

JENKINS, P. J., and STEPHENS, J., concur.

(25 Ga. App. 149)

DIXIE COTTON CO. v. JACKSON.  
(No. 11274.)

(Court of Appeals of Georgia, Division No. 2.  
April 8, 1920.)

### (Syllabus by the Court.)

#### 1. RELEASE ¶28(1)—SALES ¶88—WHETHER SALES CONTRACT COVERING COTTON WAS JOINT AND SEVERAL OR JOINT HELD QUESTION OF FACT; RELEASE OF ONE SELLER UNDER JOINT CONTRACT FOR SALE OF COTTON HELD TO RELEASE REMAINING SELLER.

The Dixie Cotton Company sued C. M. Jackson for breach of contract in failing to deliver 50 bales of cotton, which it alleged were bought from him by the company. The petition alleged that on July 31, 1918, the contract for the purchase of the cotton was entered into between the parties. The fourth paragraph of the petition alleged the following: "The said contract covers the sale of 100 bales and is also signed by J. B. Hinson Company, as seller, but this said company has complied with its part of the contract by the delivery of 50 bales under the terms of the contract." The petitioner further alleged that it had been damaged in the sum of \$2,437.50, the difference in the market price at the time and place of delivery and the contract price, and prayed for judgment for said amount. The contract was attached to the petition, and in the body thereof it appears to have been a contract between the plaintiff and C. M. Jackson, in which Jackson sold and agreed to deliver to the plaintiff the 100 bales of cotton within a certain time and at a certain price; the grade of the cotton being described in the contract. The contract was signed by C. M. Jackson, with the word "Seller" before the signature. Below was signed: "J. B. Hinson Co., J. B. Hinson, Secy. Dixie Cotton Company, Izzie Bashinski, President (with the word 'Buyer' prefixed to the signature of the latter company)." The contract was witnessed by R. W. Wynne. The plaintiff amended his petition by striking paragraph 4 and inserting in lieu thereof the following: "The said contract stipulates for the sale and purchase of 100 bales of cotton, but 50 bales have been delivered under the contract according to its terms, and the contract has been breached only as to the failure by the said C. M. Jackson to deliver 50 bales, for the breach of which petitioner sued." To this petition the defendant filed an answer, ad-

mitting he was a resident of said county, and denying all the other paragraphs of plaintiff's petition. The defendant amended his answer by alleging: (1) That the plaintiff, before the bringing of this suit, "released this defendant's joint obligor, J. B. Hinson Company, a corporation, from said joint obligation, declared on, in the following manner, to wit: By recovery [receiving] from said J. B. Hinson Company 50 bales of cotton on said contract and entering on said contract the following: 'Chester, Ga., 9/9, 1918. Received on the within contract fifty (50) bales of cotton in full of J. B. Hinson Company part of contract. Dixie Cotton Co., by R. W. Wynne.'" (2) "that this defendant never consented to nor satisfied [ratified] said release of said J. B. Hinson Company;" and (3) "that by reason of the facts set out in this amendment the defendant has been released and discharged."

By agreement of counsel the case was tried before the judge of the superior court without a jury. On the trial the defendant admitted a prima facie case for the plaintiff. He admitted the execution of the contract sued on, the breach by a failure to deliver the cotton to the plaintiff, and the value of the cotton at the time specified for delivery. The plaintiff then introduced the original contract. The defendant introduced the duplicate of the original contract with the receipt on the back of the same; the receipt being in the following language: "Chester, Ga. 9/9, 1918. Received on the within contract fifty bales of cotton in full J. B. Hinson Company part of contract. [Signed] Dixie Cotton Co., by R. W. Wynne." The defendant also introduced the fourth paragraph of the plaintiff's original petition. The defendant testified in his own behalf that he knew R. W. Wynne, and had sold him his cotton as the agent of the Dixie Cotton Company for a number of years, and had been paid by him for the cotton, as the agent of the Dixie Cotton Company; that he told Wynne that he and J. B. Hinson wanted a contract with the Dixie Cotton Company to sell them 100 bales of cotton; that in a few days Wynne brought this contract to him, and that he and Hinson signed it in Hinson's office in the presence of Wynne. Wynne turned one copy over to Hinson and defendant and retained one himself. The entry of receipt on the duplicate contract held by the defendant and Hinson was in Wynne's handwriting, and the signature following the Dixie Cotton Company was Wynne's. After hearing the evidence and argument, the court rendered a judgment in favor of the defendant. *Held*, it was for the judge, who heard the case without a jury, to determine as to whether the contract was a joint and several contract or a joint contract, and he having found that it was a joint contract, and there being evidence to sustain this finding, there was no error in his holding that the receipt releasing J. B. Hinson Company operated to release C. M. Jackson.

**2. PRINCIPAL AND AGENT**  $\S$ 190(2)—RECEIPT IN FULL OF PARTY JOINTLY LIABLE ON CONTRACT FOR SALE OF COTTON HELD PROPERLY ADMITTED.

The court did not err in admitting, over objection, the receipt on the back of the duplicate contract, accepting "50 bales of cotton in full

J. B. Hinson Company part of contract [Signed] Dixie Cotton Co., by R. W. Wynne." There was ample evidence showing the agency of R. W. Wynne for the Dixie Cotton Company, and this evidence was properly admitted.

**Error from Superior Court, Dodge County; H. A. Mathews, Judge.**

Action by the Dixie Cotton Company against C. M. Jackson. Judgment for defendant, and plaintiff brings error. Affirmed.

**Larsen & Crockett, of Dublin, for plaintiff in error.**

**Chas. W. Griffin and D. D. Smith, both of Eastman, and Mallet & Bell, of Atlanta, for defendant in error.**

**SMITH, J.** Judgment affirmed.

**JENKINS, P. J., and STEPHENS, J., concur.**

(25 Ga. App. 121)

**MOOTY v. BUTLER. (No. 10985.)**

(Court of Appeals of Georgia, Division No. 2, April 8, 1920.)

(Syllabus by the Court.)

**1. APPEAL AND ERROR**  $\S$ 222—NEW TRIAL  $\S$ 132(2)—OBJECTION TO BRIEF OF EVIDENCE MUST BE MADE IN LOWER COURT; BRIEF OF EVIDENCE SUFFICIENT IF BONA FIDE EFFORT IS MADE TO BRIEF IT.

Under the provisions of the act approved August 21, 1911 (Park's Ann. Code, § 6090(a)), no question as to the filing of the brief of evidence can be entertained by the reviewing court, where the judge has finally passed on the merits of the motion for a new trial, unless the question was first raised and insisted on before the trial judge. *Charleston & Western Carolina Ry. Co. v. McElmurray*, 12 Ga. App. 441, 78 S. E. 258; *Collins v. State*, 12 Ga. App. 635, 77 S. E. 1079; *Chicago & Northwestern Railway v. Elliott*, 16 Ga. App. 888, 85 S. E. 615. A bona fide effort to brief the evidence being manifest in this case, this court will not hold that it so fails to comply with the requirements of law as to prevent its being treated as a brief of the evidence.

**2. MALICIOUS PROSECUTION**  $\S$ 72(4)—CHARGE AS TO CONCLUSIVENESS OF VERDICT OF ACQUITTAL ON QUESTION OF MALICE HELD ERRONEOUS.

This was a suit for damages growing out of an alleged malicious prosecution. The verdict in the criminal case found the defendant (the plaintiff in this suit) not guilty, and also found that the prosecution was malicious. The judge trying the damage suit instructed the jury that "as a matter of law that verdict is conclusive as to the question of malice, but is not conclusive as to the question of probable cause." The jury found for the plaintiff damages in a named sum. The trial judge granted a new trial, and the plaintiff excepted. *Held*:

(a) This court declines to hold as a matter of

law that the evidence demanded a finding that the criminal prosecution was without probable cause. Such would be the effect of holding that the grant of the new trial was an abuse of discretion.

(b) The verdict was properly set aside for the reason that the excerpt quoted from the charge is deemed an erroneous statement of law. Although the defendant in the damage suit was the prosecutor in the criminal proceeding and while under the Penal Code (Pen. Code 1910, § 1109) the prosecutor can be compelled to pay the cost when a jury finds the prosecution to be malicious, still it cannot be said that the real parties in the criminal case and in the damage suit were identical, or that the issues were the same either in scope or as to attendant results. The defendant in the criminal case, not being sworn, was not subject to the penalties relating to witnesses, and was not subject to the right of cross-examination, nor was the conduct of the criminal case under the direction and control of the prosecutor. See Metropolitan Life Ins. Co. v. Hand, 102 S. E. 647, recently decided by this court, and the cases there cited.

Error from City Court of La Grange; L. L. Meadors, Judge pro hac.

Action by M. U. Mooty, administrator, against H. C. Butler. Verdict for plaintiff, and from an order granting a new trial, he brings error. Affirmed.

See, also, 23 Ga. App. 572, 99 S. E. 10.

M. U. Mooty, of La Grange, for plaintiff in error.

Duke Davis and E. T. Moon, both of La Grange, for defendant in error.

JENKINS, P. J. Judgment affirmed.

STEPHENS and SMITH, JJ., concur.

(25 Ga. App. 169)

**BANKS v. STATE.** (No. 10706.)

(Court of Appeals of Georgia. Division No. 1. April 13, 1920.)

*(Syllabus by the Court.)*

**1. CRIMINAL LAW §200(1)—BONA FIDE OFFER TO MARRY AND JUDGMENT OF DISCHARGE BARS PROSECUTION FOR SEDUCTION.**

Where one who is being prosecuted for the offense of seduction makes a timely, bona fide, and continuing offer to marry the woman whom he is charged with having seduced, obtains a marriage license from the ordinary of the county of the female's residence, and gives the bond provided for in section 879 of the Penal Code of 1910, and his offer of marriage is refused by the female, and the court thereupon enters a judgment ending the prosecution for seduction and discharging the defendant, that judgment is a bar to any subsequent prosecution of the defendant for the offense of fornication, founded upon the same transaction.

**2. ERROR IN STRIKING OF PLEA IN BAR.**

Under the above ruling the court erred in striking the defendant's special plea in bar, on the ground that it was insufficient in law; and the further proceedings on the trial were nugatory.

Error from Superior Court, Appling County; J. P. Highsmith, Judge.

Warrior Banks was prosecuted for fornication, his plea in bar was stricken, and the Court of Appeals certified a question. Reversed in conformity to Supreme Court's answer (150 Ga. —, 102 S. E. 519).

W. W. Bennett, of Baxley, for plaintiff in error.

Alvin V. Sellers, Sol. Gen., of Baxley, for the State.

LUKE, J. [1, 2] Certain questions of law involved in this case were certified to the Supreme Court, and the preceding headnotes embody in brief the substance of that court's answers. See the full opinion of the Supreme Court in Banks v. State, 150 Ga. —, 102 S. E. 519, rendered March 9, 1920.

The court having erroneously stricken the defendant's special plea in bar, the further proceedings in the case were nugatory, and a new trial is required. If the defendant upon the next trial sustains by proof the material allegations of his plea in bar, he will be entitled to an acquittal.

Judgment reversed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(25 Ga. App. 107)

**BELLINGER v. JONES et al.** (No. 10747.)

(Court of Appeals of Georgia, Division No. 2. April 7, 1920.)

*(Syllabus by the Court.)*

**1. APPEAL AND ERROR §977(4)—FIRST GRANT OF NEW TRIAL NOT DISTURBED WHERE DISCRETION NOT ABUSED.**

"The first grant of a new trial will not be disturbed by the Supreme Court, unless the plaintiff in error shows that the judge abused his discretion in granting it, and that the law and facts require the verdict, notwithstanding the judgment of the presiding judge." Civil Code 1910, § 6204.

**2. NEW TRIAL §70—ABSENCE OF EVIDENCE AS TO BAD FAITH HELD GROUND IN ACTION FOR INTRUSION.**

In granting the new trial the presiding judge passed the following order: "This was a proceeding brought against the defendants as intruders and the burden was on the plaintiff not only to establish his right to possession, but also to show that the defendants acquired possession in bad faith. Bad faith, as applied to this case, means that when the defendants took

possession they must have known, or at least had reasonable grounds to suspect, that the plaintiff's title and right of possession was superior to theirs. In other words, they must have taken possession with knowledge or reasonable grounds to suspect that their title was bad. It appears, from the evidence that both parties have a deed, the general description in which may include the land act in dispute. The defendants claim under a deed dated in 1902, and the description in that deed is sufficient to cover the few acres in dispute between the parties. While the preponderance of evidence seems to indicate that the predecessors in title of the plaintiff had been in the uninterrupted possession of this tract for many years prior to his purchase, a careful examination of the evidence fails to disclose any testimony which would authorize a finding that when the defendants took possession of the land they knew the facts in reference to this prior possession of plaintiff's predecessors in title. Constructive knowledge is not sufficient to show bad faith. There must be actual knowledge. There is no such a thing in the law as constructive bad faith. There being no evidence as I construe it to authorize a finding that the defendants had such actual knowledge of the plaintiff's title as would charge them with bad faith and the fact that they took possession in the plaintiff's absence not alone being sufficient for this purpose, I am constrained to grant a new trial on the ground that the verdict is without evidence to support it." The trial judge did not err in granting the new trial for the reason assigned. See *Nichols v. Chandler*, 46 Ga. 479.

Error from City Court of Albany; J. R. Pottle, pro hac Judge.

Action by F. P. Bellinger against P. W. Jones and others. Judgment for plaintiff. A new trial was granted, and plaintiff brings error. Affirmed.

S. B. Lippitt, of Albany, for plaintiff in error.

Milner & Farkas, of Albany, for defendants in error.

JENKINS, P. J. Judgment affirmed.

STEPHENS and SMITH, JJ., concur.

(25 Ga. App. 216)

**LIBERTY BANKING CO. v. CHATHAM BANK & TRUST CO.** (No. 10977.)

(Court of Appeals of Georgia, Division No. 1. April 14, 1920.)

*(Syllabus by the Court.)*

**AWARD OF NONSUIT.**

The court did not err in its rulings on the demurrers, nor in excluding evidence, and a nonsuit was properly awarded.

Error from City Court of Savannah; Davis Freeman, Judge.

Action by the Liberty Banking Company against the Chatham Bank & Trust Company. Judgment of nonsuit, and plaintiff brings error. Affirmed.

Edwin A. Cohen and Hitch & Denmark, all of Savannah, for plaintiff in error:

Lawton & Cunningham, of Savannah, for defendant in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(25 Ga. App. 153)

**TERRY SHIPBUILDING CORPORATION v. DUBOSE.** (No. 11293.)

(Court of Appeals of Georgia, Division No. 2. April 8, 1920.)

*(Syllabus by the Court.)*

**MASTER AND SERVANT** — 116(1) — **LEAVING PLANKS OF SCAFFOLD UNFASTENED HELD NOT NEGLIGENCE.**

The defendant, being engaged in building ships, employed the plaintiff to operate a drill motor and countersink holes in the side of a ship, and in order to perform this work the plaintiff stood on a scaffold, some 35 or 40 feet high, and while so engaged one of the unnailed and loose planks of the scaffold upon which he was standing "gave way, slipped, and turned," causing him to be precipitated to the ground, and for the injuries occasioned by the fall he brought this suit against the master, alleging that the latter was negligent in failing to provide for him a reasonably safe place upon which to work. *Held*, a petition which amplifies, but alleges in substance only, the above facts, does not set out a cause of action, and is subject to general demurrer, since no reason is alleged "why the master should have taken the unusual precaution of nailing down the planks, or why the servant should have had any reason to believe that the planks were nailed down. Planks upon temporary scaffolds of this kind are not usually nailed down, the natural inference arising in the mind of any man of ordinary intelligence and experience [and the plaintiff was such a man] upon approaching such a platform is that the planks are unsecured, and this petition suggests no reason why the plaintiff conceived any other notion. It would be far-fetched indeed to say that the master ought to have foreseen that any servant would presume that the planks were nailed down." *Riverside Mills v. Brooks*, 6 Ga. App. 67, 69, 64 S. E. 282. See also *Daniel v. Forsyth*, 106 Ga. 568, 32 S. E. 621; *Ludd v. Wilkins*, 118 Ga. 525, 45 S. E. 429; *Bolden v. Central Ry. Co.*, 130 Ga. 456, 60 S. E. 1047; *Quinn v. Allen*, 1 Ga. App. 807, 57 S. E. 957.

Error from Superior Court, Chatham County; P. W. Meldrim, Judge.

Action by Ira Dubose against the Terry Shipbuilding Corporation. Judgment for



plaintiff, and defendant brings error. Reversed.

David S. Atkinson, of Savannah, for plaintiff in error.

E. S. Fuller, of Savannah, for defendant in error.

SMITH, J. Judgment reversed.

JENKINS, P. J., and STEPHENS, J., concur.

(25 Ga. App. 233)

REDDING v. STATE. (No. 11208.)

(Court of Appeals of Georgia, Division No. 1. April 14, 1920.)

(Syllabus by the Court.)

1. ASSAULT AND BATTERY  $\Leftrightarrow$  66, 67—CRIMINAL LAW  $\Leftrightarrow$  1159(2)—VERDICT MAY BE BASED ON TESTIMONY OF PROSECUTOR; ADULTERER IN DANGER OF ASSAULT CANNOT USE DEADLY WEAPON IN DEFENSE.

The plaintiff in error was indicted for assault with intent to murder and convicted of unlawfully shooting at another. The facts of this case bring it squarely within the ruling in the case of *Drysdale v. State*, 83 Ga. 744, 10 S. E. 358, 6 L. R. A. 424, 20 Am. St. Rep. 340, where it was held:

"1. Where the verdict is correct, if the testimony of the prosecutor was true, and where the jury must have believed it true in order to render the verdict, the result coincides with the substantial merits of the case.

"2. A husband may attack for intimacy with his wife in his presence, raising a well-founded belief that the criminal act is just over or about to begin; and the adulterer, though in danger, has no right to defend himself by using a deadly weapon."

See, also, *Brown v. State*, 10 Ga. App. 50 (3), 52 (7), 56 (4), 72 S. E. 537.

## 2. CHARGE OF COURT.

When they are read in connection with the remainder of the charge of the court, there is no error in any of the excerpts of which complaint is made.

Error from Superior Court, Bibb County; E. D. Graham, Judge.

Gude Redding was convicted of unlawfully shooting at another and he brings error. Affirmed.

John R. Cooper, W. O. Cooper, Jr., W. R. Nisbet, and Walter J. Grace, all of Macon, for plaintiff in error.

Chas. H. Garrett, Sol. Gen., of Macon, for the State.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(25 Ga. App. 247)

BELL v. STATE. (No. 11284.)

(Court of Appeals of Georgia, Division No. 1. April 14, 1920.)

(Syllabus by the Court.)

VERDICT CLEARLY CORRECT.

The evidence for the state shows an unprovoked attack with a deadly weapon upon the person assaulted. Even under the statement of the defendant a verdict of guilty was demanded. There is nothing in any of the special grounds of the motion for new trial which would demand that a verdict so clearly correct should be set aside.

Error from Superior Court, Terrell County; W. C. Worrill, Judge.

Proceeding by the State against Leander Bell, and from the judgment, Bell brings error. Affirmed.

M. C. Edwards, of Dawson, for plaintiff in error.

B. T. Castellow, Sol. Gen., of Cuthbert, and R. R. Arnold, of Atlanta, for the State.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(25 Ga. App. 173)

ROME RY. & LIGHT CO. v. FOSTER. (No. 11214.)

(Court of Appeals of Georgia, Division No. 1. April 13, 1920.)

(Syllabus by the Court.)

1. TRIAL  $\Leftrightarrow$  191(8)—INSTRUCTION HELD ERRONEOUS AS INTIMATING NEGLIGENCE.

The court erred in charging the jury as follows: "It is the duty of the motorman, in propelling a car through the public streets, to notice the presence of other vehicles and pedestrians ahead of his car, and at all times be watchful to see that the way is clear, and where he has reason to apprehend danger, or should in the exercise of ordinary care become cognizant of danger, he should regulate the speed of his car, so that it may be quickly stopped, should occasion require it." This charge clearly intimated that a failure by the motorman to do the things enumerated would constitute negligence, and questions of diligence and negligence are for determination by the jury and not by the court. *Columbus Railroad Co. v. Peddy*, 120 Ga. 590, 43 S. E. 149 (6).

## 2. CHARGE OF COURT.

There were some inaccuracies in the charge as to the contentions of the parties, as complained of in the first special ground of the motion for a new trial.

## 3. CHARGE OF COURT.

None of the other excerpts from the charge, excepted to, when considered in connection with the charge as a whole, contains material error.

#### 4. REVERSAL FOR ERROR IN CHARGE.

The verdict was amply authorized by the evidence, but, because of the errors in the charge referred to above, another trial of the case is demanded.

Error from Superior Court, Floyd County; Moses Wright, Judge.

Action by J. C. Foster against the Rome Railway & Light Company. Judgment for plaintiff, and defendant brings error. Reversed.

Dean & Dean and L. H. Covington, all of Rome, for plaintiff in error.

M. B. Eubanks, of Rome, for defendant in error.

BROYLES, C. J. Judgment reversed.

LUKE and BLOODWORTH, JJ., concur.

(25 Ga. App. 198)

JONES v. STATE. (No. 11278.)

(Court of Appeals of Georgia, Division No. 1.  
April 18, 1920.)

*(Syllabus by the Court.)*

#### SUFFICIENCY OF EVIDENCE AND CORRECTNESS OF INSTRUCTIONS.

Under the facts of the case, none of the exceptions to the charge of the judge, or to his refusal to charge as requested, is well taken; the verdict was amply authorized by the evidence, and the court did not err in refusing a new trial.

Error from Superior Court, Crawford County; H. A. Mathews, Judge.

Proceedings between Ed Jones and the State. Judgment for the latter, and the former brings error. Affirmed.

John R. Cooper, of Macon, R. H. Culverhouse, of Knoxville, and W. J. Wallace, of Soperton, for plaintiff in error.

Ohas, H. Garrett, Sol. Gen., of Macon, for the State.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(25 Ga. App. 116)

LESTER v. BANK OF ADRIAN.  
(No. 10912.)

(Court of Appeals of Georgia, Division No. 2.  
April 7, 1920.)

*(Syllabus by the Court.)*

#### 1. EVIDENCE §434(1)—PROOF OF MISREPRESENTATIONS HELD ADMISSIBLE TO SHOW INVALIDITY OF INSTRUMENT.

Misrepresentations as to an existing and material fact, amounting to fraud, when made

either by a principal or through his agent, whereby another is induced to enter upon an obligation in writing, may, as between the parties, be alleged and proved, if not inconsistent with the writing, not as being an attempt to add to or vary the terms of the written instrument, but as a means of showing its invalidity. *Loyless v. Hesse Envelope & Lithographing Co.*, 10 Ga. App. 680, 74 S. E. 90; Civil Code 1910, § 4623; Clark on Contracts (2d Ed.) para. 227, 228.

#### 2. ADMISSIBILITY OF EVIDENCE.

The court erred in refusing to admit in evidence the testimony offered under the plea whereby it was sought to establish fraud in the procurement of the note, and in thereafter directing a verdict for the plaintiff. See *Daniel v. Burson*, 16 Ga. App. 39, 41, 84 S. E. 490.

Error from City Court of Dublin; R. D. Flynt, Judge.

Action by the Bank of Adrian against Mark Lester. Judgment on a directed verdict for plaintiff, and defendant brings error. Reversed.

The Bank of Adrian, for the use of the payees, sued the maker on the last of a series of five promissory notes. The contention that the holder of the note is a bona fide purchaser is admittedly not made. The consideration of the note was for part purchase of a certain tract of timber described in a contemporaneous written instrument of sale. In suit on the note the defendant pleaded fraud in its procurement, in that the plaintiff had guaranteed that the premises contained at least 200,000 feet of available timber, whereas not more than 25,000 feet existed, and that, in order to effect the sale and induce the signing of the notes, the plaintiff had falsely and fraudulently represented that the land on which the timber was located was ordinarily dry swamp land, and that, although it was then temporarily covered with water, such condition was unusual and would not so remain more than for a period of two or three days, whereas, in truth and in fact, as the plaintiff then and there well knew, the land was not dry swamp land temporarily overflowed, but was such as stood continually under water so as to prevent the removal of the timber bargained for. No demurrer was entered to the plea. The trial judge refused to admit testimony offered in support of such allegations of fraud, and directed a verdict for the plaintiff.

S. P. New, of Dublin, for plaintiff in error.

JENKINS, P. J. Judgment reversed.

STEPHENS and SMITH, JJ., concur.

(25 Ga. App. 161)

(102 S.E.)

**GROSSMAN v. CITY OF ATLANTA.**  
(No. 11301.)(Court of Appeals of Georgia, Division No. 2.  
April 8, 1920.)*(Syllabus by the Court.)***1. APPEAL AND ERROR ¶853—FAILURE TO EXCEPT TO SUSTAINING OF SPECIAL DEMURRERS AND ALLOWING TIME TO AMEND MAKES RULING LAW OF CASE.**

The court overruled the general demurrer to the petition, but sustained all the grounds of the special demurrer, and allowed the plaintiff 20 days within which to amend his petition to meet these special grounds. The order provided that upon failure to meet the grounds of the special demurrer the case should stand dismissed. To this ruling no exception was taken, nor is error assigned thereon in the bill of exceptions. Therefore the ruling that the petition was subject to the special demurrer became the law of the case. The plaintiff, within the 20 days allowed, filed a purported amendment to his petition. This amendment was in all substantial respects merely a reiteration of the various allegations contained in the original petition; and, though it did set out somewhat more at length the contentions of the plaintiff, these contentions were substantially the same, and the amendment clearly failed to meet the objections raised by the special grounds of the demurrer. No further amendment was tendered within the 20 days allowed in the court's order. Under these facts, when the case came up for trial before a jury, the court did not err in dismissing it upon oral motion made by the defendant. *Hinson v. Mutual Fertilizer Co.*, 19 Ga. App. 121, 91 S. E. 241; *Baker v. City of Atlanta*, 22 Ga. App. 483, 96 S. E. 332.

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by L. Grossman against the City of Atlanta. Action dismissed on defendant's oral motion, and plaintiff brings error. Affirmed.

J. L. Anderson, of Atlanta, for plaintiff in error.

J. L. Mayson and J. M. Wood, both of Atlanta, for defendant in error.

SMITH, J. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(25 Ga. App. 179)

**EDWARDS v. STATE.** (No. 11230.)(Court of Appeals of Georgia, Division No. 1.  
April 13, 1920.)*(Syllabus by the Court.)***1. SUFFICIENCY OF DEMURRER TO INDICTMENT.**

The court did not err in overruling the demurrer to the indictment.

(a) The last ground of the demurrer is too general and indefinite to raise the question of

the constitutionality of section 22 of the act of the General Assembly of Georgia approved March 28, 1917 (Ga. Laws Ex. Sess. 1917, p. 18). See, in this connection, *Rooks v. Tindall*, 138 Ga. 863, 76 S. E. 378; *Commercial Bank v. Blassingame*, 147 Ga. 638, 95 S. E. 222; *Crapp v. State*, 148 Ga. 150, 95 S. E. 993.

(b) The other grounds of the demurrer are without substantial merit. See, in this connection, *McRae v. State*, 23 Ga. App. 13, 97 S. E. 410.

**2. CORRECTNESS OF CHARGE.**

The excerpt from the charge of the court, complained of, is not erroneous for any reason assigned.

**3. SUFFICIENCY OF EVIDENCE.**

There was no evidence which authorized the defendant's conviction of the offense charged, and the court erred in overruling his motion for a new trial.

Error from Superior Court, Taliaferro County; B. F. Walker, Judge.

Tom Edwards was convicted of an offense, and he brings error. Reversed.

M. L. Felts, of Warrenton, for plaintiff in error.

R. O. Norman, Sol. Gen., of Washington, Ga., for the State.

BROYLES, O. J. Judgment reversed.

LUKE and BLOODWORTH, JJ., concur.

(25 Ga. App. 234)

**TURNER v. STATE.** (No. 11220.)(Court of Appeals of Georgia, Division No. 1.  
April 14, 1920.)*(Syllabus by the Court.)***INTOXICATING LIQUORS ¶236(6½)—EVIDENCE HELD INSUFFICIENT TO SUSTAIN CONVICTION FOR POSSESSION OR CONTROL.**

A conviction of having unlawful possession or control of liquor was not authorized by the evidence in this case.

Error from Superior Court, Taliaferro County; B. F. Walker, Judge.

C. J. Turner was convicted of unlawful possession or control of intoxicating liquors, his motion for a new trial was overruled, and he brings error. Reversed.

J. A. Beazley, of Crawfordville, for plaintiff in error.

R. C. Norman, Sol. Gen., of Washington, Ga., and Alvin G. Golnoke, of Crawfordville, for the State.

BLOODWORTH, J. The evidence in this case is as follows:

"W. J. Sturdivant, sheriff, sworn for the state: 'On the 24th of December, 1918, I went with several others to the home of Clark J. Turner, the defendant, in search of liquor. We found in the front or company room a gallon jug full of liquor or about full. This was hidden behind a dresser. This was the front or company room. It was not Clark's bedroom, or where his family roomed, but a sort of parlor or company room. In another room occupied by Jack Turner, who is the father of Clark Turner, we found some empty jugs that had contained liquor. This was in Jack Turner's bedroom, the room that he slept in. Clark Turner lived there, and I suppose it was his home. It is the old home that Jack Turner has lived in for years, and where he raised a family, and I suppose Clark was raised there for the most part. I suppose Clark carried on the farm, as Jack is not able to work, being blind. I don't know whether it is Clark's house or not. Yes; it is the old Jack Turner home, that he or his wife, now dead, has owned for years. Clark was not there when we went there, and we did not see him.'

"John Blackwell, sworn for state: 'I was present at the house where Clark Turner lives when he [we?] found the whisky in the front room, just as Sheriff Sturdivant says. We also found the empty jugs in the closet of Jack's room, as the sheriff has stated. While we were searching in this room Jack Turner went to a chest and took out a flask containing some liquor and turned it up and drank it, and said: "They may get the balance of my liquor, but they won't get this." Clark Turner was not there.'

"J. T. Overton, sworn for the state: 'I live adjoining farms to Clark Turner. I was present with Sheriff Sturdivant and Deputy Blackwell when we found the liquor in the house where Clark Turner lived. We found a gallon jug about full in the front room. This room was a front room, a sort of company room, and not occupied by any one. The liquor was behind the dresser. In Jack Turner's room we found some empty jugs that had had liquor in them in his closet. Jack went to a chest and took out a flask with some liquor in it and drank it, and said: "They may get the balance of it, but they won't get this." We didn't get that. Jack Turner lived in the old part of the house. Clark Turner lived in the new part of the house. The room where the liquor was found was a part of the new part of the house. A

closet separated the new part from the old part. The liquor that Jack got out of the chest and drank up was in the old part of the house, where Jack roomed. Clark run the farm. All this was in Taliaferro county. Clark runs a store near his home. We searched that carefully. We found no liquor or any bottles indicating liquor had been in them.'

"Jack Turner, sworn for defense: 'The liquor that the officers got was my liquor. It was brought to me by a man I did not know, but who owned or had an automobile. I wanted some liquor, and he said he could get it for me. He did get it, and brought it to me while Clark Turner was gone, and the officers got it before he got back. Clark had gone off to Woodville, taking orders for clothes, and went the day before the officers came. I put this liquor over behind the dresser and hid it. I took some out of the jug and poured it in the flask, and had that in the chest in my room. When the officers came I went and got that out, and drank it before they could get it, and told them they might get the balance, but they would not get that. Clark Turner never saw any of that liquor, and did not know it was there. The house is my house. It is my old home where I have lived for 40 years and where nearly all my children were born and raised. My wife died, and Clark was living there with me in my house.'

"Clark Turner, defendant, made statement: 'When the officers came there and got that liquor I was not at home. I went to Woodville the day before and had not got back. I did not know the liquor was there, and had nothing to do with it. I live there with my father, but it is his house—the old family home where I was raised. My father raised his family there, including myself, and he has lived there continuously. Part of the time I have lived to myself on other lands, but he has continued to live in the old home. When my mother died he got me to come and live in the house with him, as he was blind and feeble.'

Under the foregoing evidence the conviction of the defendant was not authorized, and the judge erred in overruling the motion for a new trial.

Judgment reversed.

BROYLES, C. J., and LUKE, J., concur.

(179 N. C. 457)

TURNER et al. v. SOUTHEASTERN GRAIN  
& LIVE STOCK CO. et al.  
(Nos. 190, 198.)

(Supreme Court of North Carolina. April 21,  
1920.)

1. EVIDENCE ¶265(7)—ADMISSION BY COUNSEL THAT DEFENDANT OWNED PART OF THE LAND IS BINDING.

Where, during the trial of an action to recover land, plaintiffs' counsel solemnly admitted in open court that defendant was the owner and entitled to possession of a part of the land sued for, and the admission was reduced to writing at the time, plaintiff is bound thereby and cannot complain of a judgment awarding that portion of the land to defendant without having the admission set aside for inadvertence or mistake.

2. SET-OFF AND COUNTERCLAIM ¶24 — ANSWER MUST STATE CAUSE OF ACTION TO BE COUNTERCLAIM.

For an answer to state a counterclaim entitling defendants to judgment on plaintiffs' failure to reply thereto, it must set up a cause of action which defendant could have maintained in an independent suit against plaintiff.

3. EJECTMENT ¶72 — ANSWER ALLEGING MERE OWNERSHIP AND POSSESSION OF LAND IS NOT COUNTERCLAIM.

In a suit for the recovery of the land, an answer, alleging that defendant was the owner and in possession of the land, and without alleging that plaintiffs were setting up a claim which was a cloud on defendants' title or other facts entitling them to equitable relief, does not allege a counterclaim.

Appeal from Superior Court, Craven County; Connor, Judge.

Action by Chesler D. Turner and others against the Southeastern Grain & Live Stock Company and others to recover land. From a judgment awarding part of the land to defendants and directing nonsuit as to the rest of the land, both parties appeal. No error.

This is an action to recover land.

The plaintiffs filed their complaint alleging the ownership of the land, and the defendants filed answer denying the material allegations of the complaint and pleading as a counterclaim the following:

"24. That they were at the time of bringing this action and are now the owners in fee simple and in possession of the land claimed by the plaintiffs and they plead said ownership as a counterclaim; wherefore defendants demand judgment that they go without day as to plaintiffs' claim and that they be adjudged the owners in fee simple of the lands claimed by plaintiffs and that they recover cost and have general relief."

The plaintiffs failed to file a reply to the answer, and the defendants moved for judgment upon the alleged counterclaim for want of a reply which was refused, and the defendants excepted.

ment upon the alleged counterclaim for want of a reply which was refused, and the defendants excepted.

During the progress of the introduction of evidence, the plaintiffs solemnly admitted in open court that the defendants were the owners in fee simple and in possession of the home tract No. 1 described in the deed, a certified copy of which was then and there introduced by the plaintiffs from Wm. M. Jones, surviving executor of Lawrence J. Haughton, deceased, and others to C. E. Foy, J. W. Stewart, T. A. Uzzell, and W. S. Chadwick dated 15th day of October, 1912, and registered in the office of the register of deeds of Jones county, N. C., in Book 60, page 396, and particularly described in said deed, containing 7,850 acres, more or less. And said admission was taken down in a very short form by the official court stenographer at the time the same was made a solemn admission of the plaintiffs in the course of the trial, and in the judgment entered it was adjudged on said admission, and the reference to the same matter in the consolidated complaint, that the defendants had title to and were in possession of said tract of land to which said admission referred.

During said term of the court and some days after the trial of said cause in which his honor had directed that a judgment as of nonsuit be drawn as to all the remaining matters involved in plaintiffs' complaint, plaintiffs in open court gave a general notice of appeal and had entry made affecting the same. The court had up till this time held open the matter of signing the judgment at the request of the plaintiffs, so that they might consider the matters involved and confer with such counsel as they saw fit. Later during the term his honor signed the judgment set out in the record, and also signed the statement of the case on appeal of defendants set out in the record of defendants' appeal.

At said time plaintiffs' counsel appeared in open court and stated that he wished all of his entries as to the appeal and notice of appeal that had been entered stricken out, and it was so ordered, and stated that he would rely upon the notice of appeal in writing to be served by him, and that he did not desire to appeal from so much of the judgment as granted a nonsuit against the plaintiffs, but only from that part adjudging the defendants the owners of said tract No. 1 in said deed from Wm. M. Jones, executor, and others to C. E. Foy, J. W. Stewart, T. A. Uzzell, and W. S. Chadwick, and that he then and there desired to repudiate said admission. His honor later refused to permit him to repudiate it and entered up judgment.

It was adjudged by the court that the defendants were the owners of the land covered by admissions of the plaintiffs, and that

the plaintiffs be nonsuited as to the remainder of the land.

Both the plaintiffs and the defendants appealed from the judgment.

The plaintiffs assign as error his honor's rendering judgment in favor of the defendants for the 7,850-acre, more or less, tract of land described in exception 1 above.

The defendants assign as error the failure to enter judgment in their behalf for all of the land described in the complaint because of the failure of the plaintiffs to file a reply.

Frank Nash, of Raleigh, and C. D. Turner, of Hillsboro, for plaintiffs.

D. L. Ward, T. D. Warren, Gulon & Gulon, Moore & Dunn, and Ward & Ward, all of New Bern, for defendants.

ALLEN, J. The plaintiffs do not note any exception in the record to the refusal of his honor to strike out the admission solemnly made, and the only question therefore presented by their appeal is whether the admission which it is not alleged was inadvertently made, or by mistake, or that it is not according to the truth, is sufficient to sustain the judgment.

[1] It has been long recognized with us that admissions made by counsel during the progress of a cause and to facilitate the trial are binding upon the parties, and, if this were not so, much time would be consumed in proving facts about which there is no controversy.

It not infrequently happens, in the course of an action to try the title to land, that the plaintiff introduces a great number of deeds in his chain of title in which the descriptions are not always identical, and that the defendants' counsel, knowing that the deeds cover the land, do not require proof of identification, and in this way much time can be saved, and so it is in the trial of other actions.

In *Fleming v. Railroad*, 115 N. C. 693, 20 S. E. 715, the court says of admissions equally as important as the one made in this case:

"When two of the counsel for the defendant admitted in the progress of the trial, on behalf of their client, that the plaintiffs owned and were possessed of the land, it was error in the court to instruct the jury to respond in the affirmative to the first issue, involving the question of title and possession. In the same way, counsel were bound by their admission that 'Great Swamp was a natural watercourse and drain for said land,' and were not at liberty, after the trial, to except to the instruction to the jury to write the response, in accordance with their express agreement.

"The same principle applies to the consent of counsel given 'in open court, at the close of the charge, that the jury need not respond to each amount of damage separately, if more than one cause of damage was found to exist, but that they might find the aggregate amount for all causes, and respond only to the ninth issue on that question.'"

Again, in *Lumber Co. v. Lumber Co.*, 137 N. C. 438, 49 S. E. 948:

"Parties undoubtedly have the right to make agreements and admissions in the course of judicial proceedings, especially when they are solemnly made and entered into and are committed to writing and when too they bear directly upon the matters involved in the suit. Such agreements and admissions are of frequent occurrence and of great value as they dispense with proof and save time in the trial of causes. The courts recognize and enforce them, as substitutes for legal proof, and there is no good reason why they should not. 'Admissions of attorneys bind their clients in all matters relating to the progress and trial of the cause, and are, in general, conclusive.' 1 Greenleaf on Ev. 186. 'Unless a clear case of mistake is made out, entitling the party to relief, he is held to the admission, which the court will proceed to act upon, not as the truth in the abstract, but as a formula for the solution of the particular problem before it, namely, the case in judgment, without injury to the general administration of justice.' Ibid. 206. Wharton on Ev. 1184, 1185 and 1186."

We are therefore of opinion that there is no error on the plaintiffs' appeal.

[2] The defendants' appeal presents the simple question as to whether the allegations of the defendants in the answer that they are the owners of the land in controversy and in possession thereof constitute a counterclaim because, if it is a counterclaim, it was the duty of the plaintiffs to file a reply thereto, and upon failure to do so the defendants would be entitled to judgment for want of a reply.

"The criterion for determining whether a defense set up can be maintained as a counterclaim is to see if the answer sets up a cause of action upon which the defendant might have sustained a suit against the plaintiff; and if it does, then such cause of action is a counterclaim; and it must disclose such a state of facts as would entitle the defendant to his action, as if he was plaintiff in the prosecution of his suit, and should contain the substance of a complaint, and, like it, contain a plain and concise statement of the facts constituting a cause of action." *Garrett v. Love*, 89 N. C. 207.

Again, in *Askew v. Koonce*, 118 N. C. 532, 24 S. E. 218, it is said:

"Unless a defendant has some matter existing in his favor and against the plaintiff on which he could maintain an independent action, such claim would not be a counterclaim."

[3] Tested by this rule, we are of opinion that the defendants have not alleged a counterclaim.

If they had instituted an independent action alleging simply that they were the owners of the land and in possession, it would have been the duty of the court to enter judgment of nonsuit because if they owned the land and were in possession, nothing else

appearing, they had no cause of complaint.

The case would be different if, as in *Roper Lumber Co. v. Wallace*, 93 N. C. 23, and in *Yellowday v. Perkinson*, 167 N. C. 147, 83 S. E. 341, there were allegations entitling the defendants to equitable relief, or if it had been alleged that the plaintiffs were setting up a claim which amounted to a cloud upon their title; but none of these allegations appear in the answer, and, as they are relying upon the letter of the law, they must abide by it.

Affirmed on both appeals. The plaintiffs will pay the costs on the plaintiffs' appeal, and the defendants the costs on the defendants' appeal.

(179 N. C. 461)

**GAULDIN v. TOWN OF MADISON.**  
(No. 359.)

(Supreme Court of North Carolina. April 21, 1920.)

**1. LIMITATION OF ACTIONS §196(4)—IN ABSENCE OF COMPLAINT, OTHER PROOF IS INADMISSIBLE TO SHOW CAUSE OF FORMER ACTION.**

Where no complaint had been filed in the previous action upon which plaintiff relied to defeat the bar of the statute of limitations, he could not introduce parol evidence of any kind to establish what cause of action he intended to state so as to show that it was the same as in the pending action.

**2. EVIDENCE §158(5)—PAROL EVIDENCE INADMISSIBLE TO PROVE RECORD WITHOUT PROOF OF LOSS.**

Proceedings in a court of record are evidenced by the record, and proof outside of the record is inadmissible to establish such proceedings without proof of the loss or destruction of the record.

**3. EVIDENCE §332(2) — COLLATERAL PROCEEDINGS NOT A PART OF JUDICIAL RECORD.**

An affidavit in a prior action to set aside a nonsuit for failure to file complaint, and the judge's findings thereon as to the cause of action plaintiff intended to state, are not parts of the record of that action, but are collateral thereto and are not admissible to show that the cause of action therein stated was the same as that of a subsequent action so as to avoid limitations.

Appeal from Superior Court, Rockingham County; McElroy, Judge.

Action by J. O. Gauldin, administrator of estate of Bessie Virginia Gauldin, deceased, against the Town of Madison. From a judgment of nonsuit, plaintiff appeals. No error.

This suit was brought to recover damages upon the allegation that the defendant had negligently caused the death of the plaintiff's intestate by a defect in one of its streets, known as Water street, at its junction with the bridge over the Dan river, the deceased

having been thrown violently from the buggy in which she was riding, resulting in injuries to her person, from which she died on August 22, 1914. Defendant denied that it had been guilty of negligence, pleaded contributory negligence, and specially set up as a defense that the death of plaintiff's intestate occurred on August 22, 1914, and this action was commenced more than one year from the said death. Plaintiff replied, admitting that this action was commenced on October 19, 1916, more than one year after his intestate's death, but alleging that an action was previously commenced by summons which was issued on August 16, 1915, and served on August 20, 1915; it being returnable to November term of the superior court of Rockingham county; that the said action was, on motion of the defendant therein, dismissed by the court on the last day of November term, 1919 (December 4, 1919), for failure to file a complaint; that, at the next term of the court, the plaintiff moved to set aside the judgment of dismissal upon affidavit alleging that the former action "was based upon a claim for damages for the wrongful death of Bessie Virginia Gauldin, caused by a defect in the street of said town of Madison." The motion was denied by Judge Webb, then presiding, and no appeal was taken. Summons was issued in the present action October 19, 1916, and served November 1, 1916.

At the trial of the present action, the court below excluded the said affidavit and the judgment or order of Judge Webb, and all other evidence offered by plaintiff for the purpose of identifying the present with the former action, in order to repel the effect of the statute that a suit to recover damages for death by wrongful act shall be brought within one year after the death. Upon the exclusion of all available and existing evidence offered by plaintiff to carry the burden of the issue as to the bar of the statute, he submitted to a nonsuit and appealed.

Douglas & Douglas, of Greensboro, J. R. Joyce and J. M. Sharp, both of Reidsville, and R. M. Robinson, of Greensboro, for appellant.

C. O. McMichael, of Winston-Salem, J. C. Brown, of Madison, and Manly, Hendren & Womble, of Winston-Salem, for appellee.

WALKER, J. (after stating the facts as above). [1] The plaintiff contends that the affidavit of Mr. J. R. Joyce, filed by him and upon which he based his motion to set aside the former judgment, was competent to prove the cause of action in the first suit in order to repel the bar of the statute, by showing the identity of the cause of action in this case with that in the former suit, and that the court erred in excluding it. We do not

agree with the contention and hold, to the contrary, that the court was right in its decision upon the question. No pleading was filed in the first action, and the only way, that we know of, to show what the cause of action was, is by the production of the complaint itself or a duly certified copy thereof. The complaint itself is the "only" evidence of the cause of action alleged, or "intended" to be alleged. Nothing else can prove it, or, as has so often been held by this court, a record is the "only" proof of itself, which the law will hear.

[2] The precise question was raised and decided in *Bryan v. Malloy*, 90 N. C. 508, where a suit was brought and no complaint or other pleading filed; but a deposition was taken by the plaintiff and remained on file. Both parties were present when the deposition was taken, but it was never read or offered in evidence. The first action was nonsuited. A second suit was brought, but no complaint was filed, and it was attempted to be shown in the pending action by the oral examination of the plaintiff in that action what was the cause of action therein. This evidence was excluded. The defendant then in the pending action, in which pleadings had been filed, submitted to a nonsuit and appealed. This court sustained all the rulings. The court, after a clear discussion of the matter by Justice Ashe, closed with these words:

"The principle established in these adjudications is, that parol proof is admissible, and only admissible in aid of the record; that is, whenever the record of the first trial fails to disclose the precise point on which it was decided, it is competent for the party pleading it as an estoppel to aver the identity of the point or question on which the decision was had, and to support it by proof. But there must be a record to be aided. When there is no record, as in our case, there is no foundation for the proof."

In the later case of *Tomlinson v. Bennett*, 145 N. C. 279, 59 S. E. 37, the court, referring to the passage just taken from Judge Ashe's opinion, says: "The learned justice used the word 'record' as synonymous with 'pleading.'" Justice Connor further says in the *Tomlinson* Case, *supra*:

"Plaintiff encounters another difficulty—how is the court to know what the defendant, the plaintiff in that action, would have alleged therein as his cause of action? We do not think parol evidence would be competent to show what a plaintiff would have alleged in a complaint which was never filed. \* \* \* The only record is a summons; no complaint; no answer; no issue, and no verdict—only a judgment of nonsuit, which in that case means a *nolle prosequi*."

Concluding the discussion, and referring to the class of cases in which parol evidence is admissible to make more specific the issues decided in a former action, the learned justice

proceeds to the review of *Bryan v. Malloy*, *supra*, and says that Justice Ashe states the correct rule in that case, which is that the court will not admit any evidence to prove a record other than the record itself, unless that once existed and has been lost, or, having existed, cannot be produced, and the burden of showing this rests upon the party relying upon the record. It would seem that this is sufficient authority to sustain a proposition so universally recognized as law that the best and only proof of a record is by the record, as in no other mode can we be properly advised. But there is unlimited authority to sustain it. *Commissioners v. Packing Co.*, 135 N. C. 62-68, 47 S. E. 411; *Rollins v. Wicker*, 154 N. C. 559, 70 S. E. 934; *Wade v. Odeneal*, 14 N. C. 423; *Hughes on Procedure*, pp. 14 and 749; *Munday v. Vail*, 34 N. J. Law, 418; *Mondel v. Steel*, 8 Mess & W. 858. A judicial record is neither to be originally created, nor can it be increased or diminished by averment out of or beyond that record. *Hughes on Procedure*, p. 749; 17 Cyc. 497, 567, 571; *Dimick v. Brooks*, 21 Vt. 578. In *Wade v. Odeneal*, *supra*, *Ruffin, J.*, said:

"The question is, how this judgment is to be proved. Courts of record speak only in their records. They preserve written memorials of their proceedings, which are exclusively the evidence of those proceedings. \* \* \* The records may be identified by testimony, but their contents cannot be altered, nor their meaning explained by parol. The acts of the court cannot thus be established."

In *Rollins v. Wicker*, *supra*, where the plaintiff proposed to set up a record by parol evidence, which was excluded, the court said:

"The ruling was correct. That was not the way to prove the fact, even if the evidence was otherwise competent. The record itself is the primary and only competent proof of its contents, unless it has been lost or destroyed, and there was no suggestion that it had been."

A careful scrutiny of the authorities appears to show that no principle in the law of evidence is more universally accepted as the only correct one as that which excludes parol evidence to show what a pleading would, perhaps, have been if it had been filed. It must seem to be clear, apart from precedent, that a cause of action should be shown only by the complaint itself. Any other doctrine would be unsafe, without the support of a single sound reason and would be palpably wrong. The rule is thus tersely, and aptly, stated in 17 Cyc. 504:

"It is generally held that the proceedings, judgments, and decrees of courts of record can be proven only by the record itself or a properly authenticated copy thereof, and that, if no record of such matter has ever been made, the absence of the record cannot be supplied by parol or other extrinsic evidence; the rule whereby secondary evidence is admitted as to lost or destroyed records not being applicable."



Dr. Thayer says, in his excellent treatise on Evidence, at page 390, that, according to the modern and better view, the parol evidence rule is not merely one of evidence but of substantive law. Parol proof is excluded, not because it is lacking in evidentiary value, but because the law for some substantive reason declares that what is sought to be proved by it shall not be shown other than in one certain way, and everything whether oral or in writing, which is extrinsic to the method prescribed, is excluded. Greenleaf on Evidence (16th Ed.) § 350; *Pitcairn v. Philip Hiss Co.*, 125 Fed. 110, 113, 61 C. O. A. 657. In 10 R. C. L. § 329, p. 1121, we find it stated that—

"A judgment and the proceedings in the case in which it has been rendered are properly proved by the record itself, or by a certified copy. Indeed, except in case of the loss or destruction of the record, it cannot be proved otherwise than by the original, or by a duly authenticated copy."

And in 23 R. C. L. at section 7, p. 158:

"The acts of a court of record are known by its record alone, and cannot be established by parol testimony."

[3] It is manifest, therefore, that the affidavit of Mr. Joyce, and the findings in Judge Webb's order refusing to set aside the judgment of nonsuit in the first action, should not, and cannot, be made proof of the record in this case, nor can they be used to import into that record anything not already therein. The rule admitting only the record to prove itself, or its contents, applies only to such matters as originally and legitimately were in the record, and the record cannot be made or originated by mere collateral proceedings. They are not in any correct, or proper sense, proof of the original record. 17 Cyc. 304. The rule excluding parol evidence to supply a pleading never filed, or to read into any part of the record that which was omitted and never in fact existed as a part of it, cannot be avoided by a mere form. The law refuses to receive any kind of evidence, except the record, to establish what it is. Besides, the affidavit does not profess to say that there ever was a record, that is, a pleading, filed, corresponding in kind to its allegations as to the cause of action, and all it really does state, in effect, is that plaintiff intended to file such a complaint but did not do so. This is very far from complying with the rule, and if we should allow such procedure we would be deciding against all precedent and authority. Judge Webb only stated that plaintiff claims that the former case was one to recover damages for the death of his intestate, and that is all he could find upon the evidence.

Unless, at the time the suit was dismissed, there appeared in the record of it, and in the proper way, a statement of the nature of

the plaintiff's cause of action, there is now no way for plaintiff to show what, in fact, it was, because the law has declared that there has been provided a way for him to disclose the nature of his cause of action, and if that way is not followed there is no other way open to him. The way prescribed is a complaint. *Tomlinson v. Bennett*, 145 N. C. 279, 59 S. E. 37. The doctrine of the courts in respect to the proof of judicial records is thus well stated by Justice Wayne, in *Weatherhead's Lessee v. Baskerville*, 11 How. 329, 13 L. Ed. 717:

"The rule in respect to judicial records is, that, before inferior evidence can be received of their contents, their existence and loss must be clearly accounted for. It must be shown that there was such a record, that it has been lost or destroyed, or is otherwise incapable of being produced; or that its mutilation from time or accident has made it illegible. In this last, though, not without the production of the original in the condition in which it may be."

A lost record, or pleading or any other part of the record, may be shown by parol; but, before even this can be done, it must be shown that the instrument once existed. This is the essential first proof. *Improvement & R. Co. v. Munson*, 14 Wall. 442-449, 20 L. Ed. pp. 867, 872; *Bouldin v. Massie's Heirs*, 7 Wheat. 122, 5 L. Ed. 414. You cannot even show by parol testimony the contents of a record or document until you have established its former existence and its loss, or the impossibility of producing it.

We discussed fully, in *Person v. Roberts*, 159 N. C. 168, 74 S. E. 322, the question as to the competency of parol evidence to show what was the cause of action in a prior suit, when no complaint had been filed, and reached the same conclusion as we have in this case. It was there said:

"It appears that a former suit was brought, but no complaint filed, and plaintiffs were permitted to show by parol what was the cause of action in that case, for the purpose, we presume, of rebutting the defense of the statute of limitations, or, to be more exact, the claim of title by adverse possession. If it had been material to show that the two actions were for the same cause and the same relief, the ruling would be erroneous. The point was decided against the contention of the plaintiffs in *Bryan v. Malloy*, 90 N. C. 508, in which Justice Ashe says: 'Verdicts, judgments, depositions in a former cause, and the former testimony of deceased witnesses are considered as resting on the same principle.' \* \* \* The plaintiffs offered parol evidence to show that the action was brought to set aside the deed made by the Sinclairs to Kennedy. But his honor excluded the evidence and the deposition taken in the cause.'"

The ruling in *Bryan v. Malloy*, supra, was approved as appears from the above passage taken from the opinion of the court. The

case of *Person v. Roberts* was practically identical with this one, and at least sufficiently so to control the present decision. If the deposition was not competent in *Bryan v. Malloy*, which indicated what would have been the cause of action if a complaint had been filed, we fail to perceive how an affidavit filed in a collateral proceeding to set aside the judgment by default can possibly be admitted to show the cause of action in the case.

The plaintiff, in order to avoid the condition of the statute giving an action for death caused by wrongful act that it shall be brought within one year after the death, has tried to prove the impossible, which is that he brought a former action for the same cause within one year after the death of the intestate, when it affirmatively appears, and is not denied, that no complaint was ever filed in the former suit, which could be the only proof of his allegation. In other words, that he can prove an essential fact by something that never existed. *Bryan v. Malloy*, supra, and other cases we have cited to the like effect.

What is said herein does not affect the power of the court to amend its record in any manner necessary to make it speak the truth or to supply a missing record in a proper case. That rule implies, as we have said, that a record, or an entry, was ordered to be made which by inadvertence was not made, or, by clerical or other mistake or mishap, an entry was not made as ordered, and other similar cases.

Judge McElroy was right, when he intimated against the plaintiff and drove him to the nonsuit from which he appealed.

No error.

(114 S. C. 89)

**GRANT v. DIRECTOR GENERAL OF RAILROADS et al. (No. 10403.)**

(Supreme Court of South Carolina. April 14, 1920.)

1. RAILROADS  $\S$  5½, New, Vol. 6A Key-No. Series—SUBSTITUTION OF DIRECTOR GENERAL FOR RAILROAD WITHOUT NOTICE HELD UNAUTHORIZED.

Where plaintiff sued a railroad under federal control and one of its employes for injuries, it was error to substitute the Director General in place of the railroad without notice of the motion made at the trial, though the attorneys for the railroad usually represented him, and he was not in default, because they refused to file an answer.

2. JUDGMENT  $\S$  112—TRIAL  $\S$  296(1)—DEFAULT IN PERSONAL INJURY ACTION DOES NOT ADMIT ALLEGATIONS OF COMPLAINT.

A default in a personal injury action does not admit the allegations of a complaint, so a charge that where the Director General of Rail-

roads, who was substituted as a party, defaulted, he admitted the allegations of the complaint, was erroneous; the error in such charge not being cured by a charge that plaintiff was bound to prove his case.

3. MASTER AND SERVANT  $\S$  291(1)—CHARGE THAT THERE COULD BE NO VERDICT AGAINST DIRECTOR GENERAL OF RAILROADS WITHOUT VERDICT AGAINST FOREMAN HELD ERRONEOUS.

In a section hand's action against the Director General of Railroads and a foreman, who ran a new hand car into an old one on which plaintiff was riding, a charge that there could be no recovery against the Director General without recovery against the foreman was erroneous, for the foreman might not have been responsible for the defective condition of the old car, and the jury, instead of treating the foreman's act as the cause of the injury, might have determined the condition of the car to be the cause.

Appeal from Common Pleas Circuit Court of Colleton County; H. F. Rice, Judge.

Action by Edward Grant against the Director General of Railroads, substituted for the Atlantic Coast Line Railroad Company, and another. From a judgment for plaintiff, defendants appeal. Reversed.

W. Huger FitzSimons, of Charleston, and L. B. Houck, of Walterboro, for appellants.

D. B. Peurifoy and Padgett & Moorer, all of Walterboro, for respondent.

FRASER, J. This action was brought against the Atlantic Coast Line Railroad Company and a section foreman, Mr. Hiott, to recover damages for personal injuries.

The plaintiff was a section hand, working on the railroad and riding on a hand car in front of another hand car, on which Mr. Hiott was riding. The allegation of the plaintiff is that the car on which he was riding was old, hard to work, and slow; the car upon which the section foreman was riding was new and moved much faster; that the section foreman, Mr. Hiott, ran his car against the car upon which the plaintiff was riding with such force that it derailed the old car and injured the plaintiff; that the action was willful and malicious, and was the joint act of the railroad company and Mr. Hiott.

The two defendants put in a joint answer, containing a general denial, and further pleaded that at the time of the injury, to wit, on July 23, 1918, the railroad, with all its property and employes, had been taken over and was being operated by the federal government, and that the Atlantic Coast Line Railroad Company had nothing whatever to do with the management of its road, and that it was in no way responsible for the injury to the plaintiff.

On the trial of the case, after the jury had been drawn, the plaintiff moved to dismiss the action against the defendant railroad

company, and substitute in lieu thereof the Director General of Railroads as the defendant. The defendants' attorneys objected, on the ground that they had received no notice of the motion. That while they did represent the Director General in many other cases, they were entirely without authority to represent him in this case. The attorneys for the defendants stated frankly that if they had received notice of the motion they would in all probability be authorized to appear for him; yet as a matter of fact in some cases they represented antagonistic interests, and the Director General employed other attorneys, but they had no authority to represent him in this case and could not do so. The amendment was allowed, and the attorney for the defendants was offered the opportunity to answer in behalf of the Director General at once. They declined to make what they deemed an unauthorized appearance. The Director General was declared to be in default, and the trial proceeded to judgment against the Director General and Mr. Hiott. Mr. Hiott appealed.

All questions as to Mr. Hiott's right to appeal from a substitution of a codefendant has been eliminated by the request of both sides, and of course the court will not raise it of its own motion.

[1] I. In the preparation of the case the respondent proposed an amendment setting forth the fact that the attorneys representing the defendants here were the regular attorneys for the railroad company, and that their district included the place of trial, and that they had, in numerous cases, represented the Director General in the trial of causes. This amendment was allowed by the presiding judge in the settlement of the case on appeal. From this allowance the defendant appealed. It was error, but harmless. The elimination of the railroad company eliminated the attorneys. They did not represent the Director General, and were unauthorized to appear for him in this case.

The error arises from a misapprehension of conditions. In the hurried legislation at the beginning of the war, the transfer of the management from corporate to federal control, the railroad corporations were required by the government to defend suits. As soon as other matters were attended to, the gov-

ernment directed litigants to bring new suits and continue their old ones by making, not the corporations, but the Director General, a party. The necessity for a substitution was recognized in this case by the attempt to substitute, and of that the plaintiff cannot complain. We have been cited to no authority, and we know of none, which allows a person to be made a party to a suit without an application by the one who desires to become a party of his own motion, or by legal notice, if he be made a party without his consent. The railroad corporation and the Director General are separate and distinct entities. It follows, therefore, that the order that attempted to make the Director General a party without his consent, and without notice, is error, and the exceptions that raise this question are sustained.

[2] II. The presiding judge told the jury that it could not find a verdict against the Director General, unless they also found a verdict against his codefendant, Hiott. His honor also told the jury that, when one is in default, he admits the allegations of the complaint. This was not only misleading, but error. The jury might well have understood that the Director General admitted negligence, injury and the amount of damage, and, since they must find admitted facts, there must only be a verdict against the Director General, but against Mr. Hiott also. Failure to answer is taken as an admission in certain cases only. An action for damages is not one of them.

His honor told the jury that the plaintiff must prove his case against the Director General, but the jury might be satisfied with much less proof of an admitted case than one earnestly contested.

[3] III. One specification of negligence was the defective car upon which plaintiff was riding. There is nothing in the record to show that Mr. Hiott was responsible for the condition of that car. The jury may have thought the condition of the old car was the proximate cause of the injury. If so, then they might have found a separate verdict. This exception is sustained.

The judgment is reversed.

GARY, C. J., and HYDRICK, WATTS, and GAGE, JJ., concur.

(114 S. C. 21)

HOWELL v. SOUTHERN RY. CO. et al.  
(No. 10896.)

(Supreme Court of South Carolina. April 12, 1920.)

1. MASTER AND SERVANT ¶264(4)—THAT TRUCKS ON TOOL CAR WERE INSECURE ADMISSIBLE UNDER PLEADING.

In an action by conductor injured when trucks on a tool car rolled along the rail track on the car and struck him, evidence as to the proper method of loading and as to the insecurity of the trucks held admissible under an allegation that the wheels were not properly fastened.

2. APPEAL AND ERROR ¶1050(1)—EVIDENCE TO SAME EFFECT AS EVIDENCE ALREADY RECEIVED HARMLESS.

In an action against a railroad company where its own yardmaster testified that trucks on a tool car were insecure, the admission of plaintiff's evidence to that effect was inconsequential if erroneous.

3. EVIDENCE ¶110—THAT WITNESS' SUPERIOR WAS IN COURT, BUT NOT CALLED, HELD ADMISSIBLE.

Where plaintiff's witness who testified that he did not put braces on tool car to keep trucks from rolling and that he was so directed by his superior, testimony that his superior was in court, but was not called, was admissible.

4. APPEAL AND ERROR ¶232(1), 688(2)—ARGUMENT NOT IN CASE AND WITHOUT OBJECTION MADE CANNOT BE QUESTIONED.

Where the reference to flagman was brought out by the defendant railroad company on cross-examination, an objection that plaintiff's attorney stated that the company gave plaintiff yard conductor a negro flagman cannot be considered on appeal, where the objection to the argument did not raise that point and the case showed no such argument.

5. MASTER AND SERVANT ¶217(20)—CONDUCTOR HELD NOT TO HAVE ASSUMED RISK OF INSECURE TRUCKS ON TOOL CAR.

A yard conductor held not to have assumed the risk of injury from unfastened trucks breaking out of the inclosed portion of a tool car on which he was riding, where he was under no obligation to examine that portion of the car.

6. MASTER AND SERVANT ¶289(32)—NEGLIGENCE IN RIDING ON TOOL CAR HELD FOR JURY.

In an action by a conductor injured by insecure trucks while riding on a tool car, where the evidence was conflicting as to whether he should have ridden on the car or engine, motion for directed verdict on the ground he should have ridden on the engine was properly refused.

7. MASTER AND SERVANT ¶270(5)—EVIDENCE OF WORK DONE ON CAR BEFORE INJURY ADMISSIBLE.

In an action by a conductor hurt when insecure trucks broke out of box car portion of tool car on which he was riding, evidence as to work done on the car 48 hours previous showing that the trucks were not firmly fastened is admissible; the presumption being that the condition continued to exist.

8. MASTER AND SERVANT ¶332(5)—ACQUITTAL OF VICE PRINCIPAL HELD NOT TO EXONERATE MASTER.

Where injured employé sued master and vice principal, the exoneration of the vice principal will not free the master unless the vice principal was the only agency by which the injury could have been caused.

9. APPEAL AND ERROR ¶1062(4)—WHERE JURY CORRECTLY ANSWERED QUESTION, THAT COURT SHOULD HAVE DETERMINED QUESTION WAS HARMLESS.

Where the jury correctly answered a special issue, the fact that the court should have determined the question is no ground for complaint.

10. MASTER AND SERVANT ¶243(4)—VIOLATION OF RULES NOT NECESSARILY NEGLIGENCE.

The violation by railroad employé of the company's rules is not necessarily negligence, and the employé is justified in violating the rule where to follow it would accomplish disaster.

Appeal from Common Pleas Circuit Court of Richland County; W. N. Townsend, Judge.

Action by L. C. Howell against the Southern Railway Company and another. From a judgment for plaintiff, the first named defendant appeals. Affirmed.

F. G. Tompkins and C. J. Kimball, both of Columbia, for appellant.

D. W. Robinson and A. F. Spigener, both of Columbia, for respondent.

GAGE, J. The plaintiff, who is called a yard conductor, sued the railway company and one of its employes, who is called yardmaster, for a tort to the person.

The jury found a verdict for the plaintiff against the railway company, and the company has appealed upon 22 exceptions.

The event transpired at night, betwixt Royster and Columbia, and Royster is a "yard" some three miles out of Columbia.

The plaintiff on that night had charge of a train of cars made up of engine and tender, a flat car loaded with lumber, and a "tool car"; and the engine was "pushing" these two cars from Royster towards the city.

The tool car is described as "part a flat car and part a box car"; the box car part of it as the train was then made up constituted the tail end of the train; and the plaintiff was mounted upon the top of that end, and upon the top edge of the box part which faced towards the engine, and he was facing the engine.

Along the length of the tool car there were laid two rails for a track, upon which to run on and off that car certain trucks which that car carried in emergency, to put efficient trucks under such bad order cars as should need them along the line.

These trucks, and tools beside, were on the rail track within the box car section of

the tool car; and a trapdoor hung betwixt the box car section and the flat car section of the tool car.

The controversy hangs about these trucks situate in the box car end of the tool car. The testimony of the plaintiff tended to show that the train had proceeded but a short distance from Royster towards Columbia when from some unexplained cause there was an impact of the cars; the plaintiff fell from the top of the box car section of the tool car, down onto the flat car section of it; the trucks rolled out of the box car section, broke through the trapdoor, ran along the rail track upon the flat car section on and over the prostrated body of the plaintiff.

The particular delict charged against the railway company was its neglect to have these trucks made so secure that they would not run away on the track provided for them.

[1, 2] The duty of the railway company thereabout is not seriously in issue, for its trainmaster testified to that point as follows:

"A car is considered properly loaded when there are braces or blocks bolted down to keep those wheels from running up and down the track, and a car is not properly loaded until the chain of the block is bolted to the floor, and when they are not the wheels have a tendency to run up and down when the train is stopped. These wheels weigh about 1300 pounds apiece. There were six or seven pairs on this car."

Beginning first here at the appellant's first of the nine argued "points," the testimony of the trainmaster makes inconsequential the competency of the testimony of Reynolds and Burt, witnesses for the plaintiff, who testified under objection about the insecurity of the trucks.

The complaint, however, did allege that there were loaded on the tool car "heavy trucks and wheels not properly or safely braced or fastened," and to that the trainmaster, Burt, and Reynolds all testified with perfect competence.

[3] 2. The witness Reynolds, who testified for the plaintiff, was one of the car repairers for the railway company. He testified that, on the Saturday before the accident on Monday, he was at work on the car, drilling holes and putting sufficient braces to keep the trucks from rolling back and forth on the tracks; that he asked his superior, a man named Sharpe, if he should work overtime and finish the job, and Sharpe answered no; he at the same time told Sharpe this:

"I told him I had got them so if it was just switched any in the yard I didn't think the trucks would roll through. I said, 'I put five by nines under the wheels,' and I said that wouldn't roll off, I didn't think, if it was just switched in the yard. I said, 'I don't think it will roll off that car if they switch that on that track.'"

When the railway company put up its witnesses, Sharpe was not sworn to contradict Reynolds.

The plaintiff in reply testified that Sharpe was at the instant in court. The court ruled that so much was competent, and we are of the same opinion. More than that, Gaffney, the trainmaster and a witness for the defendant, testified that Sharpe was "right here in court."

[4] Under the same "point," also, exception is taken to certain remarks said to have been made by Mr. Speigener in his address to the jury.

Appellant's counsel said in oral argument at the bar that the remarks arraigned the railway company for putting a negro flagman to serve Howell on the night in question, when before that he had been served by a white flagman.

The case, however, does not show that Mr. Speigener made such remarks, and it does not show that the court's attention was called to such remarks; it shows only that Mr. Tompkins made objection to Mr. Speigener's argument in these words:

"Mr. Tompkins: I object to that line of argument. They tried to prove, when the man was on the stand, that we had taken away a flagman from him and given him another man, and he said he wasn't a competent man, but I drew your honor's attention to the fact that there was no allegation of incompetent help, and you ruled that testimony out."

And the case further shows that Mr. Tompkins not only did not object to the testimony about the change of flagman, but that circumstance was adduced by him on the cross-examination of the plaintiff.

[5] 3. That exception is untenable which challenges the charge which the court made on the subject of the assumption of risk, and which is directed to a refusal of the court on like grounds to direct a verdict for the defendant.

The court's action is always referable to the testimony. Under the testimony there was no risk in sight to be assumed. The car was not a "bad order" one. Gaffney, the trainmaster, so testified. He said:

"There was no defect in that car; therefore it would not be under the head of a car defect."

The car had been in the shops at Columbia, and, as before stated, Reynolds was there "blocking the trucks" in it on Saturday. Before that job was completed, one Parker by wire from Spartanburg on May 6 ordered the car from Columbia to Union to put a pair of wheels under another disabled car at that place. On May 7 Parker advised Gaffney at Columbia by wire that he had been informed that the car "was not loaded," and he returned it from up the road to Columbia on that day, to have necessary material placed on the car and to be forwarded to Union the next day to place trucks under the disabled car.

The car was so returned to Columbia, and

to Royster, and Howell was carrying it from Royster into the city to have material placed on it, pursuant to Parker's direction, when the accident occurred.

Howell was therefore pushing a tool car which had in the box end of it, concealed from his view by a trapdoor, unblocked trucks on rails. Gaffney, the trainmaster, testified that—

"It was not the duty of the conductor to inspect the wheels of that car whether they were braced or not."

Under this state of facts the law of the assumption of extraordinary risks was irrelevant, and the court so distinctly held.

The court charged correctly the law of the assumption of ordinary risks, and in conformity with Horton's Case, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475.

That which the court said about the assumption of extraordinary risks and now excepted to need not have been said, for the testimony did not show any such risk. We shall therefore not pursue that inquiry further.

Upon no view of the testimony could the court have directed a verdict upon the ground that the plaintiff had lost his right by an assumption of the risk.

[8] 4. "Point four" of the appellant's argument has to do with the plaintiff's alleged causative negligence in riding upon the tool car, when he should have ridden on the engine; and on that ground a verdict was moved for.

But Mr. Gaffney, an unusually open minded witness, testified thereabout thus:

"If it was safe (to ride on the tool car) so far as he (Howell) knew, he should be there."

Howell testified that he rode on the only place allowable.

Herdin, the engineer, testified to the contrary; that made an issue of fact for the jury, and the law followed hard on the fact.

[7] 5. This "point" in the brief is that the testimony failed utterly to show that there was any causal connection betwixt (1) the alleged negligence of the defendant in sending out a tool car with unbraced trucks in it, and (2) the injury to the plaintiff.

When Reynolds, the car repairer, was testifying that the blocking of the trucks was unfinished on Saturday, and that the car was sent out on the line in that condition, Mr. Tompkins made the objection now insisted upon; and the court ruled thus:

"If this was work being done on the car before the accident, it would tend to show the condition at the time of the accident, unless a change is shown."

"Mr. Tompkins: If it was the final condition it was in when this thing happened, but here is a car in the shop being worked on, which afterwards went to Union and came back before the accident, and—

"The Court: Yes; but he can show the condition from day to day, coming up to the time of the accident. If he shows it was in a certain condition on Saturday, the presumption is it continued that way, unless some change is shown."

The time which elapsed betwixt the first of the above-stated events and the second of the above-stated events was at most only 48 hours; the car went out on the line after Saturday night, it was back at Royster on Monday night, and the accident happened then. A condition such as that in the instant case proven to exist on Saturday night will be presumed to persist, without any intervening cause, until Monday night unless the contrary be shown. 1 Greenleaf, § 41.

[8] 6. The appellant seeks to bring this cause within the doctrine of Sparks v. Railroad, 104 S. C. 266, 88 S. E. 739, and Jones v. Railroad, 106 S. C. 20, 90 S. E. 183.

But the acquittal of Williams will not effect the acquittal of the railroad, unless Williams was the only agency by which the event could have been compassed; and the testimony shows abundantly that he was not.

[9] 7. There was manifestly no error in the court's submitting to the jury to find if at the instant the train was engaged in interstate commerce. The jury answered thereto, "Yes."

The exception is that the court ought to have answered, "Yes"; but, if the fact found is admittedly true, how matters it who found the fact?

8. The exception argued under point 8 is not well taken. The jury could not have understood the court to hold that the railway company was liable to the plaintiff for the negligence of another of its servants about a matter unrelated to the railway company's duty to the plaintiff.

The inquiry was about a particular act of negligence, and the court was charging the jury about that act.

[10] 9. The last and ninth "point" has to do with the court's charge about the force and effect of the rules of the railway company.

The court charged the jury that the mere violation of a rule did not necessarily constitute negligence. That is true. Rules are made to insure safety, and it might be that under some circumstances the following of a rule might accomplish disaster; so that the jury ought in each case to apply the rule to the circumstances of the case, except that, if the violation shall be in the opinion of the jury the proximate cause of the injury, then its violation shall operate to defeat the servant's right.

But the rules involved in the instant case have little or no relevancy to the facts of the case. The rules which the appellant proved, and upon which it relies, are those with reference to "inspection" of trains.

As we before stated, Mr. Gaffney distinctly testified that it was not Howell's duty to inspect the particular agency which caused the event, to wit, the bracing of the trucks. There was nothing else to inspect, for so far as the testimony shows there was no other disorder in the car.

The testimony also tended to show that there were two inspectors on each yard, and four inspectors at Royster.

The judgment of the circuit court is affirmed.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

(86 W. Va. 204)

**ALBERT v. COLONIAL FIRE UNDERWRITERS OF HARTFORD, CONN. (No. 3961.)**

(Supreme Court of Appeals of West Virginia. April 18, 1920.)

*(Syllabus by the Court.)*

**1. INSURANCE §335(3)—IRON SAFE CLAUSE MUST BE SUBSTANTIALLY COMPLIED WITH.**

The promissory warranty commonly called the "iron safe clause" in a fire insurance policy covering a stock of merchandise is a material provision of the contract of insurance, as the method adopted by the contracting parties of determining the amount of loss, and must be substantially complied with.

**2. INSURANCE §335(3)—INSURED HELD NOT TO HAVE SUBSTANTIALLY COMPLIED WITH IRON SAFE CLAUSE.**

Where the insured takes no inventory of his stock in store, except at the beginning of business about three months before the date of his policy, and thereafter at various times adds largely to his stock by new purchases, and continues all the time to make sales therefrom at retail, keeping his accounts of such sales on slips, which are destroyed at the end of each week, and only the figures showing the amounts of weekly sales are transcribed into a book, he has not substantially complied with the iron safe clause, and his policy is thereby rendered void.

Error to Circuit Court, Marshall County.

Action by George Albert against the Colonial Fire Underwriters of Hartford, Conn. Judgment for defendant, and plaintiff brings error. Affirmed.

Martin Brown and A. L. Hooton, both of Moundsville, for plaintiff in error.

Chas. A. Showacre and James T. Miller, both of Moundsville, for defendant in error.

WILLIAMS, P. This action was brought by George Albert to recover on a fire insurance policy for the destruction by fire on

January 2, 1918, of goods in a retail store in the city of Moundsville. The defendant filed its written specification of defenses and also pleaded non assumpsit. After the plaintiff had introduced all of his evidence the court, at the motion of the defendant, directed the jury to return a verdict for the defendant, and after overruling plaintiff's motion to set it aside, entered judgment thereon. Plaintiff brings the case here on writ of error; his counsel contending that the court erred in not allowing the case to go to the jury on his evidence, as being sufficient to show a substantial compliance with the provisions and warranties in the policy.

The only question we need consider is whether or not plaintiff's evidence shows a substantial compliance with what is called the iron safe clause. That it is a material promissory warranty, with which the insured must comply substantially, has been so frequently decided by the courts of this and other states of the Union, that citation of authority for the proposition is hardly necessary. The policy was for \$1,000, and covered a stock of goods, consisting of gents' furnishings, clothing, shoes, hats, trunks, and other goods usual to the clothing business, while contained in a frame building situate on the west side of Jefferson avenue, Moundsville, W. Va., from noon on the 18th of August, 1917, to noon on August 18, 1918. The goods were destroyed by fire on the 2d day of January, 1918. The policy permitted other insurance, and plaintiff carried \$5,500 additional insurance on the same stock of goods. The principal defense is that plaintiff failed to comply with the promissory warranty called the iron safe clause. It required the assured to take a "complete itemized inventory of stock on hand at least once in each calendar year," and, unless he had taken such inventory within 12 months prior to the date of the policy, he was required to take one in 30 days thereafter, else the policy should be void from and after that time. He was also required to keep a set of books, "which shall clearly and plainly present a complete record of business transacted, including all purchases, sales and shipments, both for cash and credit, from date of inventory," which books and inventory he was required to keep locked in a fireproof safe, or in some place not exposed to fire which might destroy the building in which the goods were kept. We think plaintiff has failed to comply with these covenants.

[1,2] He proved that he sold to Sam George a stock of goods amounting to \$3,546.24, on or about May 10, 1917. These goods were furnished from plaintiff's retail store, situate on the east side of Jefferson avenue, carried across the street, and placed in another building on the west side of said avenue. He did furnish at the trial a com-

plete itemized list of the goods he had sold to Sam George. Sam George then began a retail mercantile business on his own account in this building, and continued the business until the 9th of July, 1917, when, according to the testimony of both Sam George and the plaintiff, finding he was not successful, plaintiff bought the stock of goods back from him. In this transaction only \$46 in cash changed hands between the plaintiff and said George. On the 18th of August, following his repurchase of the goods from George, plaintiff procured the contract of insurance here sued on, and continued to carry on the retail mercantile business in the two buildings, situate on opposite sides of the street. He maintained a clerk by the name of Floyd Smith to conduct the sales in the store formerly occupied by George, until the time of the fire, and sometimes personally made sales therefrom. Smith began working for George, when George purchased the goods from plaintiff, and continued with him while he owned the store, and also remained in the store and worked for plaintiff, selling goods up until the fire occurred, but he kept an itemized account of sales made by him only from August 4 to December 31, 1917. This account Smith says he kept at the request of plaintiff, for the purpose of showing the sales made by himself, and not to show a complete history of all the sales in the store. During the time Smith was clerk, plaintiff himself also made sales, of which Smith says he kept no account.

Plaintiff's only method of keeping an account of sales was by means of slips, on which each sale was noted, and at the end of each week the total amount of sales for the week was ascertained, and the total then transcribed, simply as a cash item, into a book kept for that purpose. This book was produced, and it showed that the total amount of all sales from the time the store was opened by Sam George in May, 1917, down to the 31st of December, 1917, a period of more than seven months, was \$950.93. A calculation shows that for this period of 200 secular days the average daily sales amounted to less than \$5. Yet during that period of time plaintiff claims he purchased and added, to the stock originally sold to Sam George, other goods to the value of over \$7,000, as appears by an itemized account of the stock of goods furnished by plaintiff to defendant under that provision of the policy requiring proof of loss to be furnished the company within 60 days from the date of loss. But in his testimony he admits he took no inventory of the stock of goods in the store at any time. He endeavored to show compliance with the iron safe clause by producing some of the bills and a duplication of others rendered to him by wholesale merchants for goods which he swears were put in the store

that was burned. Some of these were purchased during the time Sam George ran the store, and some were purchased after plaintiff repurchased the store from George. He did not keep an itemized account of sales during any part of the time he conducted the store, except the one kept by the clerk, Floyd Smith, which was incomplete. Plaintiff kept his account of sales on slips which were destroyed at the end of each week, and the gross amount of the weekly sales then transferred to a book. This book was produced, and it showed the total amount of sales from May 26 to December 31, 1917, to be only about \$950.

The facts in this case are very similar to the facts in the case of *Fisher v. Sun Insurance Co.*, 74 W. Va. 694, 83 S. E. 729, L. R. A. 1915C, 619, wherein we held that such method of keeping accounts and such means of supplying an inventory of the stock of goods did not show a substantial compliance with the iron safe clause, and therefore avoided the policy. This case is governed by the principles of that case and cases cited in the opinion at pages 698 and 699 of 74 W. Va., at page 731 of 83 S. E. (L. R. A. 1915C, 619), to which we adhere as being sound, and we therefore affirm the judgment.

Judgment affirmed.

(86 W. Va. 173)

**E. T. BARNUM IRON WORKS v. PRESCOTT CONST. CO.** (No. 3893.)

(Supreme Court of Appeals of West Virginia.  
April 13, 1920.)

(Syllabus by the Court.)

1. **CONTRACTS** ¶29—**EXISTENCE FROM LETTERS IS QUESTION FOR COURT.**

Whether a series of letters or telegrams, or both, constitutes a contract, is for the court, not the jury, to determine.

2. **CONTRACTS** ¶26—**UNEQUIVOCAL ACCEPTANCE BY TELEGRAM MAKES A COMPLETE CONTRACT.**

Where an offer expressly or impliedly requires or authorizes acceptance by wire, the sending of an unequivocal telegram of acceptance by the offeree to the person making the offer constitutes the transaction a completed contract.

3. **CONTRACTS** ¶24—**ACCEPTANCE NOT CONDITIONAL BY SUGGESTION OF SLIGHT MODIFICATION OF OFFER.**

If an offer is accepted as made, the acceptance is not rendered ambiguous or conditional by uniting with it an expression of hope or suggestion that some unimportant addition or modification be made in its terms.

Error to Circuit Court, Wood County.

Action by the E. T. Barnum Iron Works against the Prescott Construction Company.



Judgment for plaintiff, motion for new trial denied, and defendant brings error. Affirmed.

J. W. Vandervort, of Parkersburg, J. L. Wolfe, of Ripley, and R. E. Bills, of Parkersburg, for plaintiff in error.

Merrick & Smith, of Parkersburg, for defendant in error.

LYNCH, J. The vindication of the right of the plaintiff to the judgment, challenged by defendant in the circuit court by motion for new trial and here by writ of error, depends entirely upon the existence of a contract between the parties affirmed by one of them and denied by the other.

Defendant, a corporation engaged in the construction of buildings, contracted with the county court of Jackson county to erect a combination courthouse and jail at Ripley, the county seat of that county, and to furnish certain material manufactured by plaintiff, consisting of four Bessemer prison steel lattice jail cells, three No. 22 design steel window guards, and two No. 18 design steel lattice entrance doors with vestibule frames provided with rabbet strips for metal cover doors to be locked from top to bottom with an automatic E. T. Barnum Iron Works jump lock bar and secured by a first-grade Yale prison padlock; all complete painted, and ready to erect. On May 8, 1917, defendant by letter requested plaintiff, a manufacturer of the articles so specified, "to wire us (defendant) a figure on the jail work and also the ornamental iron as per specification on the Jackson county courthouse at Ripley, West Va. L. J. Dean, Architect, Huntington, West Va. [Signed] The Prescott Construction Co." To this letter plaintiff replied three days later, saying, among other things:

"That we have not had access to the plans and specifications for this building, but another party sent us a plan of the jail cells and requested us to quote them on the cells made of our standard construction, and also on our No. 79 design balcony railing. We figured that part of the work last January, and if there are no changes we could quote you on that part of the work, as we presume the party that sent it in would have no objections to our doing so, or better, we suggest that you send us a sketch or plan of just what you want us to figure and we will be glad to quote you. Have you been awarded this contract or is the matter still undecided?"

Replying to this letter, defendant inclosed a "sketch of the jail floor plan and also the full specifications covering this part of the work," and requested plaintiff to "make us a price" on it "complete, but with separate prices on the two different kinds of work," adding:

"The contract for this building is to be let on the 23d of this month (May) and so make price accordingly and a few days longer as they

are very slow with letting a job here. There is no difference in the plans for last January and the present plans."

Acting upon this information and request and restating in detail the manufactured product specified, plaintiff on May 19th furnished defendant the price therefor "f. o. b. factory with freight allowed to Ripley," and insisted upon prompt acceptance, if at all, "owing to the existing conditions," and promised to "do our utmost to protect you until the 25th inst." Later being advised by letter of June 19th of defendant's purpose to postpone an order for the cells for 80 days from that date, plaintiff again urged promptness because of other imperative demands upon its factory capacity due to like conditions, and as an inducement agreed to complete the work ready for shipment and hold for instructions and not bill it until shipped, etc. On the 25th of June defendant wired: "Accept your proposition made May nineteenth. Letter follows to-day."

[1-3] Thus there is disclosed an unconditional offer and an unconditional acceptance of the offer, a concurrence of the minds of the parties upon the subject-matter of their negotiations; in other words, an agreement incontestable except for fraud, a consummated contract, whereby plaintiff became legally bound to manufacture and furnish certain definitely prescribed equipment desired by defendant for a stipulated price, for the payment of which defendant also became bound by its acceptance. *Watson v. Coast*, 35 W. Va. 463, 470, 14 S. E. 249. The telegram did not reserve and gave no notice of an intention to reserve by the promised letter the right to enlarge, limit, restrict, or in any manner or to any extent modify its acceptance, and as we shall see the letter did not do so either expressly or impliedly. Neither the telegram nor the letter disclosed a purpose or intention other than an unambiguous and positive acceptance of the offer. As there was no ambiguity either in offer or acceptance, the result was a completed contract, and, being complete, nothing subsequently said or done by either party bound thereby, except by their mutual assent, could affect the right of either of them. *Ozzola v. Musolino*, 225 Mass. 512, 114 N. E. 733; 1 Williston on Contracts, § 72. Giving to the letter referred to the most liberal interpretation and weight its language will allow, it does not go to the extent attributed to it by defendant or justify the conclusion sought to be drawn from it. There is in it no attempt to repudiate, alter, or modify the unconditional acceptance effected by the telegram or to revoke it or question the authenticity of the acceptance. All the letter did that is worthy of notice was to state defendant's "understanding" that the offer included "rivets" and "bucking irons," more as a matter of favor, we think, than as a constituent

element of the offer. As said in *Turner v. McCormick*, 56 W. Va. 161, 49 S. E. 28, 67 L. R. A. 853, 107 Am. St. Rep. 904, pts. 2 and 3 of the syllabus:

"A mere request, by one of the parties thereto, for an alteration or modification of a fully accepted proposed contract, which by acceptance has been wrought into a binding contract, \* \* \* relates to performance of the contract, and is not an element in the making thereof, although written, and connected \* \* \* with the acceptance on a single sheet of paper, so as to make of the acceptance and request a compound sentence."

See, also, 1 Williston on Contracts, § 79.

As a matter of fact, there are three specific references to rivets in the itemized offer made by plaintiff; but whether "bucking irons" were also included is a question of some doubt, nor does any witness give a definite or understandable explanation of the purpose to be served by them. Whether plaintiff would or would not have furnished these additional articles, had it been permitted to carry into execution the terms of the agreement, we do not know. But if it had done so, it would have been more a matter of grace than of contractual obligation on its part, or as required by any specification furnished for its guidance either in estimating the cost of the jail cells and doors or balcony railing. Nor is there anything contained or reasonably implied in the letter that necessitated an answer, or rendered conditional defendant's unqualified acceptance or anything that warranted a breach of the contract by either corporation.

What is said applies with equal force and consistency to other letters and messages comprising the correspondence. For to the telegram dated June 26th saying, "Countermand order jail cells until further orders. Report to you later," and that of June 28th saying, "Cancel order of twenty-fifth. Do not proceed with work," and the telegram dated June 29th saying, "Everything changed. Cancel order," plaintiff in reply to the first on June 27th said:

"We do not understand your telegram as we take it that you want us to furnish the work, and we are holding the material at our source of supply, and we must know right away if you want us to proceed with the order as any delay will likely add to the cost. You most likely know that the window guards and entrance doors to the cell room will have to be built in the walls as they are going up, so it will be advisable to give us all the time you can to get them made up and shipped, for you know there is terrible congestion on the railroads everywhere and it is best to give them ample time for deliveries. Awaiting your early reply so that we will know just what you want us to do, we are," etc.

And in reply to the second on June 29th said:

"Please explain by telegraph why you wish to cancel. If it has anything to do with specifications or price we will try to adjust it to your satisfaction."

And replying to the third on June 30th said:

"Your reply is quite indefinite and we will be glad to have you write us fully and explain just what changes have been made and how it will affect the cell work, and it is more than likely that we can use the same material that we are holding up. It is to your advantage to get the matter adjusted at the earliest possible moment, and we trust you will send drawings (or pencil sketch will do) showing changes, and we will tell you just what we can do."

And again on July 11th plaintiff wrote saying:

"We assume that this work will be required and the changes will not affect the number of cells, but of course we cannot determine that until you send us the particulars. We want to furnish the work and want to do everything we can to help you get the matter straightened."

Instead of indicating uncertainty or doubt as to the existence of a valid and binding contract, these letters, properly construed, indicate plaintiff's recognition of the contract and its insistence upon defendant's permission to perform it, and in addition show a willingness to make slight modifications and adapt itself to the changes, if any, that were made subsequently.

It is scarcely necessary to note the objection predicated upon lack of authority in Glen Franklin, a temporary employé in defendant's office, to bind defendant by the telegram of June 25th, because the letter of that date, written by the general manager when he knew that within less than two hours before Franklin had prepared and sent the message, virtually approved and confirmed the acceptance thus concluded.

Rulings upon instructions tendered and requested by the parties and which were either given or refused are so erroneous, it is said, as to necessitate reversal of the judgment and grant of a new trial. In that conclusion we cannot concur. No serious criticism is urged against the instructions propounded to the jury on behalf of plaintiff except Nos. 1 and "A." The conclusion heretofore reached concerning the completed contract effected by acceptance of the offer bears directly upon the merits of No. 1 and shows it to be relevant and appropriate. The question whether certain letters or telegrams, or both, constitute a contract, is one to be determined by the court. 13 C. J. 782. Fairly considered, "A" is not amenable to criticism. It rightly refused to give weight to defendant's letter of June 25th for reasons already stated. The refusal of defendant's instructions Nos. 2, 3, 4, and 5 was not wrongful, but right, considered in connection with the

facts proved. Instead of quoting the words, "we will tell you just what we can do," as they appear in plaintiff's letter of June 30th referring to changes in jail cell plans, instruction No. 2, doubtless inadvertently, made the sentence read, "could not tell what it (plaintiff) would do." There is in that letter no language having such import or meaning, as will appear from the reading thereof.

No. 3 is faulty for a similar reason. While not quoting any language used in the same letter, it virtually repeats what is said in No. 2 on the same subject. What has been remarked already regarding rivets and bucking irons applies with equal force to instruction No. 4 and need not be repeated. No. 5 proceeds upon the theory that plaintiff had begun preparations for the performance of the work required for the completion of the jail cells and balcony railing before the consummation of the contract, and that having done so was not entitled to any compensation for such preliminary work. There is in the case no proof justifying such an instruction, so far as we are able to perceive, and for that reason and others heretofore noted it was refused properly.

Judgment affirmed.

(150 Ga. 100)

SHORTER v. SHORTER. (No. 1673.)

(Supreme Court of Georgia. April 14, 1920.)

(Syllabus by the Court.)

**DISMISSAL AND NONSUIT  $\Leftrightarrow$  19(3)—DIVORCE  $\Leftrightarrow$  76—PLEADING  $\Leftrightarrow$  332—PLAINTIFF SUBMITS HIMSELF TO JURISDICTION OF COURT IN WHICH HE BRINGS ACTION; RELIEF SOUGHT IN CROSS-PETITION HELD PERTINENT; CROSS-BILL PRAYING FOR RELIEF GERMANE TO ORIGINAL PETITION NEED NOT BE SERVED.**

A husband sued his wife for a divorce on the ground of cruel treatment. The petition alleged that at the time of instituting the action the plaintiff was a citizen of Fulton county, where the suit was brought, and that the plaintiff and the defendant had been citizens thereof for more than 12 months next preceding the filing of the petition; that the parties had four minor children, of the ages of 9, 8, 7, and 3 years; and that the plaintiff had cared for them since the separation of himself and wife, and expected to continue to support them. The defendant filed a verified answer, wherein the alleged residence of her husband and herself was admitted as stated in the petition. She denied that she had ever been guilty of any of the acts of cruelty alleged against her, but averred that the plaintiff had been guilty of cruelty toward her, setting forth specific instances, and that the plaintiff had also been guilty of frequent acts of adultery with a named woman. The defendant therefore prayed for a divorce from the plaintiff. She further prayed for the cus-

tody of the minor children, for temporary and permanent alimony, and for counsel fees. The defendant subsequently had an amendment allowed to her answer, in which she averred that the plaintiff was not residing in Fulton county at the time he brought suit against her for divorce, and that he had never been a resident of the state of Georgia, and that he was not in the state at the time of bringing his action, and had not thereafter been in the state. She prayed that the action against her be enjoined until the question of alimony and counsel fees could be adjudicated, and, as plaintiff was beyond the jurisdiction of the court, that his attorneys of record, who instituted the action for divorce in his behalf, be served with her cross-petition. An order was granted that the defendant show cause why the prayers of the cross-petition should not be granted, and that the attorneys of record for the plaintiff be served with the cross-petition and amendment thereto. They were so served. Upon the hearing counsel for the plaintiff appeared for the sole purpose, as stated, of making the point that the plaintiff had not been personally served with the cross-petition. The court thereupon passed the following order: "Upon oral demurrer to defendant's application to enjoin plaintiff's suit for divorce until provision for alimony is made, and for temporary alimony, it is ordered that said injunction and temporary alimony be denied, upon the ground that service upon attorneys for a nonresident plaintiff is insufficient." *Held*, that the court erred in granting such order. The plaintiff, by bringing the action for divorce in the superior court of Fulton county, had submitted himself to the jurisdiction of the court. The relief sought in the cross-petition was pertinent, and could be rightfully urged against the plaintiff, and it was not necessary that he be served with the cross-petition. *Civ. Code 1910, §§ 5406, 5410, 5547; Gilpin v. Gilpin, 12 Colo. 504, 21 Pac. 612; 14 Cyc. 873; 15 C. J. 798, 811; Callaway v. Jones, 19 Ga. 277; Markham v. Huff, 72 Ga. 874; Caswell v. Bunch, 77 Ga. 504; Moore v. Medlock, 101 Ga. 94, 101, 28 S. E. 836; Ray v. Home, etc., Co., 106 Ga. 492, 32 S. E. 608; Home Mixture Guano Co. v. Woolfolk, 148 Ga. 567, 97 S. E. 687.*

(a) Under the practice in this state there is no requirement for service of a cross-bill or answer praying for affirmative relief which is germane to the original petition. Where such relief is sought, a plaintiff cannot dismiss his action for the purpose of avoiding it, notwithstanding he has not been served.

(b) This case is clearly distinguishable from *Baldwin v. Baldwin, 116 Ga. 471, 42 S. E. 727*, and *Stallings v. Stallings, 127 Ga. 469, 56 S. E. 469, 9 L. R. A. (N. S.) 598*.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Suit for divorce, on the ground of cruel treatment, by Arthur Shorter against Lillian Shorter, with answer and cross-petition, praying for a divorce, custody of children, temporary alimony, and counsel fees, and to enjoin the action pending adjudication of alimony and counsel fees. Injunction and

temporary allmony denied, and defendant brings error. Reversed.

Hines, Hardwick & Jordan, of Atlanta, for plaintiff in error.

Branch & Howard, of Atlanta, for defendant in error.

FISH, C. J. Judgment reversed. All the Justices concur, except GILBERT, J., absent for providential cause.

(150 Ga. 99)

BROWN et al. v. HARDEN. (No. 1618.)

(Supreme Court of Georgia. April 14, 1920.)

*(Syllabus by the Court.)*

1. HABEAS CORPUS  $\S$  56, 92(1), 99(3, 6), 109—COURT ON DEMURRER MAY DISMISS WRIT, WHERE IT AFFIRMATIVELY SHOWS LEGAL RESTRAINT; WHEN PERSON DETAINED IS BEFORE COURT, BETTER PRACTICE IS TO INQUIRE INTO CAUSE OF RESTRAINT; WISH OF MINOR AS TO CUSTODY, WHILE TO BE CONSIDERED, IS NOT NECESSARILY CONTROLLING; NOTWITHSTANDING WISHES OF A MINOR OVER 14, COURT MAY AWARD CUSTODY TO A THIRD PERSON, IN INTEREST OF CHILD.

This was a contest for the custody of three minor children, to wit, a girl, aged 18, and two boys, aged respectively 14 and 16, years. The petition was brought by the grandmother of the children against the mother and a third person, on whose land the mother lived. It was alleged that the mother was a lewd woman, and that she was living in a state of adultery with the codefendant, that the mother had recently given birth to an illegitimate child, that the mother was under the control of the codefendant, and that through his control of the mother he held the children in a state of involuntary servitude. To the petition for habeas corpus the defendants demurred, upon the grounds that there was a misjoinder of parties defendant, and, it appearing that the youngest of the children was over 14 years of age, the court was without jurisdiction to grant the relief prayed. The demurrers were overruled. Upon the trial of the case the daughter and the elder son stated that they preferred to live with their mother. The younger son stated that he desired to live with an uncle. The court awarded the custody of the younger son to the uncle selected by him, the elder son to another uncle, and the daughter to an aunt. The finding of the ordinary was approved by the judge of the superior court on an application for certiorari, and the defendants excepted. *Held*:

(a) Where an application for the writ of habeas corpus affirmatively shows on its face that the restraint complained of is legal, the court before whom the writ is made returnable has the power, on demurrer, to dismiss the writ and remand the applicant. *Smith v. Milton*, 149 Ga. 28, 98 S. E. 607. Nevertheless, where the person detained is before the court, the better practice is to inquire into the cause

of the restraint, and pass such order as the justice of the case requires. *Simmons v. Georgia Iron, etc., Co.*, 117 Ga. 306, 43 S. E. 730, 61 L. R. A. 739. See, also, *Plunkett v. Hamilton*, 136 Ga. 72, 80, 70 S. E. 781, 784, 35 L. R. A. (N. S.) 583, Ann. Cas. 1912B, 1259.

(b) In habeas corpus proceeding to determine who is entitled to the custody of a minor over the age of 14, the wish of the minor, while entitled to due consideration, is not in all circumstances necessarily controlling. Where the respondent is shown to be an improper person to have the custody of such child, the court may exercise its discretion as to whom the custody of such child should be given, and shall have power to award the custody to a third person. The interest of the child must be given consideration. Civ. Code 1910,  $\S$  2972; *Hunter v. Dowdy*, 100 Ga. 644, 28 S. E. 387; *Barlow v. Barlow*, 141 Ga. 535, 81 S. E. 433, 52 L. R. A. (N. S.) 683(2).

(c) The demurrer to the petition and the motion to quash the writ upon the grounds stated were properly overruled.

2. HABEAS CORPUS  $\S$  85(1)—EVIDENCE AS TO BAD REPUTATION OF MOTHER OF MINORS AND HER CODEFENDANT FOR CHASTITY HELD ADMISSIBLE.

Upon the trial of the case the court admitted evidence that the general reputation of the mother for chastity was bad, and that the general reputation of the codefendant for chastity was likewise bad. Objection was urged to the admissibility of this evidence, upon the ground that the same was irrelevant and immaterial. *Held*, that the evidence was properly admitted. *Moore v. Dozier*, 128 Ga. 90, 57 S. E. 110(2).

3. HABEAS CORPUS  $\S$  85(1)—LETTER OF MINOR DAUGHTER HELD ADMISSIBLE AS BEARING ON HER WISHES AS TO CUSTODY.

Upon the trial a letter alleged to have been written by the minor daughter a short time before the hearing, in which she indicated a wish to leave the home of the mother, was admitted in evidence. *Held*, that the execution of the letter by the daughter was prima facie proved, and the letter was admissible in evidence under the facts in this case.

4. PERSONS PROPER TO HAVE CUSTODY OF MINORS.

The court was authorized to find that the uncles and the aunt to whom the custody was awarded were proper persons to have the custody of the minors, and that they were financially able and willing to support and educate the children.

5. OVERRULING OF CERTIORARI.

The ordinary by whom the writ of habeas corpus was issued and heard committed no error in any of the rulings complained of, and the judge of the superior court did not err in overruling the certiorari.

Error from Superior Court, Laurens County; J. L. Kent, Judge.

Habeas corpus by Mrs. R. A. Harden against Mrs. N. C. Brown and another for the custody of three minor children of de-

fendant Brown. Custody of boy aged 14 awarded to an uncle selected by him, and custody of older boy awarded to another uncle, and custody of daughter awarded to an aunt, which finding was approved by the superior court on application for certiorari, and defendants except and bring error. Affirmed.

J. S. Adams, of Dublin, for plaintiffs in error.

R. Earl Camp, of Dublin, for defendant in error.

GEORGE, J. Judgment affirmed. All the Justices concur, except GILBERT, J., absent for providential cause.

(150 Ga. 92)

McBRIDE v. STATE. (No. 1808.)

(Supreme Court of Georgia. April 18, 1920.)

(Syllabus by the Court.)

1. WITNESSES  $\S$ 361(1), 394, 414(1)—ON IMPEACHMENT BY DISPROVING TESTIMONY SHOWING CONTRADICTORY STATEMENTS AND GENERAL BAD CHARACTER, EVIDENCE AS TO GENERAL GOOD CHARACTER ADMISSIBLE.

Where it is sought to impeach a witness by disproving the facts testified to by him, by proof of contradictory statements previously made by him as to matters relevant to his testimony and to the case, and by evidence as to his general bad character, evidence of his general good character is admissible to sustain him, and the jury in passing on his credibility may consider the evidence as to his good character in connection with all three of the methods by which it is sought to impeach him. The portions of the charge in respect to impeachment of witnesses are not subject to the criticisms made thereon in the first ground of the motion for a new trial.

2. CHARGE OF COURT.

The instructions as to the presumption of malice upon proof of the homicide with a deadly weapon were not erroneous for any reason assigned.

3. CRIMINAL LAW  $\S$ 863(2)—CHARGE THAT JURY REQUESTING REPORT OF DEFENDANT'S STATEMENT MUST RELY ON EVIDENCE THEY HAD HEARD OBJECTIONABLE AS WITHDRAWING STATEMENT FROM JURY.

A ground of the motion complains that the court erred as follows: "After the jury had retired to consider their verdict, they returned into the courtroom with the request that they be furnished the stenographic report of certain parts of the defendant's statement; whereupon the court instructed the foreman as follows: 'Well, I couldn't let any notes or written evidence go out before you in this case. You will have to rely on the testimony you have heard.'" So much of the instruction as directed the jury that "you will have to rely on the testimony you have heard" is not cause

for a new trial on the ground that it "withdrew from the consideration of the jury the defendant's statement." The charge of the court in respect to the prisoner's statement was clear, full, and correct, and therefore it was not probable that the jury could understand that the court, in using the language last quoted, intended to withdraw from their consideration the statement made to them by the accused.

4. CRIMINAL LAW  $\S$ 364(3), 413(1)—DECLARATION OF ACCUSED HELD PROPERLY EXCLUDED AS SELF-SERVING AND NOT RES GESTÆ.

It was not error to refuse to allow a witness for the accused to testify that, after the accused had gone a quarter of a mile from the place of the homicide, he said "he would go back and stay till somebody came." He did not go back. The declaration would have been merely a self-serving one, and was not a part of the res gestæ.

5. CRIMINAL LAW  $\S$ 464—EXCLUSION OF ANSWER TO QUESTION WAS NOT ERROR.

Nor was it error to refuse to allow a witness to answer the following question: "If a man, say, between 2 and 3 o'clock, had been so drunk that he couldn't sit up in a buggy, you think at 4:30 you would have been able to smell whisky on him?" Moreover, it does not appear what the witness' answer would have been.

6. SUFFICIENCY OF EVIDENCE.

The evidence authorized the verdict, and the court did not err in refusing a new trial.

Error from Superior Court, Muscogee County; G. H. Howard, Judge.

J. T. McBride was convicted of murder with recommendation of life imprisonment, his motion for a new trial was denied, and he brings error. Affirmed.

Geo. C. Palmer, Frank D. Foley, and T. T. Miller, all of Columbus, for plaintiff in error  
C. F. McLaughlin, Sol. Gen., of Columbus, and Clifford Walker, Atty. Gen., for the State.

FISH, C. J. [1] Under an indictment charging J. T. McBride with the murder of Joe Bailey, he was found guilty as charged, with a recommendation of life imprisonment. He excepted to the overruling of his motion for a new trial. One of the grounds of the motion is that the court erred in charging the jury as follows:

"A witness may be impeached by disproving the facts testified to by him. A witness may be impeached by contradictory statements previously made by him as to matters relevant to his testimony and to the case. A witness may be impeached by evidence as to his general bad character. A witness may be sustained by similar proof of good character. Whether a witness has been impeached is for a jury to determine from all the evidence in the case, after considering the witness' testimony and the testimony of the other witnesses, and the evidence

of witnesses who may testify in his behalf, if any. You are the sole judges of the credibility of the witnesses, as I have already said. Whether a witness has been impeached is a question for your determination. You can believe a witness or witnesses under investigation, or you can believe the other witness or witnesses, as I have stated. After all, it is a question for your sole determination."

One of the grounds of error assigned upon this instruction is that—

"It is not true, 'when it is sought to impeach a witness by either of these modes, the credibility of a witness may be restored by proof of general good character.'"

The court did not so expressly instruct the jury, nor is the language of the instruction fairly susceptible of such construction. The charge followed the statement of the three methods for the impeachment of witnesses, as prescribed by the Civil Code, §§ 5880, 5881, 5882. The instruction that "a witness may be sustained by similar proof of good character" immediately follows the statement that "a witness may be impeached by evidence as to his general bad character." And it may be that the charge that "a witness may be sustained by similar proof of good character" should properly be construed as referring to a witness sought to be impeached by evidence of his bad character, or, at least, to one so sought to be impeached and also by proof of contradictory statements previously made by him. However, if the proper construction of the language used by the court is that, where it is sought to impeach a witness by all of the three methods stated, the witness may be sustained by proof of good character, in other words, that evidence of his good character may be considered by the jury in connection with one or more of the methods by which it is sought to impeach him, then such instruction is not erroneous. The Civil Code, § 5881, provides, when it is sought to impeach a witness by proof of contradictory statements previously made by him, he may be sustained by proof of general good character. And similar proof of character is admissible to sustain a witness sought to be impeached by proof of general bad character. Section 5882. In *McEwen v. Springfield*, 64 Ga. 159, it was held:

"It having been sought to impeach a witness both by disproving facts testified to by him, and also by proof of contradictory statements, and to sustain him by evidence of good character, it was error to limit the effect of such sustaining evidence by charging that, 'if a fact or facts testified to by a witness be disproved to the satisfaction of the jury, then evidence of general good character should not be treated as re-establishing such disproved facts.'"

It was held, in *Pulliam v. Cantrell*, 77 Ga. 563, 3 S. E. 280:

"Under the facts of this case, there was no error in charging the three modes of impeach-

ing a witness laid down in the Code, and in stating that the general good character of the witness, if proved, might be considered to sustain a witness, by evidence as to the facts themselves, or by proof of general good character, having also charged as to conflicting testimony, and that all the testimony was for the consideration of the jury."

The rulings made in the two cases cited have never been overruled, though it has been held, in *Miller v. Western & Atlantic R. Co.*, 93 Ga. 480, 21 S. E. 52, that—

"A witness who is not impeached otherwise than by disproving the truth of his evidence, or by testimony tending to disprove it, cannot be supported by proof of his general good character."

That ruling has been followed in *Bell v. State*, 100 Ga. 78, 27 S. E. 669; *Anderson v. Southern Railway Co.*, 107 Ga. 500, 33 S. E. 644; *Smith v. State*, 147 Ga. 689, 95 S. E. 281. These cases and those cited in them are not in conflict with the ruling here made.

[2] 2. Error is assigned, in the motion for new trial, upon the following excerpts from the judge's charge:

"In cases of homicide, I charge you further that where the killing is shown to have been by the defendant on trial by the use of a deadly weapon, beyond a reasonable doubt, or is admitted, and all the evidence adduced to establish it shows neither mitigation nor justification nor excuse, malice will be presumed, from proof of the homicide, that the killing was murder; but this presumption is a rebuttable one, and may be overcome by evidence of excuse, or alleviation, or justification." "In other words, the law presumes every homicide resulting from the use of a deadly weapon to be felonious, until the contrary appears from circumstances of excuse or justification or alleviation; and it is incumbent upon the defendant to make out such circumstances to the satisfaction of the jury, unless they should arise out of the evidence produced against him."

The evidence submitted by the state, if credible, showed that the accused shot the deceased with a pistol, killing him, without circumstances of mitigation or justification; and a witness for the state testified that, a few days after the homicide, he asked the accused:

"If he was the one that shot and killed Joe Bailey. He says; 'I am the one.' I asked him if he was Dolly McBride's son, and he said, 'No, John McBride's,' and made no explanation of what caused him to shoot him, and I didn't ask him."

There was no admission of the accused in evidence that he killed the deceased which was coupled with any statement as to circumstances of alleviation, excuse, or justification. The evidence in behalf of the accused and his statement, if true, justified the killing. Under the facts of the case, none of the following assignments of error upon these instructions was meritorious, viz.:

(102 S.E.)

(a) "Because the very evidence which proved that the defendant committed the homicide also showed complete justification." (b) "Because the state was also dependent upon the admission of the defendant that he committed the homicide, which also showed complete justification, and that it was done in self-defense." (c) "The burden in this case was never shifted from the state to the defendant, because all the evidence of the killing showed that the defendant killed the deceased in self-defense." (d) "Because the court failed to instruct the jury that excuse, alleviation, or justification may appear from the defendant's statement to the jury."

[3-8] 3. The rulings announced in the third, fourth, fifth, and sixth headnotes require no elaboration.

Judgment affirmed.

All the Justices concur.

(150 Ga. 36)

LANG, Sol. Gen., v. SAPP, Clerk, et al.

SAPP, Clerk, et al., v. LANG, Sol. Gen.  
(Nos. 1533 and 1535.)

(Supreme Court of Georgia. April 14, 1920.)

*(Syllabus by the Court.)*

**1. PLEADING** ~~§~~8(5), 34(4)—**CONSTRUED MOST STRONGLY AGAINST THE PLEADER.**

The questions made in this case are controlled in principle by the rulings made in the case of *Wall v. Morris*, 149 Ga. 632, 101 S. E. 683.

(a) The paragraph containing the allegations in the petition showing that the fines and forfeitures in cases which were concluded, and sentences imposed, before January 1, 1913, the date when the act (Acts 1912, p. 109) went into effect, was a part of the fund involved, was withdrawn by amendment.

(b) Pleadings will be most strongly construed against the pleader, and allegations in other paragraphs of the petition that certain costs had "accrued" will be taken as a mere conclusion, in the absence of allegations showing that the cases in which it is alleged they had accrued were among those which had been disposed of before January 1, 1919, by pleas of guilty, by verdicts, or, in the case of bond forfeitures, by bonds finally forfeited.

**2. OVERRULING OF DEMURRER TO PETITION.**

From these rulings it follows that the judge erred in overruling the general demurrer to the petition.

Atkinson and Hill, JJ., dissenting.

Error from Superior Court, Whitfield County; M. C. Tarver, Judge.

Action between J. M. Lang, Solicitor General, and W. M. Sapp, Clerk, and others. General demurrer to petition overruled, and Lang brings error, and the other parties take a cross-bill of exceptions. Affirmed as to

main bill of exceptions, and reversed as to cross-bill of exceptions.

Maddox, McCamy & Shumate, of Dalton, for plaintiff in error.

W. C. Martin and F. K. McCutchen, both of Dalton, for defendants in error.

PER CURIAM. Judgment affirmed on the main bill of exceptions, and reversed on the cross-bill.

ATKINSON and HILL, JJ., dissent.

GILBERT, J., absent for providential cause.

The other Justices concur.

(150 Ga. 116)

CITY OF MACON v. ROAD COM'RS OF  
BIBB COUNTY et al. (No. 1768.)

(Supreme Court of Georgia. April 15, 1920.)

*(Syllabus by the Court.)*

STATUTES ~~§~~76(1)—SPECIAL ACT UNCONSTITUTIONAL AS COVERING CASE FOR WHICH GENERAL LAW EXISTS.

An act approved August 12, 1914 (Acts 1914, p. 977), is entitled: "An act to amend the act creating a new charter for the city of Macon, approved November 21, 1896, so as to provide for the regulation and control of the county chain gang of Bibb county; to require said county chain gang to work the public streets and alleys of the city of Macon; to prescribe under whose direction and for what period of time said county chain gang shall be so employed; and for other purposes." Among other things the act declares: "That from and after the passage of this act it shall be the duty of the county board of commissioners for Bibb county and the road commissioners of Bibb county to work the entire county chain gang upon the public streets and alleys of the city of Macon for a period of two months during the present year, 1914, and for a period of four months of each calendar year thereafter under the absolute control, supervision and direction of the mayor and council of the city of Macon." Also that, "the mayor and council of the city of Macon shall have the right and privilege to elect when and for how long said county chain gang shall be employed within the corporate limits of said city." Furthermore, "that the said county chain gang while employed at work within the limits of the city of Macon as hereinbefore provided shall be under the complete control, supervision and direction of the mayor and council of the city of Macon or such municipal officer as the mayor and council by resolution shall designate, and it shall be the duty of the road commissioners of Bibb county to furnish to the mayor and council of the city of Macon all of the county's live stock, road-working machinery, appliances, tools and general equipment connected with road working to be used by said county chain gang in working the public streets and alleys of said city." Also, "that the entire expense necessary to the

maintenance, custody and control of said county chain gang while so employed in working the said streets and all other expenses incident to the proper working of said streets shall be borne by the county of Bibb." At the time of the passage of this act, and also at the time of the enactment of the act approved November 21, 1893 (Acts 1893, p. 240), creating a new charter for the city of Macon, the general statute of 1908 (Acts Ex. Sess. 1908, p. 1119; Pen. Code 1910, § 1207 et seq.), providing for the employment of felony and misdemeanor male convicts upon the public roads of the several counties of the state, was in effect. *Held*, that the special act of August 12, 1914, above referred to, is unconstitutional and void, because violative of the provision of the Constitution of this state declaring that no special law shall be enacted in any case for which provision has been made by an existing general law. Const. art. 2, § 4, par. 1 (Civ. Code 1910, § 6391).

(a) The facts of this case are not materially different from those in the case of Board of Commissioners v. Americus, 141 Ga. 542, 81 S. E. 435, and the decision there rendered controls the present case.

(b) It follows that it was not error to refuse to grant a mandamus absolute, requiring the road commissioners for the county of Bibb to furnish the convicts in the chain gang of Bibb county and its road-working equipment to the municipal authorities of the city of Macon, upon a demand made by the latter on the former in pursuance of such unconstitutional special act.

(c) The request to review and overrule the case of Board of Commissioners v. Americus, 141 Ga. 542, 81 S. E. 435, is refused.

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

Mandamus by the City of Macon against the Road Commissioners of the County of Bibb and others. Writ refused, and plaintiff brings error. Affirmed.

Robt. G. Plunkett and P. F. Brock, both of Macon, for plaintiff in error.

W. G. Smith and Jos. H. Hall, both of Macon, for defendants in error.

FISH, C. J. Judgment affirmed. All the Justices concur, except GILBERT, J., absent for providential cause, and GEORGE, J., disqualified.

(25 Ga. App. 137)

**MACKLE CONST. CO. v. HOTEL EQUIPMENT CO.** (No. 11189.)

(Court of Appeals of Georgia, Division No. 2. April 8, 1920.)

(Syllabus by the Court.)

1. **PRINCIPAL AND AGENT** ¶21, 22(1, 2) — **TRIAL** ¶60(2)—**RULE AS TO ADMISSION OF DECLARATIONS BY AGENT TO PROVE AGENCY STATED.**

"While agency may be proved by the testimony of the alleged agent as a witness, it can-

not be proved by his mere declarations, either spoken or written. Such declarations ought not in any event to be received in evidence, unless the party tendering the same offers in good faith to supplement them by other and independent evidence of agency; and if such offer is not made good, the declarations ought to be excluded from consideration by the jury. The safer and better practice, in all cases, is to require proof of the agency before admitting such declarations at all." *Abel v. Jarratt*, 100 Ga. 732, 28 S. E. 453 (2). Under this ruling it was not reversible error for the court to admit in evidence the testimony of T. M. Turner to the effect that E. W. Roberts made purchases of the goods sued for, and bought the goods for the Mackle Construction Company. E. W. Roberts was later introduced by the plaintiff and testified that he was the agent of the Mackle Construction Company, the defendant, and that he purchased the goods for that company.

2. **EVIDENCE** ¶129(6)—**AS TO OTHER PURCHASES THAN THOSE SUED ON HELD INADMISSIBLE.**

The court erred in admitting evidence as to other purchases of goods for the Mackle Construction Company, made for the commissary at Camp Gordon at some time previous to the purchase of the goods included in the account sued on in this case; this being a suit on an account for goods alleged to have been sold to the defendant for a commissary at Camp Jewup, and that testimony being as to an entirely different transaction.

3. **SALES** ¶53(1)—**WHETHER DEFENDANT WAS PRINCIPAL OR AGENT HELD FOR JURY.**

The evidence in the case being in strong conflict as to whether the goods included in the account sued on were bought by the Mackle Construction Company through E. W. Roberts, or whether he bought them on his own account, and not as agent of that company, the court erred in directing a verdict for the plaintiff, as the question of agency and the question as to whom credit was given, and who was the real purchaser of the merchandise were all questions of fact for the jury to determine.

4. **SUFFICIENCY OF ASSIGNMENTS OF ERROR.**

Such of the assignments of error not dealt with above as are insisted upon in this court are without substantial merit, and under the above ruling the judge of the superior court erred in overruling the certiorari and entering judgment in favor of the plaintiff.

Error from Superior Court, Fulton County; John D. Humphries, Judge.

Action by the Hotel Equipment Company against the Mackle Construction Company. Judgment for plaintiff, and defendant brings error. Reversed.

Norman I. Miller, of Atlanta, for plaintiff in error.

Burruss & Dillard, of Atlanta, for defendant in error.

SMITH, J. Judgment reversed.

JENKINS, P. J., and STEPHENS, J., concur.



(25 Ga. App. 148)

RODDENBERRY et al. v. FOUCHE.  
(No. 11263.)

(Court of Appeals of Georgia, Division No. 2.  
April 8, 1920.)

(Syllabus by the Court.)

1. CHATTEL MORTGAGES  $\S$  6, 175—BILL OF SALE RESERVING TITLE HELD NOT A MORTGAGE, AND HENCE NOT TO PREVENT TROVER.

Although a mortgage is not sufficient to sustain an action of trover (Civ. Code 1910,  $\S$  3256; Horton v. Murden, 117 Ga. 72, 43 S. E. 786), the instrument which is the basis of this trover suit was in all respects in the form of a bill of sale reserving title to the personalty sold, and cannot properly be treated as a mortgage merely because it contains the following clause: "As soon as the said first party shall pay or cause to be paid all of the aforesaid notes as they become due, then and in that event title to the said Ford automobile car shall become hers, and the said party of the second part agrees that upon the payment as aforesaid of said notes to make to the said party of the first part a warranty title to the said Ford car." See Pitts v. Maier, 115 Ga. 281, 41 S. E. 570 (1), reviewing and overruling Frost v. Allen, 57 Ga. 326, and Pirkle v. Mortgage Co., 99 Ga. 524, 28 S. E. 34.

2. SALES  $\S$  461—BILL OF SALE HELD ADMISSIBLE OVER OBJECTION THAT PROPERTY NOT SUFFICIENTLY DESCRIBED.

Where a deed or bill of sale described the property sold as "one Ford automobile that the said party of the first part has this day purchased of the said party of the second part," and an action of trover was brought by the seller to recover the automobile from two parties who had purchased it from the original buyer, it was not error, upon the trial of the case, to overrule an objection by the defendants to the admission in evidence of this instrument on the ground that the property sued for was not sufficiently described therein. The case of Thomas Furniture Co. v. T. & C. Furniture Co., 120 Ga. 879, 48 S. E. 333, is controlling on this question. See, also, Farkas v. Duncan, 94 Ga. 27, 20 S. E. 267; Nichols v. Hampton, 46 Ga. 253; Beaty v. Sears, 132 Ga. 516, 64 S. E. 321 (1). The case of Reynolds v. Tifton Guano Co., 20 Ga. App. 49, 92 S. E. 389, is not in conflict with anything here ruled, for in that case the description properly held to be legally insufficient was clearly too general, vague, indefinite, and uncertain to claim the aid of extrinsic parol evidence.

3. CHARGE OF COURT.

The charge of the court was free from reversible error, there was evidence to authorize the verdict returned, and the court did not err in overruling the motion for a new trial.

Error from City Court of Brunswick; D. W. Krauss, Judge.

Action of trover by W. E. Fouché against H. H. Roddenberry and others. Judgment for plaintiff, motion for new trial denied, and defendants bring error. Affirmed.

Conyers & Wilcox, of Brunswick, for plaintiffs in error.

Robt. W. Durden and Frank H. Harris, both of Brunswick, for defendant in error.

SMITH, J. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(25 Ga. App. 96)

SALIOS v. SWIFT. (No. 11133.)

(Court of Appeals of Georgia, Division No. 2.  
March 18, 1920, On Motion for Rehearing, April 7, 1920.)

(Syllabus by the Court.)

1. APPEAL AND ERROR  $\S$  1067—TRIAL  $\S$  203 (2), 213—JUDGE MUST FULLY INSTRUCT AS TO ALL MATERIAL ISSUES AND AS TO THE LAW APPLICABLE THERETO.

It is the duty of the judge in the trial of a case before a jury to clearly and fully instruct the jury as to all the material and substantial issues in the case, and then to instruct them in the same manner as to the law applicable to these issues. In the instant case, while the judge did state the contentions of the parties and did in stating those contentions quote section 5385 of the Civil Code of 1910, he failed to instruct the jury as to what constituted a tenancy at sufferance and a tenancy at will. The failure of the court to instruct the jury fully and clearly as to these contentions and the law applicable thereto was error, and therefore the judgment of the court overruling the motion for a new trial must be reversed.

On Motion for Rehearing.

(Additional Syllabus by Editorial Staff.)

2. LANDLORD AND TENANT  $\S$  120(2)—TENANT AT WILL ENTITLED TO TWO MONTHS' NOTICE TO QUIT.

A tenant at will is entitled to two months' notice before he is subject to eviction.

3. TIME  $\S$  5—"MONTH" FOR NOTICE TO QUIT IS A CALENDAR MONTH, REGARDLESS OF THE NUMBER OF DAYS THEREIN.

On the issue as to whether defendant was a tenant at sufferance or a tenant at will, and, if he was a tenant at will, as to whether he had been given the 2 months' notice required by law before the warrant to dispossess him issued, a holding, on the assumption that the tenancy was a tenancy at will, that 23 days constituted a month, was error, as a "month" means a calendar month, whether it has 28, 30, or 31 days.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Month.]

Error from Superior Court, Elbert County; W. L. Hodges, Judge.

Action between Nick Salios and T. M. Swift, Sr. Judgment for the latter, motion

for new trial overruled, and the former brings error. Reversed.

Grogan & Payne, of Elberton, for plaintiff in error.

Z. B. Rogers, of Elberton, for defendant in error.

SMITH, J. Reversed.

JENKINS, P. J., and STEPHENS, J., concur.

**On Motion for Rehearing.**

SMITH, J. The affidavit of the plaintiff in the court below alleged that the defendant was holding over and beyond his term of rental. Thus the plaintiff evidently treated the defendant as a tenant at sufferance. On the trial of the case the plaintiff testified that the defendant had entered upon the premises on December 1, 1913, under a written lease for three years, with the privilege of extending it two years upon the defendant giving 90 days' notice. He testified further that this 90 days' notice was not given, and that the defendant was allowed to remain in possession of the premises the other 2 years, which brought it to August 31, 1918. When this time expired nothing was said about a release of the property, but the defendant was allowed to stay on, paying rent monthly. He further testified that on July 2, 1919, he gave the defendant notice that he could not occupy the property after August 31, 1919. This evidence tended to show that the plaintiff treated the defendant as a tenant at will, and undertook to give him the 2 months' notice required by law to be given a tenant at will. The defendant in his answer contended that his term of rental had not expired, and that he had not received the 2 months' notice required by law. He testified that the notice served on him was served on the 3d day of July, and the warrant was sworn out on the 1st day of September. This evidence was supported by other witnesses. So the question was whether the defendant was a tenant at will or a tenant at sufferance, and, if a tenant at will, there was a sharp conflict as to whether he had received 2 months' notice to vacate.

[2, 3] In the case of *English v. Ozburn*, 59 Ga. 393, Judge Jackson held that under the law a month meant a calendar month, whether the month had 28 days, 30 days, or 31 days. In the case of *Weed v. Lindsay*, 88 Ga. 686, 15 S. E. 836, 20 L. R. A. 33, Chief Justice Bleckley held that a tenant at will was entitled to 2 months' notice before he was subject to eviction, and in his opinion he construed the 2 months' notice to be 60 days. See, also, *Hammond v. Clark*, 136 Ga. 313, 322, 71 S. E. 479, 38 L. R. A. (N. S.) 77. In the case under review, therefore, it was an issue as to whether the defendant was a tenant at sufferance or a tenant at will, and it

was also an issue, if he was a tenant at will, as to whether he had been given the 2 months' notice required by law before the warrant to dispossess him issued on September 1, 1919. The judge in the court below, in his opinion, incorporated in the record, evidently construed the tenancy to be one of a tenant at will, and undertook to hold that 28 days constituted a month. We cannot agree with him in this holding, and, as the above issues were in the case, it was error for him to fail to instruct the jury as to what constituted a tenant at sufferance and a tenant at will.

Rehearing denied.

JENKINS, P. J., and STEPHENS, J., concur.

(25 Ga. App. 133)

WILLIAMS et al. v. MITCHEM.

MITCHEM v. WILLIAMS et al.

(Nos. 11192, 11216.)

(Court of Appeals of Georgia, Division No. 2, April 8, 1920.)

*(Syllabus by the Court.)*

1. REPLEVIN  $\Leftrightarrow$  4—BAIL TROVER DOES NOT LIE TO RECOVER UNGATHERED CROPS; "REALTY."

As bail trover lies only to recover personalty, such an action is not maintainable to recover ungathered crops, whether mature or immature, since under the law of this state crops not detached from the soil are realty.

(a) Moreover, there was no such conversion shown by the evidence in this case as to authorize a recovery.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Real Property.]

2. REPLEVIN  $\Leftrightarrow$  103(1), 125—DEFENDANT'S REMEDY ON REPLEVIN OF PROPERTY BY PLAINTIFF IN BAIL TROVER STATED.

Where a plaintiff in bail trover replevies the property in controversy, on the defendant's failure to do so, and suffers nonsuit on the trial of the case, the defendant may enter up judgment against the plaintiff and the sureties on his bond for the value of the property; and, if the defendant is content with the value stated in the plaintiff's affidavit to obtain bail, no further proof or assessment of value is necessary.

Error from City Court of Morgan; A. L. Miller, Judge.

Action by T. J. Williams and another against C. E. Mitchem. A judgment of nonsuit was entered, and both parties bring error. Judgment on main bill of exceptions affirmed, and cross-bill dismissed.

C. J. Taylor, of Morgan, and R. R. Jones, of Dawson, for plaintiffs in error.

B. W. Fortson, of Arlington, for defendant in error.

SMITH, J. T. J. Williams and Y. D. McCollum brought an action of trover against C. E. Mitchem to recover certain described crops, not detached from the soil, alleged to be of the value of \$10,000. The plaintiffs at the time of filing their trover suit also filed an affidavit to obtain bail. The defendant failed to give bond, and the plaintiffs, exercising their statutory right, gave the required bond, took possession of the crops, and gathered them. The crops were all matured, but were in the fields ungathered. The trial of the trover action resulted in a nonsuit, and the court, upon motion of defendant's counsel, entered judgment against the plaintiffs and the sureties on their bond for the sworn value of the property as set out in the bail affidavit made by the plaintiffs, with interest from the date of conversion. The plaintiffs excepted to the judgment of nonsuit and to the judgment on the bond, and the case was duly brought to this court for review.

[1] What seems to us to be the main and controlling question in the case is whether or not bail trover will lie to recover matured but ungathered crops. The fact that this question is not argued or referred to in the briefs of counsel does not, of course, preclude us from deciding the case upon this theory, for this court is not concerned with the reason given for or against the judgment of nonsuit, but with the correctness of that ruling.

In determining whether trover lies, there is often much confusion as to whether the property in question is personalty or realty; and different conclusions have been reached by text-writers and appellate courts in determining whether ungathered crops are personalty or realty. Since, however, no good purpose would be served by citing or discussing cases from states other than Georgia on this subject, and certainly it would be impracticable to try to reconcile the many decisions, both English and American, in which this question has been dealt with, we will confine our discussion to the law of this state relating to the classification of crops not detached from the soil.

In order to avoid possible confusion, we deem it necessary to state at the outset that it is wholly immaterial whether the crops in this case were growing or matured, for the Supreme Court has held in the recent case of *Newton County v. Boyd*, 148 Ga. 761, 98 S. E. 347, that—

"A crop of corn, not detached from the soil, whether mature or immature, is a part of the realty, and passes by sale of the land without contractual reservation of the crop."

Section 3617 of the Civil Code defines realty as follows:

"Realty or real estate includes all lands and the buildings thereon, and all things permanently attached to either, or any interest therein or issuing out of or dependent thereon."

With this definition before it (Civil Code 1882, § 2218), the Supreme Court in the case of *Coody v. Gress Lumber Co.*, 82 Ga. 793, 10 S. E. 218, held that trees growing upon land were a part of the realty; and that, under the statute of frauds, a sale of them must be in writing. In *Frost v. Render*, 65 Ga. 15, it appears that a sheriff sold under execution land upon which was growing crops, and it was there held that—

"A levy being on certain land as the property of the defendant in *fi. fa.*, a sale under such levy carries with it the crop growing on the land, and the sheriff cannot limit the sale by an announcement that the rent of the current year is reserved."

The holding was based on the principle that the law considers growing crops part and parcel of the land itself. Again we find that in the early case of *Pitts v. Hendrix*, 6 Ga. 452, it was decided that—

"A growing crop of corn, after it is laid by, and before maturity, passes to the purchaser of the land."

This case was cited and followed in *Ferguson v. Hardy*, 59 Ga. 758, wherein the question arose as to whether the title to crops growing on lands sold under execution passes to the purchaser as against the defendant in *fi. fa.* In the case of *Dollar v. Roddenberry*, 97 Ga. 148, 25 S. E. 410, it was held that a purchaser of lands did not acquire title as against a tenant who planted certain crops on the land, and whose estate was suddenly terminated by a sale of the lands. This decision was based upon the common-law doctrine that the tenant was entitled to the crops as "emblemments," and it was unnecessary to decide whether the crops were to be considered as personalty or realty, for no greater interest than the landlord had therein could be sold as his property, and of course the purchaser got only that which was in fact sold. In a contest between a judgment creditor of a tenant and one who claimed cotton levied on by virtue of prior purchase from the tenant of his unmatured crops, and who had accordingly entered upon the land, cultivated the crops, and gathered them when ripe, the Supreme Court said:

"Before maturity, the crops only constitute an element of value, and are not themselves distinct chattels. We know of no ruling to the contrary by this court." *Scolley v. Pollock*, 65 Ga. 389.

In that case the case of *Pitts v. Hendrix*, *supra*, was cited with approval.

Another case which bears somewhat upon the subject under consideration is that of *Hamilton v. State*, 94 Ga. 770, 21 S. E. 995, wherein the accused was charged with having fraudulently sold and disposed of personal property upon which she had previously given a mortgage. The point raised was that

a mortgage given upon a growing crop could not properly be treated as a mortgage upon personalty; and the Supreme Court, in dealing with this question, drew the distinction between growths that are *fructus naturales* and those designated as *fructus industriales*. However, what was said as to this distinction was merely obiter, for, as will be seen from the concluding remarks of the opinion then delivered, the court rested its decision, not upon the character of the crops when mortgaged, but upon the ground that, if the accused fraudulently disposed of them after maturity, so that they were removed from the land and carried beyond the reach of the mortgagee, the offense with which she was charged would unquestionably be complete. Therefore it was simply held in that case that, irrespective of whether the crops should be considered as personalty while yet immature and growing in the field, "the crop in question being personalty when sold and being then subject to the mortgage, it does not matter whether it was personalty or not at the time it was mortgaged." As far as we have been able to find, there is no decision of our Supreme Court which has unqualifiedly approved and adopted as sound the distinction drawn by many text-books and courts between property that is *fructus naturales* and that which is *fructus industriales*. We come now to the case of *Bagley v. Columbus So. Ry. Co.*, 98 Ga. 626, 25 S. E. 638, 34 L. R. A. 286, 58 Am. St. Rep. 825, and while that case holds merely that "as a general rule, unmaturing crops growing upon land belonging to the owner of the crops are to be regarded as part and parcel of the land," special attention is called to the very able and thorough opinion of Chief Justice Simmons, which is not only one of the best discussions to be found anywhere upon this troublesome subject, but one which has been repeatedly referred to by leading text-writers.

Since it seems to be indisputable, from what is said above, that crops not detached from the soil, whether mature or immature, cannot be properly classified as personalty under the law obtaining in this state, it follows that the plaintiffs in this case could not legally maintain *habeas corpus* to recover ungathered crops. Consequently it cannot be said that the judgment of the court in awarding a nonsuit was error.

Moreover, even if the crops in this case were to be considered as personalty, there was no sufficient evidence of a conversion of them, and for this additional reason the nonsuit was proper. While it is true the evidence showed a demand and refusal, this was not, under the particular facts of the case, sufficient proof of a conversion, for the uncontradicted evidence established that the plaintiffs went into possession and gathered the crops several months prior to the

1st of November, whereas the defendant had, under the terms of a valid written contract, the right to purchase at any time before this date the plantation upon which the crops were raised, and in case he exercised this right he became the owner, not only of the land, but of all the crops grown thereon. The defendant's option to buy not having expired when the plaintiffs demanded that he surrender possession of the crops, it cannot be said that his refusal to do so amounted to a conversion. In other words, their demand for possession was prematurely made.

[2] 2. The nonsuit being proper, the defendant had his choice of three remedies, to wit: (1) For the specific property, or (2) for the market value of the property at the date of the conversion, with the addition of hire or interest; or (3) for the highest proved value of the property between the date of the conversion and the date of the trial, without hire or interest. *Kaufman v. Seaboard Air Line Ry.*, 10 Ga. App. 248, 250, 73 S. E. 592; *Barfield Music House v. Harris*, 20 Ga. App. 42, 92 S. E. 402. The defendant took advantage of the second remedy, and asked for judgment for the value placed upon the property by the plaintiffs in their affidavit for bail. The court allowed judgment to be entered upon the bond, for the sworn value of the property with interest from the date of the conversion. The plaintiffs excepted to this action of the court, but their exception is, we think, without substantial merit, for, as was said by Judge Powell in the case of *Kaufman v. Seaboard Airline Ry.*, *supra*:

"The defendant in any of these events may ask for the question of value to be submitted to the jury for assessment; but, if he is content with the value sworn to by the plaintiff in his affidavit for bail, verdict is unnecessary, and he may, upon the sworn admission of the plaintiff as contained in this affidavit, take judgment against the plaintiff and his sureties for the sum stated in the affidavit, with interest thereon."

See, also, in this connection, *Mallory v. Moon*, 130 Ga. 591, 61 S. E. 401; *Block v. Tinsley*, 95 Ga. 436, 22 S. E. 672; *Thomas v. Price*, 88 Ga. 533, 15 S. E. 11; *Hayes v. Jordan*, 85 Ga. 741, 11 S. E. 833, 9 L. R. A. 373; *Jaques v. Stewart*, 81 Ga. 82, 6 S. E. 815. It is true that there was evidence introduced in behalf of the plaintiffs tending to show that the property in dispute sold for only \$5,573.06, but we do not deem this testimony sufficient to alter our ruling sustaining the action of the court in permitting defendant to take judgment for \$10,000, the amount stated in the bail affidavit to be the value of the property, for, as above indicated, the defendant elected to take a judgment for the market value of the property at the date of the conversion, and the evidence as to what the crops sold for relates to the value of the

property after its conversion by the plaintiffs. Evidence of what crops brought when sold is wholly insufficient to prove what they were worth on a date prior to the sale, for it is a matter of common knowledge that the market value of crops is subject to fluctuation from day to day. The only evidence in the case therefore as to the value of the crops at the time of their conversion was that sworn to by the plaintiffs in their bail affidavit, and the court did not err in entering up judgment for \$10,000, the amount stipulated in the affidavit as the value of the property.

It is contended that the general rule as above stated, and upon which our affirmance of the judgment for \$10,000 is based, does not apply, and would work a grave injustice in this case because the defendant had at most only a part interest in the crops in controversy; but, as said by Judge Powell in the Kaufman Case, *supra* :

"The rule does apply, and no injustice is done. The plaintiff took the goods from the defendant's possession without having the right to do so. When his lack of right was judicially established, it was obligatory on him, under his replevy bond, to put the property or its value in money back into the defendant's hands. When, under the restitution, the defendant company takes money instead of the property, it will hold the money on terms like those on which it held the property. The defendant will hold the money not for its own ultimate benefit, but for its protection."

Therefore in the present case the plaintiffs may take such steps in law or equity as shall be necessary to give adequate protection to all parties concerned. The only real ultimate hardship, if any, on the plaintiffs is that they will have to pay the costs; and this hardship they imposed upon themselves by mistaking their remedy.

Judgment on the main bill of exceptions affirmed; cross-bill dismissed.

JENKINS, P. J., and STEPHENS, J.,  
concur.

(25 Ga. App. 159)

AMERICAN REALTY CO. v. BRAMLETT.  
(No. 11299.)

(Court of Appeals of Georgia, Division No. 2.  
April 8, 1920.)

(Syllabus by the Court.)

1. VENDOR AND PURCHASER  $\S$  350—IRRELEVANT EVIDENCE AS TO REASON FOR VENDOR'S FAILURE TO CONSTRUCT SIDEWALKS AS AGREED HELD PROPERLY STRICKEN.

The court did not err in ruling out the answer of the witness Martin to the question "Would it have been economical to have laid sidewalks, even if you could have gotten material?" The witness answering that it was not,

and explaining that "Camp Gordon soldiers were parading out there, and they wanted this property to parade on," clearly this evidence was not relevant to the issues in the case.

2. CONTRACTS  $\S$  176(10)—VENDOR AND PURCHASER  $\S$  352—FAILURE OF VENDOR TO CONSTRUCT SIDEWALKS FOR THREE YEARS HELD UNREASONABLE AND TO CONSTITUTE BREACH OF AGREEMENT.

Generally what is a "reasonable time" is a question to be passed upon by the jury, in the light of the facts of the particular case, under proper instructions from the court (Baldwin Fertilizer Co. v. Cope, 110 Ga. 825, 35 S. E. 316); but where the facts are undisputed, and different inferences cannot be drawn from the same facts, the question of what is a reasonable time is one of law for determination by the court. 2 Elliott on Contracts,  $\S$  5050, p. 836. See, also, Pattillo v. Alexander, 96 Ga. 60, 63, 22 S. E. 646, 29 L. R. A. 616; Fleming v. Foran, 12 Ga. 594(2).

(a) In the instant case it was undisputed that the agreement by the defendant company to lay the sidewalks was entered into approximately three years before the filing of the suit by the plaintiff for a breach of that agreement, and the court therefore did not err in holding, as a matter of law, that the time claimed by the defendant was unreasonable, and in directing a verdict for the plaintiff, the evidence not disclosing any reasonable excuse for the delay and failure to comply with the contract.

3. ASSESSMENT OF DAMAGES.

Not being convinced that this case was brought to this court for delay only, the request of the defendant in error that 10 per cent. damages be assessed against the plaintiff in error is refused.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by M. H. Bramlett against the American Realty Company. Judgment for plaintiff, and defendant brings error. Affirmed.

On September 12, 1918, Mary Hobson Bramlett brought suit against the American Realty Company, alleging, substantially, that on September 15, 1915, she agreed to purchase a certain described lot from the defendant for the sum of \$600—\$420 cash, and remainder payable 36 months from the date of the agreement. She alleged that she paid the \$420, and gave notes for the remainder of the purchase price, receiving a bond for title (a copy of which was attached to the petition) in which the defendant made the following warranties and guaranties:

"(1) That the street or streets on which said lot faces will be graded and have trees planted;" and (2) "that either cement or tile sidewalks will be laid in front of said lot, all without cost to purchaser."

She alleged, further, that approximately three years had elapsed since the making of the agreement; that the street on which the

lot faces has not been properly graded, and no cement or tile sidewalk had been laid in front of said lot. She alleged that the agreement was breached, and asked for a judgment for the \$420 paid by her to the defendant, with interest thereon. The defendant in its answer admitted substantially the alleged contract, but denied that it had breached the contract, and denied that the plaintiff was entitled to recover the amount sued for. There was undisputed evidence that the contract was made and the money paid as alleged, that no sidewalk had been laid in front of the lot, that nearly three years had elapsed since the making of the agreement, and that before the filing of the suit the plaintiff demanded of the defendant that it carry out the agreement to lay the sidewalk. There was evidence for the defendant as to the grading of the streets and planting of trees, and to the effect that the failure to lay the sidewalk in front of this property was due to war and labor conditions; that when the war came on the defendant did not have any demand for this class of property; that building material was so high and labor so scarce that it would not be economical, and would be almost impossible to do the work; that it had laid sidewalks within a block of this lot, but quit and had not laid any since.

At the conclusion of the evidence the court directed a verdict for the plaintiff for the amount sued for, and the defendant excepted.

Evins & Moore, of Atlanta, for plaintiff in error.

Anderson & Slate and J. L. Anderson, all of Atlanta, for defendant in error.

SMITH, J. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(25 Ga. App. 183)

BAYNES v. STATE. (No. 11245.)

(Court of Appeals of Georgia, Division No. 1.  
April 30, 1920.)

(Syllabus by the Court.)

1. ASSAULT AND BATTERY  $\S$ 97—CRIMINAL LAW  $\S$ 881(3)—VERDICT OF GUILTY OF INCLUDED OFFENSE OF UNLAWFUL SHOOTING HELD NOT SO UNCERTAIN AS TO BE VOID; PUNISHMENT PRESCRIBED BY JURY HELD CONCLUSIVE OF THEIR WANT OF INTENT TO ACQUIT.

The indictment is for assault with intent to murder, but embraces the minor offense of unlawfully shooting at another, as denounced by section 115 of the Penal Code (1910). The verdict is in part as follows: "We, the jury, find the defendant guilty of unlawful shooting." The remainder of the verdict fixes a punishment appropriate to the minor offense mentioned. The verdict is attacked as being void for

uncertainty with reference to the offense referred to, and as being equivalent to an acquittal. *Held*:

(a) While the trial judge should not have received the verdict in the form in which it was returned, but should have taken proper steps to have it put in some one of the usual forms, yet under the decision of the Supreme Court in *Arnold v. State*, 51 Ga. 144, it cannot be held that the verdict as received was so uncertain as to be absolutely void. See, also, *Espy v. State*, 19 Ga. App. 743, 92 S. E. 229, and *Autrey v. State*, 23 Ga. App. 143, 97 S. E. 753.

(b) The punishment prescribed by the jury is conclusive of the want of any intention on their part to acquit the accused. *Park's Penal Code*,  $\S$  1059.

2. CRIMINAL LAW  $\S$ 796, 1172(9)—ERRONEOUS INSTRUCTION NOT DIRECTING JURY TO FIX MAXIMUM AS WELL AS MINIMUM PUNISHMENT HELD HARMLESS.

After correctly instructing the jury to fix a maximum punishment in the event they found the accused guilty of assault with intent to murder, the court further instructed them that, if they found the defendant guilty of unlawfully shooting at another, they should "fix the minimum punishment not less than one year nor longer than four years, or any time between one and four years, as the jury should see proper." Under the latter instruction the jury fixed the punishment at a minimum of two years and a maximum of four years; but the accused complains of that instruction, because it does not direct the jury to fix a maximum as well as a minimum punishment. *Held*: While the particular part of the charge complained of was erroneous for the reason assigned, yet the jury having understood and performed their duty, by prescribing both a minimum and a maximum punishment, the error became harmless. See *Ripley v. State*, 7 Ga. App. 679, 67 S. E. 834 (1).

3. ASSAULT AND BATTERY  $\S$ 92—HOMICIDE  $\S$ 269—INTENT WITH WHICH UNLAWFUL SHOOTING IS DONE EXCLUSIVELY FOR JURY; CASE DISTINGUISHED; EVIDENCE HELD TO WARRANT CONVICTION OF UNLAWFULLY SHOOTING AT ANOTHER.

The evidence authorized the verdict, and the trial judge did not err in overruling the motion for a new trial.

(a) On its facts, this case is easily distinguishable from *Kendrick v. State*, 113 Ga. 759, 39 S. E. 286, and subsequent decisions to the same effect. In every case of assault with intent to murder by unlawfully shooting at another, the intent with which the shooting is done is a question exclusively for the jury. See *Park's Penal Code*,  $\S$  97, and citations on "Intent." In the instant case the prosecutor's testimony alone is sufficient to support the verdict, but it discloses no more evidence of a specific intent to kill than must necessarily appear in every case of unlawfully shooting at another. The testimony of another witness that "Nine (the accused) told Clyde (the prosecutor) he was shooting at him to kill him" did not bring the case within the rule announced in *Kendrick's Case*, supra; it not appearing when or under what circumstances such declaration of the accused

was made, and the prisoner's statement to the court and jury containing an admission that he had a difficulty with the prosecutor at the time and place in question, and that some shooting was done then and there, and denying only that he was the person who did the shooting.

Error from Superior Court, Morgan County; J. B. Park, Judge.

Nine Baynes was convicted of unlawfully shooting at another, and brings error. Affirmed.

E. M. Baynes, of Monticello, for plaintiff in error.

Doyle Campbell, Sol. Gen., of Monticello, for the State.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(25 Ga. App. 182)

**ANDREWS v. MAYOR AND ALDERMEN OF CITY OF SAVANNAH.** (No. 11232.)

(Court of Appeals of Georgia, Division No. 1. April 13, 1920.)

*(Syllabus by the Court.)*

1. MUNICIPAL CORPORATIONS  $\S$ 741(1)—PETITION AGAINST CITY FOR PERSONAL INJURY PROPERLY DISMISSED, WHERE NOTICE NOT GIVEN WITHIN STATUTORY TIME.

The charter of the city of Savannah, as amended by the act of the General Assembly of Georgia approved August 16, 1915 (Acts 1915, p. 825, § 1), provides that "no action for damages to person or property \* \* \* shall be instituted against the city of Savannah unless within six months from the happening or infliction of the injury complained of the complainant \* \* \* shall give notice to the mayor and aldermen of the said city of such injury in writing." In the instant case the plaintiff brought suit against the mayor and aldermen of the city of Savannah for personal injuries, but her petition showed that the required notice was not given until more than six months after the infliction of the injury sued for. The court, therefore, did not err in dismissing the petition on the defendant's motion.

2. APPEAL AND ERROR  $\S$ 170(2)—CONSTITUTIONAL QUESTION NOT RAISED BELOW CANNOT BE CONSIDERED.

A constitutional question cannot be considered by the reviewing court, unless it is made during the trial of the case in the lower court. It is too late to raise such a question for the first time in the higher court. *Hendry v. State*, 147 Ga. 260, 93 S. E. 413(8); *Bolton v. Newnan*, 147 Ga. 400, 94 S. E. 236; *Scoggins v. State*, 24 Ga. App. —, 102 S. E. 39. Counsel for the plaintiff in error contend in their brief that the provision of the charter of the city of Savannah referred to above is invalid and unconstitutional. It does not appear, how-

ever, from the record or the bill of exceptions, that this question was made in the lower court, and accordingly it cannot be considered by this court, or by the Supreme Court, to which court this case would have to be transferred if a constitutional question had been raised in the lower court.

Error from Superior Court, Chatham County; P. W. Meldrim, Judge.

Suit by Ellen Andrews against the Mayor and Aldermen of the City of Savannah. Petition dismissed on defendants' motion, and plaintiff brings error. Affirmed.

Oliver & Oliver, of Savannah, for plaintiff in error.

Shelby Myrick and E. A. Cohen, both of Savannah, for defendant in error.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(25 Ga. App. 193)

**WILLIAMS v. STATE.** (No. 11281.)

(Court of Appeals of Georgia, Division No. 1. April 13, 1920.)

*(Syllabus by the Court.)*

1. CRIMINAL LAW  $\S$ 785(3), 828—WITHOUT A WRITTEN REQUEST, JUDGE NEED NOT CHARGE ON IMPEACHMENT; CHARGE THEREON SHOULD CONTAIN EVERYTHING APPLICABLE TO FACTS.

It is well settled that, while it is not incumbent upon the judge, in the absence of a timely and appropriate written request, to charge upon the subject of the impeachment of witnesses, yet, where that subject is referred to in the charge, all of it that is material and applicable to the facts of the case should be given. *Rouse v. State*, 2 Ga. App. 184, 58 S. E. 416(7); *Harper v. State*, 17 Ga. App. 561, 87 S. E. 808(2).

2. CRIMINAL LAW  $\S$ 825(4) — CHARGE THAT IMPEACHMENT MAY BE BY CONTRADICTORY STATEMENTS HELD ADEQUATE, IN ABSENCE OF REQUEST.

In the instant case the only reference in the court's charge to the law upon the impeachment of witnesses was as follows: "I charge you that a witness may be impeached by contradictory statements. This is one of the methods of impeachment recognized by the law." Under the above ruling, and the facts of the case, the court erred in not giving fuller and more adequate instructions upon this subject, although no request to do so, or to charge at all upon the subject, was presented. On account of this error, another trial of the case is required.

Error from Superior Court, Berrien County; R. G. Dickerson, Judge.

Proceeding by the State against Elbert Williams. From the judgment, Williams brings error. Reversed.

Story & Story, of Nashville, for plaintiff in error.

J. D. Lovett, Sol. Gen., of Nashville, for the State.

BROYLES, C. J. Judgment reversed.

LUKE and BLOODWORTH, JJ., concur.

(25 Ga. App. 191)

NEWSOME v. STATE. (No. 11265.)

(Court of Appeals of Georgia, Division No. 1.  
April 13, 1920.)

*(Syllabus by the Court.)*

1. CRIMINAL LAW  $\S$  1064(3) — MOTION FOR NEW TRIAL, NOT SHOWING GROUND OF APPLICABILITY FOR CONTINUANCE OF THE EVIDENCE, WAS INCOMPLETE.

No question is presented for decision by a ground of motion for a new trial in the following language: "Because the court overruled defendant's motion for continuance, which was first made on August 20, and renewed and heard and overruled on August 21, 1919, which was the day said case was tried." Such a ground of a motion for a new trial is incomplete, in that it fails to disclose the ground of the application for continuance, and further, in that it fails to set out or refer to an exhibit setting out the evidence considered by the presiding judge in passing upon the application. Park's Pen. Code,  $\S$  986; Delk v. State, 99 Ga. 667, 26 S. E. 752(4).

2. CRIMINAL LAW  $\S$  1064½ — GROUND OF MOTION FOR NEW TRIAL DISAPPROVED BY TRIAL JUDGE WILL NOT BE CONSIDERED.

A ground of a motion for a new trial that is not approved by the trial judge, and which he expressly declines to approve, will not be considered by this court. See Park's Pen. Code,  $\S$  1090, 1090(a), and citations on "Approval."

3. CRIMINAL LAW  $\S$  1064½ — GROUND OF MOTION FOR NEW TRIAL, BASED ON FACTS NOT OTHERWISE SHOWN BY RECORD, MAY BE DISAPPROVED.

Where a ground of a motion for a new trial is based either in whole or in part upon facts not otherwise shown by the record, and which did not transpire in open court or within the immediate knowledge of the presiding judge, unless they are made to appear by supporting affidavits annexed to the motion, it is proper for the judge to decline to approve the ground or certify to the truth of such recitals of fact.

4. JURORS' AFFIDAVITS CANNOT IMPEACH THEIR VERDICT.

"The affidavits of jurors may be taken to sustain, but not to impeach their verdict." Civ. Code 1910,  $\S$  5933.

5. CRIMINAL LAW  $\S$  789(8) — CHARGE AS TO REASONABLE DOUBT HELD NOT TO APPLY THE RULE IN CIVIL CASES.

The court charged: "All the law requires is moral and reasonable certainty. So, in this case, if you are satisfied to a moral and reasonable certainty, and that beyond a reasonable doubt, it would be your duty to find the defendant guilty." Such a charge is not subject to the criticism that it applies to a criminal case the degree of proof applicable only to a civil case. Considered in connection with the entire charge, it was not error for any reason assigned. See Park's Pen. Code,  $\S$  1012, and annotations.

6. CRIMINAL LAW  $\S$  789(17) — CHARGE THAT REASONABLE DOUBT IS THAT ARISING IN MIND OF HONEST JUROR HELD NOT ERROR.

Complaint is made of the following charge: "When I say 'a reasonable doubt,' I do not mean some mere vague conjecture or possibility, conjured up in the mind of the jury for acquitting the defendant, but such a doubt as arises in the mind of an honest juror seeking the truth, and leaves it wavering and doubtful as to the truth of the transaction. It may arise from having heard the case, the want, weakness, or insufficiency of the evidence." Held, the charge was free from error. Peterson v. State, 47 Ga. 525(5); Cobb v. State, 11 Ga. App. 52, 74 S. E. 702(1); Dumas v. State, 63 Ga. 600(8); Fletcher v. State, 90 Ga. 468, 17 S. W. 100(2).

7. DENIAL OF NEW TRIAL.

The evidence authorized the verdict, and there was no error in denying the motion for a new trial.

Error from Superior Court, Glascock County; B. F. Walker, Judge.

George Newsome was prosecuted for an offense. From the judgment, and the overruling of his motion for a new trial, he brings error. Affirmed.

J. C. Newsome, of Sandersville, for plaintiff in error.

R. C. Norman, Sol. Gen., of Washington, Ga., for the State.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

¶ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes



(25 Ga. App. 118)

**LANG v. HALL** (No. 10983.)(Court of Appeals of Georgia, Division No. 2.  
April 7, 1920.)*(Syllabus by the Court.)*

1. **APPEAL AND ERROR**  $\S$  66, 452—**BILL OF EXCEPTIONS NOT COMPLAINING OF A FINAL JUDGMENT CONFERS NO APPELLATE JURISDICTION; NOTWITHSTANDING CERTIFIED BILL OF EXCEPTIONS TO A JUDGMENT NOT FINAL, THE TRIAL COURT RETAINS JURISDICTION.**

A bill of exceptions which does not complain of a judgment finally disposing of the case, or of a judgment which would have been final if rendered as contended for, will not operate to confer any jurisdiction upon this court. Where a trial judge has certified a bill of exceptions which complains of a ruling sustaining a demurrer to and striking a defendant's plea, which is not a final judgment, the case still remains within the jurisdiction of the trial court. Where the case thereafter proceeds to trial and a final judgment is rendered therein, a bill of exceptions duly tendered, bringing such final judgment to this court for review, will not be dismissed upon motion of the defendant in error, based upon the ground that the trial judge lost jurisdiction of the case by certifying to the first bill of exceptions.

2. **APPEAL AND ERROR**  $\S$  452—**AFTER CERTIFYING BILL TO JUDGMENT NOT FINAL, COURT MAY ORDER IT FILED AS EXCEPTIONS PENDENTE LITE.**

Where the trial judge certifies a bill of exceptions which excepts to a judgment not final, and which would not have been final if rendered as contended for, it is not error for him thereafter, and within the time allowed by law after the rendition of the judgment complained of, to pass an order amending such certificate and ordering that such bill of exceptions operate and be filed as exceptions pendente lite. Where a proper assignment of error is made in this court upon such exceptions pendente lite, the same will be here considered.

3. **BILLS AND NOTES**  $\S$  534—**A SUIT PENDING AT SERVICE OF STATUTORY NOTICE ON DEFENDANT, BUT DISMISSED BEFORE SECOND SUIT, IS NO DEFENSE AGAINST ATTORNEY'S FEES.**

It is no defense to a claim for attorney's fees in a suit upon a promissory note that, before the filing of the suit and before the giving to the defendant of the ten days' notice required by statute, the payee had already brought suit on the note against the defendant, and that such suit was pending at the time of service upon the defendant of the statutory notice required, but had been dismissed by the plaintiff prior to the filing of the second suit. *Bacon v. Hanesley*, 19 Ga. App. 69, 90 S. E. 1033(3).

4. **VENDOR AND PURCHASER**  $\S$  308(6)—**PLEA ALLEGING DEFECT OF TITLE, IN ABSENCE OF EXPRESS WARRANTY OF TITLE, DEMURRABLE.**

"In a sale of land there is no implied warranty of title." *Civ. Code* 1910, § 4193. In a suit upon a promissory note, a plea which

alleges that the note sued on was executed by the defendant in payment of the balance due the plaintiff on the purchase money of certain land which the defendant had purchased from the plaintiff, and which further alleged that there was a defect in plaintiff's title to the land, which was afterwards discovered by the defendant, in that the plaintiff had acquired title to only four-fifths interest in the land and never acquired title to the whole estate, and where it nowhere appears that the plaintiff obligated himself to make title or expressly warranted the title to the land, such plea set forth no defense and was properly dismissed on demurrer.

5. **BILLS AND NOTES**  $\S$  537(1)—**DIRECTED VERDICT PROPER, WHERE PLEA HAS BEEN PROPERLY DISMISSED.**

This being a suit upon a promissory note, and it being undisputed that the defendant had received the statutory notice of the plaintiff's intention to bring suit and claim attorney's fees, it was not error for the court, after having properly dismissed defendant's plea, to direct a verdict for the plaintiff.

Error from Superior Court, Gordon County; M. C. Tarver, Judge.

Action by G. A. Hall against J. M. Lang. Judgment for plaintiff on a directed verdict, and defendant brings error. Affirmed.

Lang & Lang, of Calhoun, for plaintiff in error.

A. L. Henson, of Calhoun, for defendant in error.

STEPHENS, J. Judgment affirmed.

JENKINS, P. J., and SMITH, J., concur.

(25 Ga. App. 212)

**GRIGGS v. STATE** (No. 11268.)(Court of Appeals of Georgia, Division No. 1.  
April 14, 1920.)*(Syllabus by the Court.)*

1. **INTOXICATING LIQUORS**  $\S$  236(19)—**EVIDENCE HELD INSUFFICIENT TO SUSTAIN A CONVICTION FOR MAKING LIQUOR.**

The evidence in this case shows that certain persons approached what was designated as "the still site," and where evidently some one had recently been making liquor. A witness swore: "We stopped, I suppose, about 30 steps from the still. I saw a negro there. He was as close to the still as the edge of that table, walking from me. He had a quart or a half gallon cup in his hand, and he was drinking something out of the cup. He was walking away from the still, and drinking something as he was walking. I suppose he got as far as the back of the courthouse before he recognized me, and I spoke to Mr. Glawson, and says: 'Look there, yonder goes a negro from that still,' and the negro heard me, and threw the cup down and started to run, and I told him to stop, and

he didn't, and I shot at him two or three times." Another witness swore: "When I got on the branch I [could?] see that distillery, and saw a man down there. I could not see his head, but I could see his hands and back moving. In a very short time he stepped back and turned his back to me, and reached down on the ground and got a bucket of some description, and went off drinking out of it. He was right at the furnace. I didn't know it at that time. I saw him as he went away. About the time he peartened up, Mr. Ezell and me hailed him and told him to stop, and about that time I shot. \* \* \* This man didn't seem to be excited. He had not seen me. \* \* \* I don't know what started him running. He started, I suppose, when Ezell told him to stop." This is all the evidence that in any way connects the defendant with the offense of making liquor, and is not sufficient to authorize his conviction. The most that can be said of it is that it shows "presence" and "flight." In *Griffin v. State*, 2 Ga. App. 534, 58 S. E. 781(2), it was held: "Neither presence nor flight, nor both together, without more, is conclusive of guilt."

## 2. OTHER ASSIGNMENTS.

It is not necessary to consider the assignments of error not dealt with above.

Error from Superior Court, Jones County; J. B. Park, Judge.

Sam Griggs was convicted of offense of making liquor, and he brings error. Reversed.

J. B. Jackson, of Gray, for plaintiff in error.

Doyle Campbell, Sol. Gen., of Monticello, for the State.

**BLOODWORTH, J.** Judgment reversed.

**BROYLES, C. J., and LUKE, J.,** concur.

(25 Ga. App. 175)

**ALEXANDER v. STATE.** (No. 11224.)

(Court of Appeals of Georgia, Division No. 1. April 13, 1920.)

*(Syllabus by the Court.)*

**INTOXICATING LIQUORS**  $\Leftrightarrow$  236(22)—**CONVICTION FOR PERMITTING DISTILLING APPARATUS ON PREMISES HELD AGAINST EVIDENCE, WHERE OWNERSHIP OF PREMISES NOT SHOWN.**

The defendant was convicted, under section 22 of the act of 1917 (Ga. Laws Ex. Session 1917, p. 18), of knowingly permitting apparatus for the distilling or manufacturing of intoxicating liquors to be located on his premises. There was no evidence which authorized a finding that the land upon which the apparatus was discovered was owned, controlled, or possessed by the defendant. His conviction, therefore, was contrary to law and the evidence, and the court erred in overruling his motion for a new

trial. See *Atkinson v. State*, 102 S. E. 878, this day decided.

Error from Superior Court, Taliaferro County; B. F. Walker, Judge.

Felix Alexander was convicted of knowingly permitting an apparatus for distilling or manufacturing intoxicating liquor to be located on his premises, his motion for a new trial was overruled, and he brings error. Reversed.

J. A. Beazley, of Crawfordville, for plaintiff in error.

R. C. Norman, Sol. Gen., of Washington, Ga., and Alvin G. Golucke, of Crawfordville, for the State.

**BROYLES, C. J.** Judgment reversed.

**LUKE and BLOODWORTH, JJ.,** concur.

(25 Ga. App. 176)

**ATKINSON v. STATE.** (No. 11221.)

(Court of Appeals of Georgia, Division No. 1. April 13, 1920.)

*(Syllabus by the Court.)*

**INTOXICATING LIQUORS**  $\Leftrightarrow$  236(22)—**CONVICTION FOR PERMITTING APPARATUS FOR MANUFACTURING TO BE LOCATED ON PREMISES HELD CONTRARY TO THE EVIDENCE.**

The defendant was convicted, under section 22 of the act of 1917 (Ga. Laws Ex. Session 1917, p. 18), of knowingly permitting apparatus for the manufacturing or distilling of intoxicating liquors to be located on his premises. There was no evidence which authorized a finding that the land upon which the apparatus was discovered was owned, controlled, or possessed by the defendant. His conviction, therefore, was contrary to law and the evidence, and the court erred in overruling his motion for a new trial. See *Alexander v. State* (No. 11224) 102 S. E. 878, this day decided.

Error from Superior Court, Taliaferro County; B. F. Walker, Judge.

J. E. Atkinson was convicted of knowingly permitting an apparatus for manufacturing and distilling intoxicating liquor to be located on his premises, his motion for new trial was overruled, and he brings error. Reversed.

J. A. Beazley, of Crawfordville, for plaintiff in error.

R. C. Norman, Sol. Gen., of Washington, Ga., and Alvin G. Golucke, of Crawfordville, for the State.

**BROYLES, C. J.** Judgment reversed.

**LUKE and BLOODWORTH, JJ.,** concur.

(25 Ga. App. 242)

BARBER v. STATE. (No. 11259.)

(Court of Appeals of Georgia, Division No. 1.  
April 14, 1920.)*(Syllabus by the Court.)*

CRIMINAL LAW  $\S$ 935(1), 1160 — APPROVED VERDICT, SUPPORTED BY SOME EVIDENCE, CANNOT BE DISTURBED; WHERE VERDICT IS DECIDEDLY AGAINST THE EVIDENCE, TRIAL COURT HAS WIDE DISCRETION ON MOTION FOR NEW TRIAL.

"In this case the motion for a new trial contained only the usual general grounds. There was some slight evidence authorizing the verdict; and the verdict having been approved by the trial judge, under the repeated and uniform rulings of this court and of the Supreme Court, a reviewing court is powerless to interfere. When the verdict is apparently decidedly against the weight of the evidence, the trial judge has a wide discretion as to granting or refusing a new trial; but whenever there is any evidence, however slight, to support a verdict which has been approved by the trial judge, this court is absolutely without authority to control the judgment of the trial court." *Bradham v. State*, 21 Ga. App. 510, 94 S. E. 618. See, also, *Smith v. State*, 91 Ga. 188, 17 S. E. 68.

Error from Superior Court, Monroe County; W. E. H. Searcy, Jr., Judge.

Proceeding by the State against Sam Barber. From the judgment, and the overruling of his motion for a new trial, Barber brings error. Affirmed.

Hubert F. Rawls and Walter J. Grace, both of Macon, for plaintiff in error.

E. M. Owen, Sol. Gen., of Zebulon, for the State.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(25 Ga. App. 193)

REYNOLDS v. STATE. (No. 11269.)

(Court of Appeals of Georgia, Division No. 1.  
April 13, 1920.)*(Syllabus by the Court.)*

1. CRIMINAL LAW  $\S$ 938(1) — CUMULATIVE AND IMPEACHING EVIDENCE NO GROUND FOR NEW TRIAL.

The alleged newly discovered evidence is merely cumulative and impeaching in its character, and therefore, under repeated rulings of the Supreme Court and of this court, affords no ground for a new trial.

2. CRIMINAL LAW  $\S$ 1160 — APPROVED VERDICT, SUPPORTED BY SOME EVIDENCE, CANNOT BE DISTURBED.

There was some evidence which authorized the defendant's conviction of manslaughter,

and, the finding of the jury having been approved by the trial judge, this court is without jurisdiction to interfere.

Error from Superior Court, Putnam County; J. B. Park, Judge.

Flag Reynolds was convicted of manslaughter, and he brings error. Affirmed.

Davidson, Callaway & De Jarnett, of Eatonton, for plaintiff in error.

Doyle Campbell, Sol. Gen., of Monticello, for the State.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(25 Ga. App. 118)

TILLMAN v. GROOVER et al.

DUBBERLY et al. v. TILLMAN.

(Nos. 10982, 11006.)

(Court of Appeals of Georgia, Division No. 2.  
April 7, 1920.)*(Syllabus by the Court.)*

1. APPEAL AND ERROR  $\S$ 23—APPELLATE COURT WILL RAISE QUESTION OF ITS JURISDICTION WHEN IN DOUBT.

"It is not only the right, but the duty, of a reviewing or appellate court to raise the question of its jurisdiction in all cases in which there may be any doubt as to the existence of such jurisdiction." *Welborne v. State*, 114 Ga. 793, 796, 40 S. E. 857, 859.

2. COURTS  $\S$ 189(14), 217—CITY COURT HAVING TRIAL JURY OF LESS THAN 12 CANNOT GRANT NEW TRIAL; WRIT OF ERROR DOES NOT LIE THEREFROM TO SUPREME COURT.

"A city court, which under the act creating it is provided with a trial jury composed of less than 12 jurors, is not the kind of city court which, under the Constitution, can grant new trials, and from which writs of error lie to the Supreme Court." *Ash v. People's Bank of Oliver*, 149 Ga. 713, 101 S. E. 912; *Ga. Laws* 1915, p. 117.

3. COURTS  $\S$ 217—COURT OF APPEALS HAS NO JURISDICTION OF CASES WHICH COULD NOT, BEFORE ITS CREATION, BE BROUGHT BY WRIT OF ERROR TO SUPREME COURT.

The constitutional amendment fixing the jurisdiction of the Court of Appeals does not intend "to confer jurisdiction in cases which could not be brought by writ of error to the Supreme Court before the creation of the Court of Appeals." *Ash v. People's Bank of Oliver*, *supra*.

Error from City Court of Reidsville; J. V. Kelley, Judge pro hac.

Action between N. B. Tillman, by guardian, and J. C. Groover and others. Judgment for the latter, and the former brings error. Writ of error dismissed.

Action between H. C. Dubberly and others and N. B. Tillman, by guardian. Judgment for the latter, and the former bring error. Writ of error dismissed.

A. S. Way, of Reidsville, for plaintiffs in error.

JENKINS, P. J. Writs of error dismissed.

STEPHENS and SMITH, JJ., concur.

(25 Ga. App. 120)

SIKES v. McDILDA. (No. 11251.)

(Court of Appeals of Georgia, Division No. 2.  
April 7, 1920.)

(Syllabus by the Court.)

**FOLLOWED CASE.**

For the reasons given in Tillman v. Groover, 102 S. E. 879, this day decided, the writ of error in this case must be dismissed.

Error from City Court of Reidsville; O. L. Cowart, Judge.

Action between Stout Sikes and T. B. McDilda. Judgment for the latter, and the former brings error. Dismissed.

Elders & De Loach, of Reidsville, for plaintiff in error.

W. T. Burkhalter and S. B. McCall, both of Reidsville, for defendant in error.

JENKINS, P. J. Writ of error dismissed.

STEPHENS and SMITH, JJ., concur.

(25 Ga. App. 236)

ALEXANDER v. STATE. (No. 11223.)

(Court of Appeals of Georgia, Division No. 1.  
April 14, 1920.)

(Syllabus by the Court.)

**CRIMINAL LAW** ¶1160—APPROVED VERDICT, SUPPORTED BY SOME EVIDENCE, WILL NOT BE DISTURBED.

The motion for new trial contains no special ground; there is some evidence to support the verdict, which has the approval of the trial judge; and this court cannot interfere.

Error from Superior Court, Tallahassee County; B. F. Walker, Judge.

Proceeding by the State against Son Alexander. From the judgment, Alexander brings error. Affirmed.

J. A. Beazley, of Crawfordville, for plaintiff in error.

R. C. Norman, Sol. Gen., of Washington, Ga., and Alvin G. Golucke, of Crawfordville, for the State.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(25 Ga. App. 196)

TUCKER v. STATE. (No. 11289.)

(Court of Appeals of Georgia, Division No. 1.  
April 13, 1920.)

(Syllabus by the Court.)

**1. CRIMINAL LAW** ¶1129(3)—ASSIGNMENT OF ERROR, BASED ON EXPRESSION OF JUDGE AS TO WHAT HAD BEEN PROVED, HELD TOO VAGUE AND INDEFINITE TO BE CONSIDERED.

Where a long excerpt from the charge of the court is assigned as error on the ground "that it was an expression of opinion by the judge presiding as to what had been proved on the trial of the case," without stating what the expression was, or pointing out the particular part or parts of the excerpt complained of, and the excerpt as a whole is not subject to the criticism made, the assignment of error is too vague, indefinite, and uncertain to be considered. *Roberts v. State*, 92 Ga. 451, 17 S. E. 262 (3).

**2. OVERRULING OF MOTION FOR NEW TRIAL.**

The evidence authorized the verdict, and the trial judge did not err in overruling the motion for a new trial.

Error from Superior Court, Hancock County; J. B. Park, Judge.

Proceeding by the State against Ephriam Tucker. From the judgment, and the overruling of his motion for a new trial, Tucker brings error. Affirmed.

Wiley & Lewis, of Sparta, for plaintiff in error.

Doyle Campbell, Sol. Gen., of Monticello, for the State.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(179 N. C. 494)

CONNOR v. DISTRICT GRAND LODGE No.  
7, G. U. O. of O. F. in America et al.  
(No. 447.)

(Supreme Court of North Carolina. April 28,  
1920.)

**INSURANCE**  $\Rightarrow$  753(2)—**LIFE CERTIFICATE NOT  
FORFEITED WHERE GRAND LODGE HAD MON-  
EY IN HANDS OF ITS AGENT FOR PAYMENT  
OF PREMIUMS.**

In an action against a grand lodge on a life insurance certificate defended upon the ground that it lapsed for nonpayment of premiums, where it was the local lodge's duty to collect the premiums and there was due insured from it and in the hands of its secretary sufficient money from sick benefits to have paid them when due, such money was in the hands of the grand lodge through its agent, so that the certificate was not forfeited.

Appeal from Superior Court, Mecklenburg County; Harding, Judge.

Actions by Laura Hettie Connor against the District Grand Lodge No. 7, G. U. O. of O. F. in America, to recover on an insurance policy, and against the Rising Star Lodge No. 1656, to recover sick and funeral expenses, referred and heard as one action before a referee, and before the judge only on exceptions in the action against the Grand Lodge, where the cause continued as to the defendant Local Lodge without prejudice. Judgment for the defendant Grand Lodge, and plaintiff appeals. Reversed.

This is an action in forma pauperis, by an aged colored woman, widow of John Connor, deceased, who was for many years a member of a colored organization, commonly styled the Odd Fellows. The case was referred to W. M. Smith, referee, and on exceptions to his report it was reviewed by the judge, who modified the facts found and entered judgment thereon against the plaintiff, who appealed.

E. R. Preston, of Charlotte, for appellant.  
Edgar W. Pharr and Thaddeus A. Adams,  
both of Charlotte, for appellees.

CLARK, C. J. There were two actions, one against the District Grand Lodge, which is sued for recovery on the insurance certificate, and the other against the local lodge to recover sick and funeral expenses. For convenience and by agreement of counsel the two cases were referred and heard as one before the referee, but on the exceptions to his report the case was heard by the judge only as to the exceptions in the action against the District Grand Lodge, and the cause was continued as to the local lodge without prejudice in any way by the decision in this case.

In this appeal the court finds as facts that John Connor was a member of the Rising

Star Lodge of Charlotte and held the policy of insurance for \$200 in the District Grand Lodge payable to his wife, the plaintiff. John Connor obtained credit from the local lodge (on account of sick benefits due him) for his dues as a member of said local lodge, and also for his premiums to be remitted on his insurance certificate for the months of April, May, June, July, August, September, October, and November, 1916, which credits were entered upon the record of the local lodge. These credits the local lodge afterwards claimed were obtained by John Connor by fraud or imposition and voted John Connor "unfinancial," which means "not in good standing"; but the court finds that the credits were not obtained by fraud.

The court further finds as facts that under the rules of the local lodge a member could not become "unfinancial" in the local lodge until he was six months in arrears in his dues, nor while sick, it being the custom of said local lodge to retain out of sick benefits the monthly dues to said lodge and to the District Grand Lodge and to turn the dues to the latter over to one Lem Russell, secretary, whose duty it became to forward the same to the District Grand Lodge; that Lem Russell was the permanent secretary of the local lodge, and by virtue of his office was subendowment secretary of the District Grand Lodge, and as such officer received the monthly dues due the local and District Grand Lodge amounting to 50 cents per month and entered them in his book provided for that purpose.

The judge further found that John Connor paid no dues and obtained no credit for dues as a member of the local lodge after November, 1916, but was taken sick within 6 months from that date, i. e., in February, 1917, and remained sick until he died, June 24, 1917; that after John Connor was taken sick in February, 1917, he was informed by Lem Russell that he was financial; that the local lodge advanced or paid for John Connor his insurance premiums to the District Grand Lodge for the months of December, 1916, and January, February and March, 1917, but did not advance or pay for John Connor any premiums on his insurance certificate to the District Grand Lodge for April, May, or June, 1917, and that he knew that the local lodge did not advance or pay for him his insurance premiums for said months, and that he neither paid nor made any effort to pay them himself; the local lodge was not the agent of the District Grand Lodge, and the local lodge alone could determine whether it should maintain a sick or funeral benefit feature; that the insurance premiums due by John Connor to the Grand Lodge were a level monthly rate of 25 cents per month, and a failure to pay any month's premiums during the current month ipso facto lapsed the in-

insurance certificate of any member making such failure; that John Connor was in good financial standing in the local lodge and entitled to sick benefits as a member thereof when he was taken sick, and he could not become unfinancial therein as to sick benefits or other rights during his illness, and he was in good standing in the local lodge at the time of his death; that no notice was given by Secretary Russell to John Connor that he was nonfinancial, but as to the insurance certificate the court held that no notice was required; that for April and May, 1917, the local lodge in its monthly reports to the Grand Lodge included John Connor as a member, but did not show that he had paid the 25 cents per month insurance premiums, and the court held that his insurance certificate in the Grand Lodge became lapsed by his failure to pay the level monthly premiums for April, May, and June, 1917.

The court held that the local lodge was not the agent of the District Grand Lodge; that the insurance certificate of John Connor had lapsed and become null and void for more than two months prior to his death on June 24, 1917; and that the District Grand Lodge is not liable to any sum to the beneficiary on account thereof, and rendered judgment accordingly.

The District Grand Lodge issued the certificates of insurance, and the local lodge, if it saw fit, could establish, as this lodge did, a provision for sick benefits. The court finds as a fact that the local lodge was not the agent of the District Grand Lodge, but it also finds that the secretary of the local lodge, Lem Russell, was also ex officio the agent of the Grand Lodge to transmit to it the premiums due by the members upon the certificates of insurance. Though it is found as a fact that John Connor at the time of his death had failed for more than two months to pay his premiums on his insurance certificate, said Lem Russell had in his hands \$36 "sick benefit dues" belonging to John Connor. It would seem clear that, whenever the premiums to the District Grand Lodge by John Connor became due, so much of the fund belonging to said Connor in the hands of Lem Russell, by the operation of law would eo instanti be held by him for said District Grand Lodge and should have been taken out of said \$36 in his hands and have been transmitted by him on the premiums due to the District Grand Lodge. *Bragaw v. Supreme Lodge*, 128 N. C. 354, 38 S. E. 905, 54 L. R. A. 602, and citations thereto in *Anno*. Ed.

The case turns upon this proposition of law, and we think therefore that John Connor having \$36 to his credit in the hands of Lem Russell, the agent of the District Grand Lodge, the 50-cent premiums due the District Grand Lodge were in its possession, being

in the hands of its agent, and, if they were not actually forwarded, it was the fault of Lem Russell, the agent of the District Grand Lodge, and John Connor's interest in the insurance certificate was not lapsed and forfeited, and hence the plaintiff is entitled to recover, as beneficiary in the insurance certificate held by John Connor, the \$200 from the District Grand Lodge, and the judgment below is reversed.

(179 N. C. 485)

**J. T. BOSTICK & BRO. v. LAURINBURG & S. R. CO.** (No. 414.)

(Supreme Court of North Carolina. April 28, 1920.)

**1. JUDGMENT  $\S$ 153(2) — JUDGMENT BY DEFAULT FINAL ON COMPLAINT FOR UNASCE- TAINED DAMAGES MAY BE SET ASIDE.**

Judgment by default final on a complaint for unascertained damages is irregular, and on application made within a reasonable time and on proper showing of merits may be set aside in sound legal discretion of court, though motion is made more than 12 months after rendition; limitation of Revisal 1906, § 513, being a statutory restriction applying only to judgments which have been taken according to course and practice of court.

**2. JUDGMENT  $\S$ 101(1) — COMPLAINT STATING AT LEAST ONE GOOD CAUSE OF ACTION UP- HOLDS FINAL JUDGMENT BY DEFAULT.**

When a complaint states two or more causes of action, and any one of them is sufficient to uphold judgment by default final, such judgment will be upheld.

**3. JUDGMENT  $\S$ 101(2) — COMPLAINT OF SHIP- PER AGAINST RAILROAD HELD TO SUPPORT JUDGMENT BY DEFAULT FINAL.**

Under Revisal 1906, § 556, complaint by shipper of cantaloupes against railroad alleging shipment was damaged by road's failure to furnish refrigerator cars as agreed, and that road agreed to pay difference between what might be realized on sale of damaged melons and prior contract price to a responsible purchaser, with figures, *held* sufficiently specific and certain to support judgment by default final.

**4. PLEADING  $\S$ 301(1) — VERIFICATION OF COMPLAINT BY PLAINTIFF HELD PROPER.**

Complaint in shipper's action against rail- road whereon judgment by default final was entered for plaintiff *held* properly verified, in that affidavit made by a plaintiff followed form approved and required by statute and prece- dents, and was duly made before clerk, though apparently showing plaintiff had appeared be- fore himself.

Appeal from Superior Court, Scotland County; Finley, Judge.

Action by J. T. Bostick & Bro. against the Laurinburg & Southern Railroad Company, resulting in default judgment for plaintiffs, which defendant moved to set aside. From

an order denying motion, defendant appeals. Judgment affirmed.

The court refused defendant's motion to set the judgment by default final aside in that the complaint was not properly verified, and held as a matter of law that the said complaint was properly verified. The verification was as follows:

State of North Carolina, Scotland County.

Personally appeared before me, John T. Bostick, who, being duly sworn, says that he is interested in the above-entitled action, being one of the plaintiffs, that he has read the allegations in the foregoing complaint that the foregoing complaint is true of his own knowledge except as to those matters therein alleged upon information and belief, and as to those matters he believes it to be true. J. T. Bostick.

Sworn to and subscribed before me this 20th day of September, 1917.

C. D. McCormick, Clerk Superior Court.

The general course of proceedings leading up to the principal judgment are embodied in his honor's present judgment denying the motion, as follows:

"(1) That summons in this action was issued on the 4th day of July, 1917, returnable to October term, 1917, of Scotland superior court, and duly served upon the defendant on July 5, 1917. That the plaintiffs filed their complaint on September 20, 1917, and furnished a copy to defendant's counsel, Hon. G. B. Patterson.

"(2) That the case was calendared for trial at the March term, 1918, and at the April term, 1918, and continued to allow defendant to file answer.

"(3) That no answer was filed, and at the June term, 1918, judgment was rendered by default final for failure to file answer.

"(4) That the motion to set aside this judgment was made at October term, 1919, more than 12 months after the rendition of the same, otherwise the defendant has a good and meritorious defense.

"(5) That upon the defendant's contention that the judgment is irregular, the court holds, as a matter of law, that the verification of the complaint as appears of record is sufficient under statute to support the judgment, and the court further holds as a matter of law that complaint states such a cause of action as will support the judgment.

"(6) That the general order allowing time to file pleadings made at the June term, 1918, was made after the rendition of the said judgment.

"Upon the foregoing facts, the court declines to set aside the judgment, as a matter of law, and the defendant excepts and appeals to the Supreme Court."

Cox & Dunn, of Laurinburg, and G. B. Patterson, of Maxton, for appellant.

Russell & Weatherspoon, of Laurinburg, for appellees.

HOKE, J. Defendant seeks to sustain his application to set aside the original judgment on two grounds:

(1) That the complaint is not properly verified.

(2) That it does not state a cause of action that justifies a judgment by default final.

Considering these positions in reverse order, the complaint states plaintiffs' claim in the form of three causes of action and demanding recovery for the same amount in each, \$984.04.

As a first cause of action, plaintiff avers: That, in the late summer of 1916, they were engaged in shipping cantaloupes to market in carload lots over defendant road and had a contract with defendant company that, on notice given by 7 p. m. of one day, defendant road would have the designated number of refrigerator cars on at the shipping station at Laurinburg, on the following morning by 7 a. m.; that the notice had been given for four cars to be in readiness at the proper point on August 1, 1916, and, in expectation of compliance, plaintiff had a sufficient number of cantaloupes properly crated, etc., and ready for shipment at the appointed hour and place; that defendant, in breach of its contract, failed to supply the cars till late in the afternoon, leaving the said cantaloupes exposed, etc., whereby they were greatly injured and deteriorated in value to plaintiff's damage, \$984.04.

[1] The third cause of action, alleging the same damages in kind and amount, is substantially a repetition of the first, and, both containing a claim only for unascertained damages, a judgment by default final is irregular and, on application made within a reasonable time and on a proper showing of merits, may be set aside in the sound, legal discretion of the court. *Becton v. Dunn*, 137 N. C. 559, 50 S. E. 289; *Witt v. Long*, 93 N. C. 388; *Williams v. Lumber Co.*, 113 N. C. 928-936, 24 S. E. 800. And this, in proper instances, though the motions may be made more than 12 months from the rendition of the judgment, the decisions on the subject being to the effect that this 12 months' limitation is a statutory restriction, Rev. § 513, applying only to judgments which have been taken according to the course and practice of the court. *Calmes v. Lambert*, 153 N. C. 248, 69 S. E. 188, and authorities cited.

In the second cause of action, plaintiff states his claim in a more definite and precise way, as follows: After alleging that plaintiff at that time was engaged in shipping cantaloupes to market, and that defendant was to supply refrigerator cars, on notice, there was a breach of contract, causing great damage and practical loss of melons, the complaint avers further that plaintiff had sold these particular melons to a responsible purchaser for \$1,088.47; that the bargain was lost by reason of the injury occasioned by defendant's breach of contract; that plaintiff presented claim for the entire price to defendant company and was told by the duly authorized agent of defendant to sell the damaged melons to the best advantage, credit the purchase price received on the bill as ren-

dered, and that the defendant road would pay plaintiff the difference; that plaintiff, in compliance with these instructions, sold the melons for \$104.43, credited same on the bill rendered, \$1,088.47, leaving a balance due plaintiff of \$984.04, for which judgment is claimed.

[2, 3] It is held with us that, when a complaint states two or more causes of action and any one of them is sufficient to uphold a judgment by default final, such judgment will be upheld, and, this being true, we are of opinion that plaintiff's suit as presented in this second cause of action is sufficiently definite and precise to support the judgment, that the same has been entered according to the course and practice of the court, and is in all respects regular. *Scott v. Life Association*, 137 N. C. 515-522, 50 S. E. 221; *Cowles v. Cowles*, 121 N. C. 272, 28 S. E. 476; *Adrian & Vollers v. Jackson*, 75 N. C. 536. In *Adrian & Vollers' Case*, it was held that, where a claim for damages is precise and final by the agreement of the parties or can be rendered certain by mere computation, there is no need of proof, as the judgment by default admits the claim. An inquiry is necessary only when the claim is uncertain. These decisions are but the proper and necessary construction of our statute on the subject. Revisal, § 558, which provides that a judgment by default final may be had on failure to answer, when a complaint sets forth one or more causes of action consisting of a breach of an express or implied contract to pay absolutely or upon a contingency a sum or sums of money fixed by the terms of the contract or capable of being ascertained thereupon by computation."

The motion having been made more than 12 months after rendition of the judgment, defendant's right to relief on account of surprise or excusable neglect is precluded by the express terms of the statute, Rev. § 513, requiring that such applications as against a regular judgment must be made within 12 months.

[4] In this aspect of the matter therefore, his honor was clearly right in holding against defendant as a conclusion of law. *Lee v. McCracken*, 170 N. C. 575, 87 S. E. 497. The objection to the verification is without merit. This was placed on the ground that the affidavit apparently showed that plaintiff had appeared before himself. But a proper perusal of the affidavit will show that it is made by one of the plaintiffs; that it follows the form approved and required by the statute and precedents, and that it was duly made before the clerk, and here, too, we are of opinion that the judgment is according to the course and practice of the court and has been properly upheld.

There is no error, and the judgment is affirmed.

Affirmed.

(179 N. C. 479)

**MILES v. WALKER et al. (No. 354.)**

(Supreme Court of North Carolina. April 28, 1920.)

**1. LANDLORD AND TENANT §101—LIABILITY OF LANDLORD FOR BREACH OF LEASE AFTER REPAIRING INJURED BUILDING IN ABSENCE OF REPAIR AGREEMENT.**

While a landlord is under no implied obligation to restore or repair a building destroyed or injured so as to be untenable, if he does enter and make such repairs without further agreement, the rebuilt or restored building will come under the provisions of the lease as far as same may be applied, and for breach thereof, the landlord may be held liable in damages.

**2. LANDLORD AND TENANT §157(1) — LESSEE'S AGREEMENT TO INSTALL SHELVING PERMITS REASONABLE TIME AND IS NOT WITHIN PROVISION FORFEITING LEASE FOR NON-PAYMENT OF RENT.**

Where a lease agreement provided for lessee's installing shelving in the store building, he must be allowed a reasonable time to do so, and the placing of shelving does not come within the provision forfeiting the lease for nonpayment of rent; the liability to repair when the same exists, and to pay rent, being as a rule distinct and independent obligations.

**3. EVIDENCE §441(4)—PAROL EVIDENCE OF CONTEMPORARY OR PRECEDENT UNDERSTANDINGS CONFLICTING WITH WRITING INCOMPETENT.**

General statements or assurances given when consulting together on the terms of a lease regarding the putting of shelving in a store building held too indefinite to be allowed contractual effect, and came within the rule that, when persons have reduced their contract to writing plain of meaning, parol evidence as to contemporary or precedent assurances and understandings in conflict with the writing is incompetent.

**4. EVIDENCE §424, 425—PAROL EVIDENCE RULE AS TO WRITING DOES NOT APPLY WHERE DEFENDANT WAS NOT A PARTY OR TO COLLATERAL MATTERS.**

In an action for damages for landlord's breach of lease, permitting plaintiff tenant to say that he had sublet the property at a fixed price per month is not subject to the objection that the sublease was a written document, and that parol evidence of its contents should not have been permitted, since such rule does not prevail as to collateral matters, though relevant to the inquiry, or where defendant was not a party to the writing, and the enforcement of its obligations were not sought.

**5. HUSBAND AND WIFE §184—MARRIED WOMAN LIABLE FOR BREACH OF LEASE CONTRACT, EVEN THOUGH CONTRACT NOT ENFORCEABLE.**

In an action against a lessor, a married woman, for damages for breach of a lease in which her husband had not joined or given his written consent, the objection that the lease, being for more than three years, is avoided by Revisal 1905, § 2096, and is expressly excepted from the provisions of the Martin Act (Laws



1911, c. 109), making a married woman capable of contracting as if she were a feme sole, is not well taken, since specific performance is not sought, and a married woman may be held liable in damages for such breach.

Appeal from Superior Court, Rockingham County; McElroy, Judge.

Action by F. S. Miles against Mrs. Ola S. Walker and husband. Verdict and judgment for plaintiff, and defendants appeal. No error.

Civil action to recover damages for failure on part of defendants to carry out the provisions of a written lease. On the trial it was properly made to appear that plaintiff had a written lease of a store building, signed by defendant owner, a married woman, in terms as follows:

"This agreement made and entered into this, the 1st day of January, 1917, by and between Mrs. Ola S. Walker, party of the first part, and Felix S. Miles, party of the second part, witnesseth: That in consideration of the improvements hereinafter mentioned to be made by the said Felix S. Miles to the property of the said Mrs. Ola S. Walker, hereinafter described, the said Mrs. Ola S. Walker hereby agrees to rent her store building known as No. 10 Scales street, in the town of Reidsville, N. C., to the said Felix S. Miles, for a period of one year from this date at a rental of twenty-five dollars per month, payable by the said Felix S. Miles to the said Mrs. Ola S. Walker monthly, and the said Mrs. Ola S. Walker hereby agrees to give the said Felix S. Miles the option to continue this said lease for the period of four more years at the same price and terms as above mentioned.

"The said Felix S. Miles hereby agrees to put into the said building a set of oak shelving practically as good as new and costing, when new, approximately four hundred dollars, which said shelving will greatly enhance the value of the property, and the said Felix S. Miles hereby agrees that upon the termination of this lease the said improvements installed by him shall thereupon become the property of the said Mrs. Ola S. Walker.

"It is further agreed by and between the parties hereto that, if the said Felix S. Miles shall fail to pay the said rents promptly as above agreed upon, then this lease shall thereupon become null, void, and of no effect.

"It being understood that this lease is to cover the entire building, the said Felix S. Miles having the right to subrent any portion of said building (within the limits of this lease) as he may desire.

"In witness whereof we, the parties hereto, have hereunto set our hands and seals the day and year first above written.

"Felix S. Miles. [Seal.]

"Mrs. Ola S. Walker. [Seal.]"

It was admitted on the trial that the lease bearing date January 1, 1917, was not actually executed till February 18, 1917. It appeared further that plaintiff had possession of the property under the terms of the lease, and that on March 22, 1917, without fault on plaintiff's part, the building was

practically destroyed by accidental fire, or so extensively injured that it was no longer suitable or available for store purposes; that, without further agreement between the parties concerning it, the defendant owner entered on the premises and repaired the building, making the same substantially as it was before the fire, except that it was more attractive and desirable; that at the time of the fire the oak shelving referred to in the contract of lease had not been placed in the building, but plaintiff had procured the shelving and had arranged for having them installed on the day after the fire; that the repairs were substantially completed on September 1, 1917, when defendants refused to allow plaintiff to re-enter or use the store, and over his protest rented same to other parties at a much higher price; that plaintiff within the time had signified his desire and purpose to hold and extend the lease for the four additional years, and for several months had tendered the monthly rental due under the terms of the contract.

There was denial of liability; the defendants insisting that the lease with all rights thereunder had become forfeited by reason of failure on part of plaintiff to install the shelving, etc. Defendants also excepted to the ruling of the court excluding certain evidence offered by defendants to the effect that in conversations and in one or two letters written by plaintiff prior to execution of the lease plaintiff had expressed the intention, amounting to an agreement, that he would install the shelving "Immediately," and that such stipulation had the force and effect of a condition precedent to the lease as a binding agreement, etc. Defendants made further objection that the court had allowed plaintiff to state that he had sublet the property to Steiner & Co. at a monthly rental of \$50, when it appeared that such sublease was in writing.

On issues submitted, the jury rendered the following verdict:

"(1) Did the plaintiff and defendants enter into the contract of lease, as alleged in the complaint? Answer: Yes.

"(2) Did the plaintiff suffer termination of his rights under the contract of lease by failure to install the shelving as agreed? Answer: No.

"(3) Did the defendant Ola S. Walker, after the store was repaired and ready for occupancy, wrongfully fail and refuse to permit the plaintiff to enter and occupy the same, under the contract of lease? Answer: Yes.

"(4) What damages, if any, is plaintiff entitled to recover? Answer: \$800."

Judgment on verdict for plaintiff, and defendants excepted and appealed.

W. R. Dalton, of Reidsville, and King & Kimball, of Greensboro, for appellants.

P. W. Glidewell, of Reidsville, and Manly, Hendren & Womble, of Winston-Salem, for appellee.

HOKE, J. In states like ours, basing their system of jurisprudence on the principles of the common law, it is the accepted position that, where a store building or other is held under a lease, conveying also the present right to the soil, and the same is destroyed by accidental fire, or so injured as to be unfitted for its principal purpose, the lessee is not relieved of the obligation to pay the stipulated rent during the term, unless the contract so provides, or the landlord is under a covenant to repair. *Gates v. Green*, 4 Paige (N. Y.) 355, 27 Am. Dec. 68; *McMillan v. Solomon*, 42 Ala. 356, 94 Am. Dec. 654; *Viterbo v. Friedlander*, 120 U. S. 708-712, 7 Sup. Ct. 962, 30 L. Ed. 776; 16 R. C. L. pp. 956, 957, title "Landlord and Tenant," § 465; *McAdam on Landlord and Tenant*, § 198; *Taylor on Landlord and Tenant* (9th Ed.) p. 468. In the citation to *McAdam*, the general principle is stated in part as follows:

"It seems to have been the doctrine of the common law that rent issued out of the land itself regardless of the erection thereon, and therefore that the destruction of the buildings on the leased premises or those becoming unfitted for use did not discharge the obligation of the tenant to pay the rent as agreed upon for the full term."

The position referred to has been modified to some extent by statute in this state (Revisal, § 1992), and in which it is provided that, where a building is destroyed or rendered unfitted for use during the term, without negligence on the part of the lessee or his agents or servants, and there is no agreement in the lease respecting repairs, and the use of the house was the main inducement for the hiring, the lessee may surrender the estate by writing to that effect delivered within 10 days from the damages and on paying the rent accrued and apportioned as to the remainder to the time of the injury, etc. The law in question, however, enacted for the benefit of the lessee, has no bearing on the instant case, as the lessee is insisting on certain rights arising to him under the provisions of the lease, and the fact that the statute was enacted is to some extent a legislative recognition that without its provisions the principles of the common law would prevail.

[1] Again, it is held, as apposite to the facts presented, that while a landlord is under no implied obligation to restore or repair a building which had been destroyed or injured to the extent and in the manner suggested, if he does enter and make the required repairs without further agreement on the subject, the building so rebuilt or restored will come under the provisions of the lease as far as the same may be applied, and for breach the landlord may be held liable in damages. *Smith v. Kerr*, 108 N. Y. 31, 15 N. E. 70, 2 Am. St. Rep. 362, cited and approved in *Taylor on Landlord and Tenant*, § 329.

A proper application of these principles is in full support of the recovery had by plaintiff in the cause, and we find no reason presented for disturbing the results of this trial.

[2, 3] It is chiefly urged for error that the court excluded certain evidence offered by defendants as tending to show a forfeiture of the lease by reason of failure to install the shelving designated in the contract of lease. It was not contended that this would follow from the stipulations contained in the written lease. This, as his honor ruled, clearly allowed plaintiff a reasonable time to procure and put up the shelving. Nor does it come within the provision of the lease forfeiting the same for nonpayment of rent; the liability to repair, when the same exists, and to pay rent, being as a rule, distinct and independent obligations. *McAdam on Landlord and Tenant* (3d Ed.) p. 1259. Defendants, however, insist that, by reason of a further additional agreement in parol between the parties made at or before the execution of the written lease, the obligation to put in the shelving was immediate and in the nature of a condition precedent to the maintenance of plaintiff's rights. A perusal of this proposed evidence will show, however, that it consisted of more general statements or assurances given when the parties were consulting together as to the terms of the contract they were expecting to make, to the effect that the shelving would be "put in at once," etc. They seem to be too indefinite to be allowed contractual effect, and in any event they are controlled by the terms of the written lease that the parties afterwards executed. The delay about the shelving, slight in itself, is very satisfactorily explained in the testimony, and the case in our opinion comes clearly within the wholesome principle that, when persons have reduced their contract to writing plain of meaning, parol evidence as to contemporary or precedent "assurances and understandings" in conflict with the written agreement is incompetent. *Mfg. Co. v. McCormick*, 175 N. C. 277, 95 S. E. 555, L. R. A. 1918F, 572, citing *Woodson v. Beck*, 151 N. C. 145, 65 S. E. 751, 81 L. R. A. (N. S.) 235; *Walker v. Cooper*, 150 N. C. 129, 63 S. E. 681; *Walker v. Venters*, 148 N. C. 388, 62 S. E. 510; *Mudge v. Varner*, 146 N. C. 147, 59 S. E. 540; *Bank v. Moore*, 138 N. C. 532, 51 S. E. 79.

[4] Again it is objected that the court, over defendants' objection allowed plaintiff to say that he had sublet the property at \$50 per month, the objection being put on the ground that this sublease was in writing, but, as held in numerous cases on the subject, the rule excluding parol evidence of the contents of a written paper or document applies only in actions between the parties to the writing, and, when the enforcement of obligations created by it is substantially the cause of action, it does not prevail as to col-

(103 S.E.)

lateral matters, though they may be relevant to the inquiry. This exception must also be disallowed. *Morrison v. Hartley*, 178 N. C. 618, 101 S. E. 375; *Holloman v. Railroad*, 172 N. C. 375, 90 S. E. 292, L. R. A. 1917C, 416, Ann. Cas. 1917E, 1069; *Ledford v. Emerson*, 138 N. C. 502, 51 S. E. 42.

[5] Defendants except further that the lessor is shown to be a married woman, and her husband not having joined in the lease or given his written assent thereto, and the lease being for more than three years, it is avoided by section 2096 of Revisal, and is expressly excepted from the provisions of the Martin Act (Laws 1911, c. 109), making a married woman to contract and deal as if she were a feme sole. It may be that, under the effect and operation of the statutes referred to, no specific performance of this lease could be enforced, but in a contract of the kind presented our decisions on the subject are to the effect that in case of breach a married woman may be held liable in damages, and plaintiff's recovery for such breach must therefore be upheld. *Sills v. Bethea*, 178 N. C. 315, 100 S. E. 593; *Everett v. Ballard*, 174 N. C. 16, 93 S. E. 365; *Warren v. Dall*, 170 N. C. 406, 87 S. E. 126.

We find no reversible error in the record, and judgment for plaintiff is affirmed.

No error.

(178 N. C. 489)

SMITH v. MASSACHUSETTS BONDING & INS. CO. (No. 442.)

(Supreme Court of North Carolina. April 28, 1920.)

1. INSURANCE — 531—FOREMAN IN CHARGE OF GANG HELD NOT TO HAVE CHANGED OCCUPATION BY CUTTING A WIRE.

Insured, described in his application as a foreman and supervisor having overseeing duties only, did not change his occupation, within a provision of the policy reducing the indemnity in such case, by cutting an electric wire while with a gang of linemen, instructing them how to perform the work.

2. INSURANCE — 531—INDEMNITY NOT REDUCED FOR INJURY FROM ACT PERTAINING TO OCCUPATION AND ALSO TO MORE HAZARDOUS OCCUPATION.

Under a provision of a policy for reduction of indemnity, if the injury was sustained while doing any act or thing pertaining to any occupation classed as more hazardous than that therein stated, the cutting of an electric wire by a foreman was not an act requiring reduction of the indemnity, though it pertained to a more hazardous business than that of foreman, where it was also within the line of insured's employment as foreman, as such provision applied only to hazardous acts of another occupation not pertaining to his own occupation.

3. APPEAL AND ERROR — 927(7) — EVIDENCE FOR PLAINTIFF ASSUMED TRUE IN REVIEWING DIRECTED VERDICT.

Where, in an action on a policy, there was evidence that the act of insured, a foreman in charge of a gang of linemen, in cutting an electric wire, was within the line of his duty as foreman, such evidence must be assumed to be true in reviewing a directed verdict for defendant.

4. INSURANCE — 531 — FOREMAN ACTING WITHIN LINE OF EMPLOYMENT AS SUPERVISOR IN CUTTING WIRE.

Insured, described in his application as a foreman and supervisor having overseeing duties only, was acting directly within the line of his employment as foreman in charge of a gang of linemen in cutting an electric wire, as it was his master's legal duty to have the men instructed by the foreman or some one else, and his right to have them familiarized with the methods of performing the work.

5. INSURANCE — 668(13)—DIRECTED VERDICT FOR REDUCED INDEMNITY PROVIDED FOR MORE HAZARDOUS OCCUPATION ERRONEOUS.

Where there was evidence for the consideration of the jury to show that insured, when killed, was acting within the line of the occupation stated in the policy, it was error to direct a verdict for a smaller amount provided for more hazardous occupations.

Appeal from Superior Court, Mecklenburg County; Shaw, Judge.

Action by W. M. Smith, administrator of Ollie C. Kistler, against the Massachusetts Bonding & Insurance Company. From a judgment for plaintiff for an insufficient amount, he appeals. New trial granted.

The intestate of the plaintiff was employed by the Southern Power Company a part of whose business is the manufacture and transmission of electricity, and the decedent's occupation was the supervision of construction work, building tower and pole lines, and maintenance of the same. The defendant insured him, among other provisions of the policy, against loss of life and the effect of injuries resulting solely from external, violent, and accidental means. The policy contained this clause:

"If the assured contracts illness or sustains injury, fatal or otherwise, after having changed his occupation to one classed by the company as more hazardous than that herein stated, or while doing any act or thing (except ordinary duties about his residence or while engaged in recreation) pertaining to any occupation so classed, then this policy shall not be forfeited, but the liability of the company shall be only for such proportion of the principal sum or other indemnity as the premium paid by him would have purchased at the rates and within the limits fixed by the company for such more hazardous occupation according to its rates and classification of risks filed prior to the occurrence of the injury, or the commencement of

the illness for which indemnity is claimed, with the state official having supervision of insurance companies in the state where the assured resides at the time this policy is issued."

If the insured violated this provision, the beneficiary is entitled to recover \$125; and, if he did not, she is entitled to recover \$850. The insured stated in his application for the policy that he was "foreman and supervisor having overseeing duties only." There was evidence tending to show that, at the time he was killed, he was on a tower of one of the power company's lines, with a gang of hands or linemen, instructing them how to perform their work, and while doing so, and as a part of his duty as foreman or supervisor, he cut a wire where there was a kink in it near the insulators on the loop, in order to get the kink out and connect the joints. As he cut the wire, he was knocked off the tower and fell 40 feet, receiving injuries from which he died. There was evidence tending to prove that cutting the wire, under the circumstances, was a part of his duty in the instruction and supervising of the hands. Witnesses testified that he was there in his capacity as foreman, showing the hands how to do the work; demonstrating at the particular time when he was killed to one of the workmen how the work should be done. He had been foreman for nine years. He was knocked off the tower because the circuit was not grounded on both sides of him, and he therefore received into his body the static current, which means that the electric fluid had been taken off the line and gathered in the wire, one side being grounded and the other side open, and when the wire was cut it let the static in on the line. The foreman, with his gang, was changing insulators when he was killed. The court directed the jury to answer the issue: "One hundred and twenty-five dollars, with interest from March 23, 1918, until paid." The jury returned the following verdict:

"Is the defendant indebted to the plaintiff, and, if so, in what sum? Answer: Yes; one hundred and twenty-five dollars, with interest from March 23, 1918, until paid."

The plaintiff excepted, and afterwards assigned as error the charge of the court directing the verdict, and insisted that the court should have submitted the case to the jury upon the evidence, to find whether the cutting of the wire was a part of intestate's duty as foreman, or was an act of the class forbidden by the policy. The defendant excepted, because the court allowed interest and cost. Plaintiff appealed.

A. B. Justice and J. D. McCall, both of Charlotte, for appellant.

J. F. Flowers, of Charlotte, for appellee.

WALKER, J. (after stating the facts as above). [1] There was no change of occupa-

tion by the deceased. He was performing his duty in his occupation as supervisor, foreman, or overseer at the time he was killed, although he may have done one hazardous act, not pertaining to that occupation, which caused his death. This has been settled by this court, and the principle seems to have received the almost uniform approval of the other courts. *Hoffman v. Insurance Co.*, 127 N. C. 338, 37 S. E. 466; *Miller v. Insurance Co.*, 168 Mo. App. 330-332, 153 S. W. 1080; *Schmidt v. Am. M. Acc. Ass'n*, 96 Wis. 304, 71 N. W. 601; *Fox v. M. F. Acc. Ass'n*, 96 Wis. 390, 71 N. W. 363; *Pac. Mut. Life Ins. Co. v. Van Fleet*, 47 Colo. 401, 107 Pac. 1087; *Hall v. Am., etc., Acc. Ass'n*, 86 Wis. 518, 57 N. W. 366. In the *Hoffman* case, Crisp, the insured, represented that he was "a freight flagman, not coupling or switching," and he was killed while placing a "slack pin" behind a coupling pin, and he was allowed to recover.

[2] We do not construe the expression "or while doing an act or thing pertaining to any occupation so classed" as more hazardous, to mean that, if the injury is caused by the doing of an act within the line or scope of the insured's employment, if hazardous, he is to be paid only the diminished amount of insurance, if it also be an act which pertains to a more hazardous business, but as meaning, at most, that if he does a more hazardous act of another occupation, not pertaining to his own, the payment to him shall be reduced as specified. Cutting the wire would not be an act or thing more hazardous than his own occupation, as that was a part of his own duty as overseer, as we have shown, and therefore would not be embraced by the following language of the policy:

"While doing an act or thing pertaining to any occupation so classed as more hazardous than that herein."

Any other construction would make the policy a deception and a snare. The one we adopt is a reasonable interpretation of the language used and the only admissible one. Under the other construction, the company would be saying to the insured: We accept your risk as a supervisor and overseer, but if you do a certain act, which is essential to the proper and full performance of your duties to your employer, you must forfeit the larger part of your insurance. It was said in *Redmond v. U. S. Health & Acc. Ins. Co.*, 96 Neb. 744, 148 N. W. 913:

"The diminished liability for which the contract provides applies to a change of occupation, or to the doing of an act or thing pertaining to a changed occupation classed as more hazardous than the one abandoned, and not to mere temporary acts generally performed by those in other occupations, where there has in fact been no change in assured's occupation"

—citing *Thorne v. Casualty Co.*, 106 Me. 274, 76 Atl. 1106; *Miller v. Mo. State L. Ins. Co.*, 168 Mo. App. 330, 153 S. W. 1080.

[3] Our case is stronger for the plaintiff than the case from Maine was for *Thorne*, because here the act done which proved to be fatal, was within the line of *Ollie Kistler's* duty or there is evidence that it was and we must assume that evidence to be true in dealing with a directed verdict. The same principle as that decided in the *Redmond Case*, *supra*, was adopted in *Pacific Life Co. v. Van Fleet*, *supra*, where it was held, as shown by the tenth headnote, that—

“A condition in an accident policy avoiding it, or limiting the recovery, in case the assured is ‘injured or killed while following any occupation, or in any exposure, or performing acts parallel in hazard to the characteristic acts of any occupation classed by this company as more hazardous,’ etc., is effective only where there is a permanent change of occupation. A recovery is not defeated by the circumstance that the assured is injured or killed in performing some individual act, or exposing himself to some particular risk, of greater hazard than that attending his customary occupation upon which the policy was issued.”

[4] It will be observed when reading them that the cases we have cited go beyond what is necessary for us to hold in order to justify the larger recovery in this case. Here the insured was doing an act directly within the line of his employment as supervisor of the hands. It was his master's legal duty to have them instructed by the foreman or some one else, and his right to have them familiarized with the methods of performing their work, and this is what the intestate was doing when he received the fatal stroke of the electric current, and the intestate also was required by the implied terms of his employment to instruct the hands in their work. He could not well supervise them without doing this. It was held in *Schmidt v. A. M. Acc. Ass'n*, *supra*, that—

“The acts of the insured [a supervisor] in such a case, in not only indicating how the work should be done, but actually taking hold and assisting therein when necessary or convenient, would not constitute a substantial change of occupation, since the word ‘supervising,’ as used in the application, means taking part in the work.”

It was said in *Thorne v. Casualty Co.*, *supra*, that—

“From the nature of the business, then, is to be implied the duties and responsibilities of his employment. As head of the concern in *Gardiner*, he was solely responsible for its management. He was superintendent of every department and responsible for every detail of the business. The designation of his office, therefore, by necessary implication not only authorized, but required, him to visit every part of

the establishment, to direct in every detail of the work, and if necessary point out and illustrate how it should be done. To hold, then, that a person designated as manager of a business concern could not step from his office, to direct the performance of any part of the work, without being charged under an insurance contract with engaging in work defined in the policy as extrahazardous, would be to put a serious check upon the transaction of business, or cut down the indemnity for which a policy holder had fully paid, and to which he would be otherwise entitled.”

In *Miller v. Insurance Co.*, *supra*:

“As has been stated, it is agreed deceased was a contractor, and we can see no sound reason for the assertion that a contractor loses his character as a supervisor because he sees the need of some temporary labor on his part to enable him properly to carry on his duty of supervision. In this case the evidence shows that deceased was directing or supervising the work and was not engaged as one of the laborers. If he had not been killed he would soon have left and gone to another place. The fact that after seeing the tank was not working properly he undertook to adjust it, so as to see if it would properly perform its function, did not destroy his capacity as supervisor within the meaning of the schedule of warranties.”

And lastly in *Schmidt v. Insurance Co.*, *supra*, it was said:

“Supervising does not mean ‘not working.’ On the contrary, it means, and would be naturally understood to mean, taking part in the work. Supervising indicates work, not idleness. It would be entirely consistent with supervising if the deceased not only indicated how work was to be done, but actually took hold and assisted in the work when necessary or convenient.”

This statement of the law was approved in the *Miller Case*, *supra*, 168 Mo. App. at page 333, 153 S. W. at page 1081.

The right and duty of the master to instruct his servant as to how he should perform dangerous work may involve questions of fact to be decided by the jury, but the right and the duty to instruct in proper cases will not be denied. *Brazille v. Barytes Co.*, 157 N. C. 454, 73 S. E. 215. It was said in *Horne v. Railroad Co.*, 153 N. C. 239, at page 240, 69 S. E. 132, at page 133:

“The claim of negligence is founded upon the theory that it is the duty of employers to instruct their employes in the use of dangerous machinery before assigning them to such duty. Such obligation is recognized generally by the law writers and courts of the country”—citing *Avery v. Lumber Co.*, 146 N. C. 592, 60 S. E. 646; *Cheason v. Walker*, 146 N. C. 511, 60 S. E. 422; *Craven v. Mfg. Co.*, 151 N. C. 352, 66 S. E. 203; *Marcus v. Loane*, 133 N. C. 54, 45 S. E. 354; *Turner v. Lumber Co.*, 119 N. C. 888, 26 S. E. 23.

[5] There being evidence for the consideration of the jury upon the question of defendant's liability for the larger, or undiminished, amount, it was error to direct a verdict for the smaller amount. It would even be error to instruct the jury that, if they found the facts to be as stated by the witnesses, the verdict must be for the smaller amount.

New trial.

(179 N. C. 469)

**FRISBEE v. COLE. (No. 539.)**

(Supreme Court of North Carolina. April 21, 1920.)

**1. ACKNOWLEDGMENT ¶55(2)—WANT OF CONSIDERATION HELD INSUFFICIENT TO ANNUL FINDING OF CLERK OF SUPERIOR COURT ON GRANTOR'S PRIVY EXAMINATION.**

Evidence that a conveyance of realty by a married woman to her husband was not supported by consideration is insufficient to annul the finding of the clerk of the superior court, on privy examination under Revisal 1905, § 2107, as contained in the certificate, that the deed was not unreasonable or injurious as to the grantor.

**2. ACKNOWLEDGMENT ¶55(2)—CLERK'S CERTIFICATE ON PRIVY EXAMINATION PRESUMED CORRECT.**

The decision of the clerk of the superior court, on privy examination of a married woman under Revisal 1905, § 2107, that her deed to her husband was not unreasonable or injurious, must be presumed to be correct as against collateral attack.

**3. ACKNOWLEDGMENT ¶10—GRANTOR'S ACKNOWLEDGMENT, LONG AFTER EXECUTION OF DEED, HELD NOT TO AFFECT ITS VALIDITY.**

That a husband's signature to a deed wherein the wife joined was acknowledged long after the execution of the deed and after the wife's death does not affect the validity of the conveyance, in view of Revisal 1905, § 953.

Appeal from Superior Court, Buncombe County; Webb, Judge.

Action by J. M. W. Frisbee against D. F. Cole. Judgment for plaintiff, and defendant appeals. Affirmed.

This is a controversy in regard to the title of land arising out of the sale of the same by the plaintiff to the defendant. The tract contains 163 acres, more or less, and the defendant promised to pay for the same the sum of \$125 per acre, the number of acres to be ascertained by a survey of the premises, upon the payment of which sum the plaintiff promised to convey to the defendant a good title to the said land, free from all liens and incumbrances. Plaintiff was originally owner of the land, and on May 10, 1898, conveyed it to his wife, R. E. Frisbee, by deed of that date duly proved and registered, and on June 10, 1898, she conveyed it back to him

"for and in consideration of—dollars"; the amount not being set forth in the deed, and it being agreed that no consideration passed from the plaintiff to his wife for the last mentioned deed. The deed from his wife to plaintiff was jointly executed by him with her, and witnessed by R. E. Wells, and was proved, and afterwards registered, upon the following certificate of the clerk of the superior court of Buncombe county, where the land is situated on the waters of Turkey and Newfound creeks:

North Carolina, County of Buncombe.

I, J. L. Cathey, clerk of the superior court of Buncombe county, do hereby certify that R. E. Frisbee (and her husband, J. M. Frisbee, consenting thereto in writing as heretofore appears) personally appeared before me this day and acknowledged the due execution by her of the foregoing deed; the said R. E. Frisbee, being by me examined, separate and apart from her said husband, touching her voluntary execution of the same, doth state that she signed the same freely and voluntarily, without fear or compulsion of her said husband or any other person, and that she still voluntarily assents thereto; and it appearing to the undersigned clerk that same is not unreasonable or injurious to the said R. E. Frisbee, and all things appearing to the satisfaction of the undersigned clerk, it is adjudged that the foregoing is not unreasonable or injurious to the said R. E. Frisbee. Therefore let the same, with this certificate be registered. This the 9th day of June, 1898.

J. L. Cathey,  
Clerk of the Superior Court of Buncombe County, N. C.

State of North Carolina, County of Buncombe.

The due execution of the foregoing instrument by J. M. Frisbee was this day proven before me by the oath and examination of R. M. Wells, the subscribing witness thereto. Let said instrument and this certificate be registered.

Dated Jan. 26, 1920. John H. Cathey,  
Clerk of the Superior Court of Buncombe County, N. C.

North Carolina, Buncombe County.

I, J. H. Cathey, clerk of the superior court, hereby certify that J. M. Frisbee this day personally appeared before me and acknowledged the due execution by him of the foregoing instrument. Let the same, with this certificate, be registered. This Jan'y 28, 1920.

John H. Cathey,  
Clerk Superior Court, Buncombe County, N. C.

The last two proofs were taken and the last two certificates were made several years after the death of Mrs. Frisbee.

Defendant resisted recovery of the purchase money and the performance of the contract of sale on the ground that plaintiff could not convey a good and indefeasible title because, there being no consideration for the deed from R. E. Frisbee to the plaintiff, necessarily injurious to the deed to the husband, was necessarily injurious to her,

and notwithstanding the certificate of the clerk that it was not unreasonable or injurious to her, the deed was void as to her, and the plaintiff, her husband, acquired no title to the land, and therefore could not pass a good title to the defendant, as he contracted to do. The court, Judge Webb presiding, was of the opinion that the deed was valid, and that the plaintiff could comply with his contract, and so held, and gave judgment for \$20,750, the amount due. Defendant appealed.

Martin, Rollins & Wright, of Asheville, for appellant.

Zeb F. Curtis and Harkins & Van Winkle, all of Asheville, for appellee.

WALKER, J. (after stating the facts as above). We do not see that the cases cited by the learned counsel for the defendant militate at all against our view of this case, which agrees with that of the learned judge who presided at the trial. These cases are *Sims v. Ray*, 96 N. C. 87, 2 S. E. 443; *Rea v. Rea*, 156 N. C. 529, 72 S. E. 573, 873; *Archbell v. Archbell*, 158 N. C. 408, 74 S. E. 327, Ann. Cas. 1913D, 261; *Singleton v. Cherry*, 168 N. C. 402, 84 S. E. 698; *Butler v. Butler*, 169 N. C. 584, 86 S. C. 507, Ann. Cas. 1918E, 638. They were cited by the defendant for the position that the deed of a married woman is void, unless the probate of the deed and the privy examination of the wife are properly taken under Revisal, § 2107, and upon inquiry of the officer taking the same it shall appear, as further required by said section, that the contract or deed is not unreasonable or injurious to her. The section further provides that "the certificate of the officer shall state his conclusions, and shall be conclusive of the facts therein stated, but the same may be impeached for fraud as other judgments may be." In this case there is no direct attack upon the certificate of the clerk attached to Mrs. Frisbee's deed, nor is there any suggestion or intimation of fraud or collusion or other fact sufficient to set it aside. The complaint simply states that plaintiff made the contract of sale with the defendant, and is ready, able, and willing to comply with it, and that defendant has failed and refused to do so, and demands judgment for the amount of the purchase money. The defendant, in his answer, admits the contract, but denies that plaintiff is the owner of the land and is able, ready, and willing to give him a good title thereto. There is no direct attack in the pleadings upon the certificate of the clerk. The assault, as appears, is not on the certificate as having been fraudulently or collusively obtained, but is upon the finding of the clerk that the deed is not unreasonable or injurious to Mrs. Frisbee. This is based upon the admission of the parties that there was no consideration for the deed. But is this sufficient to annul the finding of the

clerk as contained in his certificate, when the inquiry as to the facts was properly conducted and the adjudication and certificate of the clerk, as to them, were regularly made?

[1] We are of the opinion, as was the learned judge, that it is not. The statute itself expressly declares that the clerk shall state his conclusions, but not the evidence upon which they were based, and that his findings shall be conclusive, but may be impeached for fraud, as other judgments may be. It therefore must be seen that, according to the statute, the defendant cannot avoid the clerk's certificate in the collateral way he has adopted, and that it must stand for the truth until it is properly impeached and set aside. It would not do to permit an attack upon the certificate, or any finding in it, by extraneous evidence which was not brought forward for the purpose until many years had elapsed since it was made by the clerk. It was a most solemn adjudication by him, and presumably upon ample evidence to warrant his conclusion, which should not be contradicted or set at naught by any such irregular and unauthorized method. The proceeding to set aside this record should, at least, be as solemn as the one which made it. But we have the authority of this court to the same effect. In *Wynne v. Small*, 102 N. C. 133-136, 8 S. E. 912, 913, which involved the validity of a married woman's deed and the legal effect of the clerk's certificate, Chief Justice Smith said:

"It is true that the certificate, while it retains its form, from the verity attaching to it as such, must be accepted, when it comes up collaterally, and its recitals cannot be disproved nor its omissions supplied by extraneous proof."

Any record, as he says, may be amended to make it speak the truth, when something was omitted by inadvertence, which was really a part of the record. But that is not the question here. It is merely attempted to contradict the record by evidence dehors, and that, too, when it does not appear whether that evidence was before the clerk. If it was not before him, it is too late for it to be heard now; if it was before him, then there is no use in offering it at this time, as the presumption is that he gave it due consideration, and that, notwithstanding, he reached, upon all the circumstances in evidence, the conclusion as stated in his certificate. The evidence upon which he proceeded is not before us, but his conclusions are, and they are presumed to have been based upon sufficient evidence, nothing else appearing to rebut that presumption.

[2] It appears here that the land now in question was formerly owned by the husband, that he conveyed it to his wife, and she a month afterwards reconveyed it to him, which gives color to the theory that there had been some understanding between them, entered into for their joint benefit, by which she was

under some obligation to act as she did by executing the deed to her husband, and that the clerk found the arrangement, whatever it was, was not unreasonable or injurious to her. We would not change his finding, if we could do so, without knowing what evidence the clerk had before him. In the absence of such knowledge, we must presume conclusively that his decision was correct. It cannot be reversed, simply upon suggestion that he found erroneously, or upon extraneous matter, without first setting aside his judgment for fraud, or upon some other legal and adequate ground. While the order or judgment stands, it must be respected as importing verity, as, "jurisdiction existing, any order or judgment is conclusive in respect to its own validity, in a dispute concerning any right or title derived through it, or anything done by virtue of its authority." *Vanfleet on Collateral Attack*, § 17, p. 29; *Irvine v. Randolph L. Corporation*, 111 Va. 408, 69 S. E. 350. The clerk of the court had jurisdiction to hear the evidence and determine therefrom whether the deed would be reasonable and not injurious to the wife, and his judgment is final and conclusive until reversed in proper proceedings for that purpose. The following cases show what the law is in this state with respect to judgments of courts which have general jurisdiction and their exemption from collateral attack: *Wade v. Dick*, 36 N. C. 313; *Morris v. Gentry*, 89 N. C. 248; *Brittain v. Mull*, 99 N. C. 483, 6 S. E. 382; *Beckwith v. Lamb*, 35 N. C. 400; *Marshall v. Fisher*, 46 N. C. 111-115. Justice Pearson says, for the court, in *Marshall v. Fisher*, supra, citing *Beckwith v. Lamb*, 35 N. C. 400:

"Every court, where the subject-matter is within its jurisdiction, is presumed to have done all that is necessary to give force and effect to its proceedings, unless there is something on the face of the proceedings to show to the contrary. This must be the rule, unless we adopt the conclusion that the court is unfit for the business which by law is confided to it."

With regard to courts of special or limited jurisdiction, the rule is not so broad as the other, which is applicable to those of general jurisdiction; but they also are, to a certain extent, immune from indirect or collateral attack, as will appear from the text-books and decisions. Justice Hoke says in *Fann v. Railroad Co.*, 155 N. C. at marg. p. 139, 71 S. E. 82:

"In this day and time and under our present system, it seems to be generally conceded that the decrees of probate courts, when acting within the scope of their powers, should be considered and dealt with as orders and decrees of courts of general jurisdiction, and where jurisdiction over the subject-matter of inquiry has been properly acquired that these orders and decrees are not as a rule subject to collateral attack."

Referring to administration on an estate, where the question as to the domicile of the

intestate and the place where his assets are as determining the right of administration and the power of the clerk to appoint a personal representative, he further says:

These are the "very questions referred to him [the clerk] for decision. But if a person has been selected contrary to the prevailing rules of law, the error must be corrected by proceedings instituted directly for the purpose," and not by a collateral attack on the letters—citing several cases.

It may be, as we have said, and now repeat, that the clerk ascertained and determined from all the facts and circumstances that the conveyance by the husband to the wife and her reconveyance to him one month afterwards were acts done in furtherance of an arrangement or agreement between them to advance their joint interests, and that, instead of being injurious, it was reasonable and a distinct advantage to her. We can conceive of circumstances in which she might be benefited. But, whatever the nature of the transaction was, we must presume the clerk acted properly and rightly, instead of improperly and wrongly, as there is no principle which would justify the latter conclusion in a collateral proceeding.

[3] There is nothing in the objection that the probate of the husband was taken after the wife's death. He assented to the conveyance, at the time it was executed, as stated by the clerk in the first certificate made at the time, and he joined in the execution of the deed with his wife, though his acknowledgment of the execution by him was made some time afterwards. The latter is not the execution of the deed by him, but merely the proof thereof, and the taking of it long afterwards does not affect the validity of the conveyance. *Revisal*, § 953.

There was no error in Judge Webb's ruling as to the plaintiff's title.

Affirmed.

CLARK, C. J., concurs on the following grounds:

The Constitution (article 10, § 6) provides that a married woman shall hold her property in the same manner as if she had remained single, and may devise and bequeath it, and, "with the written assent of her husband," convey it as if she were unmarried. Even this requirement of the husband's assent has long since been abolished in England, and with rare exceptions by all the states in this country. It is the sole restriction permitted by our state Constitution upon the wife's power to dispose of her own property. If Rev. § 2107, extended to conveyances, it would be a violation of that provision of the Constitution, by adding the requirement that some third party, a magistrate or other official, must give his wise approval before she can do what the Constitution guarantees that



she may do "with the approval of her husband."

In the second place, out of deference to the Constitution, Rev. § 2107, does not mention conveyances of realty. That section comes under subhead 3, entitled "Contracts between Husband and Wife," and an examination of the section shows that it applies only to contracts. In *Rea v. Rea*, 156 N. C. 531, 72 S. E. 574, it is said:

"An examination of section 2107 shows that it applies solely to contracts and not to conveyances; indeed, the word 'contract' is used five times in that section," besides in the heading. "The object of the Legislature was clearly to prevent the wife making any contract with her husband whereby she should incur a liability against her estate which in future might prove a burden or charge upon it, or cause a change or impairment of her income or personality. To that end not only a privy examination was required, but the certificate of a magistrate that the contract is not unreasonable or injurious to her. This provision does not attempt" to add, as to "conveyances by her as to which the act of 1911 retains the constitutional restriction in regard to realty, that there must be the written assent of the husband and privy examination," any further restriction, such as the approval of a third person, adding that, if it did, it would be unconstitutional.

See *Butler v. Butler*, 169 N. C. 597, 86 S. E. 507, Ann. Cas. 1918E, 638.

(179 N. C. 630)

**DOWELL v. RALEIGH SAV. BANK & TRUST CO. (No. 269.)**

(Supreme Court of North Carolina. April 7, 1920.)

Appeal from Superior Court, Wake County; Guion, Judge.

Action by Horace R. Dowell against the Raleigh Savings Bank & Trust Company. Judgment of nonsuit, and plaintiff appeals. No error.

Manning, Kitchin & Mebane and Armistead Jones & Son, all of Raleigh, for appellant.  
R. N. Simms, of Raleigh, for appellee.

PER CURIAM. We have carefully examined this case, and can see no error in it which is sufficient ground for a reversal of the judgment. The ruling of the judge upon the evidence appears to be correct, and, when the other exceptions are considered, we agree with the court that there was not any evidence which could be held as sufficient in law to support a verdict for the plaintiff, and the judgment of nonsuit was properly allowed. This would still be our conclusion, if the rejected evidence had been admitted.

No error.

(179 N. C. 630)

**POWERS v. MASHBURN. (No. 293.)**

(Supreme Court of North Carolina. March 24, 1920.)

Appeal from Superior Court, Columbus County; Allen, Judge.

Action by O. M. Powers against Paul Mashburn. Judgment for plaintiff, and defendant appeals. No error.

Civil action, tried at November term, 1919, of the superior court, Columbus county, upon these issues:

(1) Did the defendant wrongfully and unlawfully assault the plaintiff as alleged in the complaint?

Answer: Yes.

(2) What amount of actual damages is the plaintiff entitled to recover of the defendant?

Answer: \$600.00.

Defendant appealed.

Irvin B. Tucker, of Whiteville, for appellant.

PER CURIAM. We have carefully examined the assignments of error in this case and do not think it necessary to discuss them. We find nothing in them to necessitate another trial.

No error.

(179 N. C. 633)

**DRAKE v. SPENCER. (No. 268.)**

(Supreme Court of North Carolina. March 17, 1920.)

Appeal from Superior Court, Wake County; Guion, Judge.

Action by W. B. Drake, Jr., receiver of the Raleigh Grain & Milling Company, against B. J. Spencer. From a judgment for plaintiff, defendant appeals. No error.

Civil action, tried at November term of Wake superior court, upon these issues:

(1) Did the Raleigh Grain & Milling Company make a contract with the defendant for a lot of corn, as alleged?

Answer: Yes.

(2) Was the Raleigh Grain & Milling Company ready, able, and willing to perform the contract on its part?

Answer: Yes.

(3) Did the defendant, Spencer, refuse to perform his part of the contract?

Answer: Yes.

(4) What damage, if any, is the plaintiff entitled to recover of the defendant, Spencer?

Answer: The difference between \$1.184 and \$1.64 per bushel, equal \$775.20.

From the judgment rendered the defendant appealed.

Ward & Grimes, of Washington, N. C., for appellant.

Willis Smith and J. Crawford Biggs, both of Raleigh, for appellee.

PER CURIAM. This action was brought by the plaintiff, as receiver of the Raleigh Grain & Milling Company, to recover damages on account of failure of the defendant to perform a

contract to sell to the Raleigh Grain & Milling Company 1,700 bushels of corn, for which the milling company agreed to pay \$1.184 per bushel f. o. b. Wysocking, N. C., and was to furnish the bags in which the corn was to be shipped.

No exceptions to the evidence are presented in the record, and only one exception to the charge. Upon a careful examination of the evidence and the charge, we are unable to find any error committed by the court in presenting the case to the jury. The questions involved are matters of fact, and appear to have been clearly and fairly presented to the jury.

No error.

(150 Ga. 135)

STUARD LUMBER CO. v. TAYLOR et al.  
(No. 1713.)

(Supreme Court of Georgia. April 15, 1920.)

(Syllabus by the Court.)

1. CORPORATIONS — 559(5) — EQUITY — 62 — PETITION OF MORTGAGE CREDITOR TO MODIFY INJUNCTION AND RECEIVERSHIP ORDERS TO PERMIT FORECLOSURE HELD IMPROPERLY DENIED.

Upon the petition of a minority stockholder, brought against the majority stockholders in a certain corporation, receivers were appointed to take possession of the entire property of the corporation, and injunctive relief was granted against the creditors of the corporation. A creditor having a mortgage for a large amount, who had not been notified of the proceedings for the appointment of a receiver filed a petition showing that he was the holder of a mortgage containing a power of sale, and prayed that the judgment granting injunction and appointing the receivers should be modified and dissolved, so far as it affected the petitioner's rights in the enforcement of his mortgage according to the terms thereof. The court refused the prayers of the petition. *Held* that, notwithstanding the introduction of evidence at the hearing tending strongly to show that a sale of the properties of the corporation which had been put in the hands of receivers to a third person would be greatly to the advantage of the creditors of the corporation, and that all the claims against it would be paid, and especially the claim of the petitioner, it was error to refuse the prayers of the petition. This was a case for the application of the maxim that equity follows the law, and there were no peculiar facts taking it out of the operation of this rule.

2. QUESTION NOT PRESENTED BY THE RECORD.

The question as to whether the evidence submitted upon the hearing of the application for the appointment of a receiver did not require the finding that the corporation for which a receiver was sought was solvent, and whether, if it was solvent, the appointment of a receiver was authorized, is not presented by this record for decision here.

Error from Superior Court, Berrien County; R. G. Dickerson, Judge.

Suit by R. P. Taylor, a minority stockholder, against the Pine & Cypress Lumber Com-

pany and another for injunction and other equitable relief, in which the Stuard Lumber Company, a creditor, petitioned to protect its rights. From a judgment restraining its further intervention, the Stuard Lumber Company brings error. Reversed.

R. P. Taylor, a minority stockholder in the Pine & Cypress Company, brought his petition against said corporation and against S. L. Calfee, alleged to be the owner of a majority of the stock of the corporation and the manager thereof, for injunction and other equitable relief. It was alleged in the petition that the business of the corporation was being mismanaged, its property going to waste, and that serious loss would result to all stockholders and creditors unless the relief sought was granted by a court of equity. Temporary receivers were appointed, and a temporary restraining order granted. The defendant corporation filed its answer, admitting the substantial allegations of the petition, and alleging that, if there is any mismanagement, it is caused by the mill outfit not being such as to permit the successful operation of the mill, and further:

"The mill needs new machinery and methods for conveying the logs to the mill, and, as the corporation has not the ready funds to make such improvements, it cannot well be done at this time. It is true that the mill ought to be operated; and as the corporation is amply solvent, in order that such mill may be operated, defendant feels that more money should be paid into the coffers of the corporation, either by stockholders paying in the cash for this purpose, or by selling some of the stock to an outside party, who will have the money to improve the equipment of the mill, so that it may be successfully operated, or else make some sale of the large body timber owned by the corporation upon a stumpage basis, which will bring in funds for operation as the mill should be operated, as well as to lease the mill and equipment to the party buying the timber upon a stumpage basis. Defendant avers that no one, with the equipment as it is, can successfully operate the mill. Wherefore defendant prays that the court take such action in the premises as will best protect the interests of all parties concerned, to wit, the minority and majority stockholders, the common creditors, the lien creditors, and all other parties interested in said corporation."

At the hearing, after considering the petition and answer, the court passed an order granting the relief prayed, appointing S. L. Calfee and others receivers, upon their giving bond in a stated sum. It was further ordered that these receivers were empowered to receive bids and propositions for the use of the mill and outfit, and the sale of the timber, or any part of it, and all properties of the corporation, such bids to be submitted to the court for ratification or rejection. This order was granted on August 30, 1919.

— For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

On September 23, 1919, the Stuard Lumber Company (hereinafter referred to as the Stuard Company), a corporation of this state, filed its petition to the superior court, showing that it was a creditor of the Pine & Cypress Company (hereinafter called the Cypress Company) in the sum of \$17,500 principal, besides interest; that this indebtedness arose from the purchase by the Cypress Company of certain machinery and equipment sold by the Stuard Company; that \$12,000 of the indebtedness is past due, and the notes representing this indebtedness were secured by a mortgage upon the property of the Cypress Company; that the mortgage held by the Stuard Company contained a power of sale after advertisement, and the power to execute deeds to the purchaser at such sale; that petitioner had no notice of the proceedings in which the injunction was granted and receivers were granted upon petition of R. P. Taylor. This company prayed that, if the order of injunction and appointment of receivers could be held in any way to interfere with its rights, the order be dissolved in so far as it affected the interests of petitioner, and that, unless its claim should be paid or satisfactorily adjusted, it be allowed by the court to advertise and bring to sale the property held by the receivers, in accordance with the power contained in the mortgage.

Upon the hearing of this petition of the Stuard Company, evidence was submitted to show that the receivers, in pursuance of the power given by the order of the court, had negotiated a sale of the timber and leased the sawmill and all equipment of the Cypress Company to the Albemarle Lumber Company, which was able and willing to purchase and pay for timber and the lease of the mill; that this contract was made on a scale of payments to be made monthly; that, under the order of the court appointing receivers and conferring the powers stated in the order, in a short time the claim of the Stuard Company, which is a first lien upon the property, will be paid; that the sale and lease of the property of the Cypress Company had been made upon advantageous terms; that the property was worth from \$100,000 to \$150,000; and that in a few months the sums accruing from the monthly payments by the Albemarle Company would pay off the indebtedness of the Cypress Company. After the hearing the court took the case under consideration, and rendered judgment by which the prayers of the Stuard Lumber Company were denied, and the receivers were authorized to proceed with the contract of sale as theretofore authorized by the court, and the Stuard Lumber Company was restrained from interfering in the case and from further intervening in the matter. To this judgment the Stuard Lumber Company excepted.

H. S. Murray and R. D. Smith, both of Tifton, for plaintiff in error.

C. A. Christian and W. D. Bule, both of Nashville, for defendants in error.

BECK, P. J. (after stating the facts as above). [1, 2] Under the facts of this case it is one for the application of the maxim that equity follows the law. The principle is now embodied in our statute law:

"Equity is ancillary, not antagonistic to the law; hence equity follows the law where the rule of law is applicable, and the analogy of the law where no rule is directly applicable." Civil Code, § 4520.

The Stuard Lumber Company, under its mortgage and the power of sale contained therein, had certain well-defined, absolute, vested rights. If the order restraining it from the enforcement of the mortgage according to its terms is allowed to stand, it will be deprived of a substantial right; that is, the right to bring the property to sale and realize on its security. To do this it is as clearly its right as it is to have its debt paid. If the properties of the Pine & Cypress Company, taken possession of by the receivers under the order of the court and sold or leased to the Albemarle Lumber Company, so clearly and so far exceed the liabilities of the latter company, the receivers might be authorized to borrow, and could easily borrow, a sufficient amount to pay off the debt of the Stuard Lumber Company; or, if the title to the timber and the equipment has passed to the Albemarle Lumber Company, the purchaser, it could borrow a sufficient amount to pay off the Stuard Company. But neither the receivers nor the Albemarle Company have a right to insist that the Stuard Company shall not enforce its plain legal rights, upon the ground that it would be better for the stockholders, or better for the purchaser of the property, who took with notice of the liens upon it, to postpone the payment of the Stuard Lumber Company's mortgage. Of course, circumstances arise in some cases that authorize a court of equity to restrain the mortgage or one holding a power of sale from exercising his legal rights; but no such peculiar circumstances are shown here. The power of sale in a mortgage is conferred for the purpose of effecting a speedy payment of the debt. This purpose is in the contemplation of the mortgagor and mortgagee at the time of the execution of the instrument, and the time of the exercise of the power depends upon the terms therein set forth. If no fraud was practiced by the mortgagee, and no unconscionable advantage taken to procure the mortgage containing the power, and the rights of third persons at the time of the execution of the mortgage were not affected or impaired, the instrument and any power that

it may contain will be given effect according to its plain provisions.

"Hard times constitute no ground for equitable interference to stop a judgment at law from making the money recovered, out of a defendant's lands at the suit of anybody, so far as we know or have heard." *Poullain v. English*, 57 Ga. 494.

See, also, *Tillman v. Stewart*, 104 Ga. 687, 30 S. E. 949, 69 Am. St. Rep. 192, and other cases therein cited.

Judgment reversed.

All the Justices concur, except GILBERT, J., absent for providential cause.

(150 Ga. 82)

**BARRETT v. MAYNARD.** (No. 1557.)

(Supreme Court of Georgia. April 13, 1920.)

*(Syllabus by the Court.)*

1. LANDLORD AND TENANT  $\S$ 285(1)—WHERE TENANT WAS ALLEGED INSOLVENT, AND REFUSED TO VACATE OR PAY RENT, APPOINTMENT OF RECEIVER PENDING APPEAL PROPER.

Where an owner rented a house and lot to one who declined and refused to pay the rent or to vacate the premises, and where the landlord obtained a dispossessory warrant and a judgment ordering the tenant to pay a certain amount of rent or to vacate the premises, to which judgment the defendant excepted, and carried the case by writ of error to the Court of Appeals on pauper affidavit, and where, pending such case, the plaintiff filed an equitable petition against the defendant, alleging that he was insolvent and refused to either vacate the premises or to pay the rent, and prayed for injunction and receiver, it was not error for the court, on the hearing, to appoint a receiver to take charge of the property, collect the rents, and hold them subject to the further order of the court.

2. APPEAL AND ERROR  $\S$ 448—PENDENCY OF DISPOSSESSORY WARRANT ON APPEAL NO BAR TO LANDLORD'S ACTION TO APPOINT RECEIVER.

The pendency of the dispossessory warrant in the Court of Appeals on writ of error is not a bar to the present action for the appointment of a receiver as an aid to the relief sought in that case.

Error from Superior Court, Hall County; J. B. Jones, Judge.

Action by Mrs. A. E. Maynard against J. M. Barrett, tenant, for the appointment of a receiver to take charge of the leased premises and collect and impound the rents. Receiver appointed, and defendant brings error. Affirmed.

See, also, 100 S. E. 779.

Mrs. A. E. Maynard brought her petition against J. M. Barrett and alleged substan-

tially as follows: She is the owner in fee simple of a certain house and lot in Hall county, which in the fall of 1915 she rented to the defendant for \$12.50 per month, and since that time he has occupied the premises. He failed to pay the rent due, and the plaintiff, through her attorney, made affidavit, that a dispossessory warrant might issue to evict the defendant from the premises, and the warrant was duly issued and served. The defendant filed his counter affidavit and gave bond. The issue formed upon the warrant and counter affidavit was tried at the January term, 1919, and judgment was rendered against the defendant for the possession of the premises, whereupon he filed a motion for new trial, which motion was overruled, and the defendant excepted to that judgment and filed an affidavit in forma pauperis, and a supersedeas resulted. There is no provision in law to hold the bondsmen in the eviction proceeding liable after judgment and verdict. The defendant is insolvent, and the plaintiff has no adequate remedy at law to collect the rent or to evict the defendant, who is allowing the premises to deteriorate in value, and the rent of the premises will be an absolute loss, unless a court of equity intervenes and appoints a receiver to take charge of the premises. The defendant has not paid any rent since the issuance of the dispossessory warrant in October, 1917, and he now owes, besides the judgment obtained for \$62.50, past-due rents which he fails and refuses to pay, and the rents will accumulate and the plaintiff be unable to recover them of the defendant. The prayer of the petition is that a receiver be appointed to take charge of the premises in controversy, who will look after and collect the rents and impound them until final decree, and that the defendant be enjoined and restrained from interfering in any manner whatever with the premises.

The defendant filed an answer, denying that he failed to pay the rent, or was indebted for any rent at the time the dispossessory warrant was issued. He admitted that he filed the bill of exceptions and the affidavit in forma pauperis, and that this superseded any further action in the case until the case was heard and determined by the Court of Appeals. It was further averred that the plaintiff had an adequate remedy at law, that she is now pursuing another action, and that the former action is a bar to the present suit. Defendant denies that he is committing any waste.

After hearing evidence the court rendered a judgment finding that the defendant is in possession of the property of the plaintiff without the payment of any rents, "ostensibly awaiting the termination of the suit in evidence"; that "he is admittedly insolvent, and under the evidence the property is deteriorating in value"; and ordered that the defend-

ant, within five days from the date of the judgment, pay to the plaintiff the rent due on the premises in controversy from January 21, 1919, to the date of the judgment, at the rate of \$12.50 per month, and that "the receiver herein appointed will take charge of the property and rent the same and hold the rent under order of the court." The court then proceeded to name a receiver as prayed. To this judgment the defendant excepted.

H. V. Johnson and Sloan & Sloan, all of Gainesville, for plaintiff in error.

W. N. Oliver, of Gainesville, for defendant in error.

HILL, J. (after stating the facts as above).

[1] 1. Under the facts disclosed by the record, the court did not err in appointing a receiver to take charge of the property in controversy, with direction to rent the same, collect the rent, and hold it subject to the further order of the court. The argument of the plaintiff in error is that the court erred in granting what he terms a mandatory injunction, and he cites numerous authorities from the decisions of this court to sustain the proposition that a mandatory injunction cannot be granted in this state. It is a sufficient answer to this argument to say that by reference to the decree of the court it will be observed that the court did not grant an injunction, but merely appointed a receiver to take charge of the property as above set forth. *Roberts v. Mullinder*, 94 Ga. 493, 20 S. E. 350, was a case somewhat similar in its facts to the present one. In that case a common-law judgment was obtained against one Smith and levied upon the land in controversy, to which the claimant, Mrs. Roberts, interposed her claim to the land in forma pauperis, without giving bond and security. An equitable petition was filed in that case, alleging that the claimant was insolvent, and that the claim was interposed, not in good faith, but for delay, and for the purpose of hindering and delaying the collection of the judgment, and to enable Mrs. Roberts to cultivate, rent, and use the land for her own benefit; that she had no legal or equitable interest in the land, and was insolvent; that the land was poor, badly worn, and was decreasing in value, and the improvements on it were not being kept up; and that the defendant, Smith, had no interest or ownership in any other property, and was in-

solvent when he died. The court, in that case, ordered that the defendant in the equitable proceeding give a bond for \$1,500, payable to the plaintiff, conditioned to pay such damages as the jury on the trial of the claim case should assess, and in default thereof that a receiver be appointed, and that an injunction be granted as prayed. The defendant excepted, and the Supreme Court affirmed the judgment of the court below. To the same effect, see *Smith v. Zachry*, 128 Ga. 290, 57 S. E. 513. In delivering the opinion of the court in that case Mr. Justice Lumpkin said:

"If the allegations of the petition are to be taken as true, the sole purpose of the defendant and his wife in these repeated interpositions of claims and affidavits of illegality is to delay the proper enforcement of the law. If this be so, the law will not allow such a purpose to be effectuated; nor will equity turn a deaf ear and stand idly by and permit the defendant to reap the reward of such a scheme of delay, while the creditor not only is prevented from realizing the money justly due him, but also sees the land depreciating in value below the amount of the executions. There must be an end of litigation somewhere; and we think the presiding judge did nothing more than his manifest duty when he appointed a receiver to hold the land and collect the rents pending the exception to the judgment on the last affidavit of illegality. *Hart v. Respass*, 89 Ga. 87; *Roberts v. Mullinder*, 94 Ga. 493; *Dawson v. Equitable Mortgage Co.*, 109 Ga. 889; *Powell v. Achey*, 87 Ga. 8."

[2] 2. It is argued that the present suit will not lie, because it involves the same transaction involved in the eviction proceeding, which is pending in the Court of Appeals; but we do not agree with this contention. We think that the issues are entirely different. This action is an equitable one in aid of the other, in which the plaintiff seems to have no adequate remedy at law. If the defendant is insolvent, as held by the trial judge, then, unless a court of equity interferes in an ancillary proceeding, as an aid to the legal proceeding, by appointing a receiver to collect and impound the rents due on the premises, the plaintiff is remediless.

For these reasons, and under the authorities cited above, we think the court did right in appointing a receiver as prayed.

Judgment affirmed.

All the Justices concur.

(150 Ga. 86)

CRAWLEY v. STATE et al. (No. 1590.)

(Supreme Court of Georgia. April 13, 1920.)

*(Syllabus by the Court.)***1. STATUTES  $\S$  125(1) — WARE COUNTY ROAD LAW HELD NOT UNCONSTITUTIONAL AS CONTAINING MATTER NOT EXPRESSED IN ITS TITLE.**

An act approved August 16, 1915 (Acts 1915, p. 411) was entitled "An act to create the office of commissioner of roads and revenues of the county of Ware; to provide for his election and for his recall; to define his duties and provide for his compensation; to provide for a clerk for said commissioner; to provide for the proper supervision of his acts and the auditing of his books; to repeal all acts creating the commissioners of roads and revenues for said county, and all acts amendatory thereof, and for other purposes." The first section of the act provided: "That from and after the 1st day of January, 1916, the county affairs of Ware county shall be administered by a commissioner of roads and revenues, and for that purpose the office of commissioner of roads and revenues of Ware county is hereby created. He, acting in conjunction with the ordinary and clerk of superior court of said county, shall have such control of the county affairs generally, as is now conferred by law upon the present board of commissioners of roads and revenues of said county, except as especially qualified by this act." Held, the provision that the commissioner should act "in conjunction with the ordinary and clerk of superior court of said county," in the control of county affairs, was germane to the general purpose of the act expressed in the title, and was sufficiently comprehended by the concluding words, "and for other purposes," and the matter referring to the commissioner acting in conjunction with the ordinary and clerk was not so variant from what is expressed in the title to the act as to show that the General Assembly had no right to include the same therein. *Welborne v. State*, 114 Ga. 793 (5), 818, 40 S. E. 857. Accordingly the act in question does not violate article 3, § 7, par. 8, of the Constitution of Georgia (Civ. Code 1910, § 6437), which provides that "no law or ordinance shall pass which refers to more than one subject-matter, or contains matter different from what is expressed in the title thereof," on the ground that the title to the act refers only to the creation of the office of commissioner of roads and revenues of Ware county, while the body of the act provides for the creation of the commissioner of roads and revenues, and also provides that he shall act in conjunction with the ordinary and clerk of the superior court of the county.

**2. STATUTES  $\S$  73(1) — STATUTE DEFINING DUTIES OF CLERKS OF SUPERIOR COURT AND ORDINARIES HELD NOT UNCONSTITUTIONAL AS PROVIDING FOR MATTERS COVERED BY GENERAL LAW.**

The act does not purport to add to the official duties pertaining to the office of clerk of the superior court, or of the ordinary of the

county, but merely confers, upon the individuals holding those offices, power to act in conjunction with the commissioner in respect to specified county matters, and accordingly does not contravene article 11, § 8, par. 1, of the Constitution (Civ. Code 1910, § 6600), which provides that "whatever tribunal, or officers, may hereafter be created by the General Assembly, for the transaction of county matters, shall be uniform throughout the state, and of the same name, jurisdiction, and remedies, except that the General Assembly may provide for the appointment of commissioners of roads and revenues in any county," on the ground that existing provisions of law prescribe and define the duties of the clerks of the superior courts and ordinaries throughout the state.

**3. STATUTES  $\S$  73(1), 76(4) — STATUTE DEFINING DUTIES OF A COUNTY COMMISSIONER OF ROADS AND REVENUES HELD NOT TO VIOLATE PROVISIONS AGAINST SPECIAL LAWS.**

The act does not violate article 1, § 4, par. 1, of the Constitution (Civ. Code 1910, § 6391), which provides that "laws of a general nature shall have uniform operation throughout the state, and no special law shall be enacted in any case for which provision has been made by an existing general law," on the ground that at the time of the adoption of the act the duties and powers of the clerks of the superior courts, and of the ordinaries of Georgia, were prescribed by existing general laws of the state.

**4. OFFICERS  $\S$  30 — ACT RELATING TO COMMISSIONER OF ROADS AND REVENUES OF WARE COUNTY IS NOT UNCONSTITUTIONAL AS GIVING TO ONE OFFICER MORE THAN ONE COUNTY OFFICE.**

The act was not violative of the Constitution above quoted on account of that portion of section 259 of the Civil Code of 1910 which provides: "No person shall hold, in any manner whatever, or be commissioned to hold at one time, more than one county office, except by special enactment of the Legislature heretofore or hereafter made."

**5. COUNTIES  $\S$  183(4) — JUDGMENT VALIDATING MUNICIPAL BONDS HELD NOT ERRONEOUS FOR WANT OF PROPER NOTICE OF ADJOURNED HEARING.**

Civ. Code 1910, § 450, regulating proceedings to validate municipal bonds, provides: "Prior to the hearing of said cause, the clerk of the superior court of the county in which it is to be heard shall publish in a newspaper, at least twice before the hearing, a notice to the public that on the day specified in the order providing for the hearing of said cause the same will be heard." Accordingly where a petition to validate bonds, as contemplated by the statute, is duly presented to the judge of the superior court of the county having jurisdiction, and a rule is issued which states a future date for the hearing of the petition, and directs publication of notice as provided by the statute, and notice is duly published, and at the time appointed for the hearing the court adjourns the hearing over to a future date, at which time the hearing is resumed, and a judgment rendered validating the bonds, the judgment is not

erroneous on the ground that no proper notice was given of the adjourned hearing. *Wimberly v. Twiggs County*, 116 Ga. 50, 42 S. E. 478.

#### 6. VALIDATION OF MUNICIPAL BONDS.

Applying the foregoing rulings to the facts of this case, the trial judge did not err in rendering the judgment validating the bonds.

Error from Superior Court, Ware County; J. I. Summerall, Judge.

Proceeding between R. C. Crawley and the State of Georgia and others. Judgment for the latter, and the former brings error. Affirmed.

J. L. Crawley and Jerome Crawley, both of Waycross, for plaintiff in error.

A. B. Spence, Sol. Gen., Parks, Reed & Garrett and Wilson & Bennett, all of Waycross, and E. L. Meyer, of Atlanta, for defendants in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(25 Ga. App. 172)

#### DUNSON v. STATE. (No. 11101.)

(Court of Appeals of Georgia, Division No. 1  
April 13, 1920.)

#### (Syllabus by the Court.)

1. CRIMINAL LAW §922(2) — WHERE THERE WAS CONFLICTING EVIDENCE AS TO LIMITATIONS, FAILURE TO INSTRUCT THEREON HELD TO REQUIRE NEW TRIAL.

The evidence as to the date of the alleged bigamous marriage was conflicting; one witness testifying to a date more than 4 years prior to the return of the indictment, and another to a date within the 4-year period. The accused duly requested, in writing, an instruction to the jury that he should be acquitted if they believed from the evidence that the alleged offense occurred more than four years prior to the finding of the indictment. Held, since no exception to the general rule touching the limitation of such a prosecution was alleged or proved, the refusal to give the requested instruction was error requiring the grant of a new trial. Pen. Code 1910, § 30, subd. 8.

2. BIGAMY §4—INDICTMENT AND INFORMATION §167—INDICTMENT NEED NOT ALLEGE TIME OR PLACE OF PRIOR MARRIAGE, AND SUCH AVERMENT NEED NOT BE PROVED.

"It is not essential in an indictment for bigamy to allege the time when and the place at which the prior marriage took place." *Murphy v. State*, 122 Ga. 149, 50 S. E. 48 (1); *Oliver v. State*, 7 Ga. App. 696, 67 S. E. 886 (1). Where such averments are needlessly set forth, they are surplusage, and need not be proved. The court, therefore did not err in refusing the requested charge to the contrary.

3. MARRIAGE §37—MARRIAGE INVALID BECAUSE OF AGE OF WIFE MAY BE RATIFIED BY HER AFTER SHE REACHES FOURTEEN.

A marriage by a female under the age of 14 years may, notwithstanding its invalidity, be ratified by her after she has reached that age. Civ. Code 1910, §§ 2931, 2935. *Powers v. Powers*, 138 Ga. 65, 74 S. E. 759 (1). The court did not err in refusing to instruct the jury to the contrary, or to give a requested charge which was easily capable of conveying a different meaning.

#### 4. ORDER OF NEW TRIAL.

The evidence was conflicting; one view of it authorizing a conviction, and the other demanding an acquittal. A new trial is ordered solely because of the error pointed out.

Error from Superior Court, Forsyth County; N. A. Morris, Judge.

George L. Dunson was convicted of bigamy, and he brings error. Reversed, and new trial ordered.

Geo. F. Gober, of Atlanta, for plaintiff in error.

Jno. T. Dorsey, Sol. Gen., of Marietta, and Wm. Butt, of Blue Ridge, for the State.

LUKE, J. Judgment reversed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(25 Ga. App. 202)

GREEN v. HINES, Director General of Railroads.

HINES, Director General of Railroads, v. GREEN.

(Nos. 10840, 10841.)

(Court of Appeals of Georgia, Division No. 1  
April 14, 1920.)

#### (Syllabus by the Court.)

CARRIERS §318(1)—IN ACTION FOR INJURY WHILE LEAVING A MOVING TRAIN AFTER ASSISTING A RELATIVE, VERDICT FOR DEFENDANT HELD SUPPORTED BY EVIDENCE.

Under the pleadings and the facts in this case, the verdict rendered was demanded by the evidence, and the motion for new trial was properly overruled.

Error from Superior Court, Chatham County; P. W. Meldrim, Judge.

Action by Mrs. Janie Green against the Central of Georgia Railway Company, in which, by amendment, Walker D. Hines, Director General of Railroads, was made a defendant. Verdict for defendant, motion for new trial overruled, and plaintiff brings error, and defendant takes a cross-bill of exceptions. Affirmed on main bill of exceptions, and cross-bill dismissed.

Mrs. Janie Green sued the Central of Georgia Railway Company. By amendment, Walker D. Hines, Director General of Railroads, was made defendant. The petition alleged:

That the plaintiff went to the defendant's station at Savannah, with a relative, and as she entered the car she told the conductor that she "was assisting her relative in boarding the train with her baggage, and would enter the coach with her, to which the said conductor consented, and permitted petitioner to enter the coach, knowing that it was petitioner's purpose not to leave on said train, but to alight from the same prior to its departure." That "for many years it had been the practice and custom of the defendant company always to sound a gong five minutes before any passenger train departs, and so long continued and uniform has been this practice and custom that petitioner and the public generally who may be on board the trains of said company await the sound of the gong before leaving the same." That "while petitioner was in the car, talking briefly with her relative, awaiting the sound of the gong to advise her to alight from the train, she ascertained that the time for the departure of the train was at hand and no gong had been sounded. Without awaiting the sound of the gong, she rose from her seat, while the train was still stationary, for the purpose of leaving the car, and started towards the back door of the car, and while approaching said door the train began to move. Petitioner found that the rear door of the car was locked and was compelled to traverse the entire length of the car to the front door in order to alight from the front platform; the train in the meantime increasing its speed. Another lady, whose name is unknown to petitioner, was likewise caught on the train in the same manner, and hastened to the front door in order to alight." "As soon as petitioner reached the front steps of the car, she lifted her son down off of the steps; the train at that time not moving at such a rapid speed as to render it dangerous for petitioner to alight. After this, having placed her son upon the ground, she endeavored to step from the slowly moving train onto the concrete platform, but because of the motion of the train, in her effort to alight therefrom, her left foot was turned and twisted, and a small bone in the instep of her foot was broken."

Among other amendments the plaintiff alleged that she "entered the car by the front door thereof," and that she "remained in the coach with her relative from five to ten minutes."

The grounds of negligence alleged were:

"(1) Because the defendant company did not advise petitioner of the time for the train to start.

"(2) Because the said company failed in accordance with its usual and uniform custom to sound a gong, warning persons to leave the train.

"(3) Because the said defendant company needlessly and carelessly had locked the rear door of the car, thus preventing petitioner to alight from the same before it had gathered sufficient speed to injure petitioner.

"(4) Because the defendant company did not give petitioner a suitable and reasonable length of time to alight from the said train in safety."

The defendant filed demurrers both general and special, and also filed a plea denying liability. After the petition had been amended to meet certain of the special demurrers, all the demurrers were overruled and the case proceeded to trial.

The plaintiff testified, in part: That she was frequently at the station where she was injured. That "the gong always rang 5 minutes before the leaving time of the train." That when she was entering the train she told the conductor that she was not going off on the train, but was there to see her sister-in-law off, and asked him if she "had time to go on the car and assist her with her baggage, and he said 'yes.'" That she "entered the coach at the forward end of it." That this was "some 15 or 20 minutes before the train was to leave." That she sat on the arm of the seat occupied by her sister-in-law some 10 minutes or more. That when the car began to get crowded she took her little boy, who was with her, and went to the back door, but, finding that it was locked, turned towards the front door, and before she reached that door the conductor cried, "All aboard." That when she reached the steps the train was moving. That she put her boy off safely. That when she stepped off, the speed of the train was gradually getting faster. That as she stepped off she lost her balance and stumbled. Plaintiff also swore:

"If the back door had not been locked, I would have had time enough to get off the car before the train started off. If the gong had been sounded five minutes before the train left, I could have left before the train started. Before I started to leave the car no one had notified any one in the car that the train was about to move. \* \* \* When I got off the car the train was moving very slowly. I am not much judge of the speed of a train. I did not think it was dangerous to step off of the car when I did. If I [had] thought it was dangerous to do so, I would not have stepped off the car as I did. I used very good care, the best I knew how, in stepping off the car."

The conductor's evidence was, in part, as follows:

"I have no recollection of Mrs. Green getting on. \* \* \* I do not know how long before this occasion it had been when they stopped sounding the gong, but it had been some days. It had not rung since the custom ceased. It used to ring five minutes before the departure of the trains. \* \* \* We are required to announce at the two waiting rooms, one white and one colored, and in front of the ticket office in the station, the leaving time of this train. The conductor does that. I leave the train and go up to the station house and make the announcement at the places I have just stated. I did that on this day before this particular train left. The announcement is made five minutes before the departure of the train. I was away,



from my train five minutes before its departure, to make that announcement. I did not see this lady attempt to get off the train after I hollered 'all aboard.' I did not know that the lady was on the train and intended to get off when I called 'all aboard.' I was standing near the front end of the first-class coach, the forward end, when I hollered, 'all aboard.' I then walked to the rear of the coach and hollered 'all aboard,' again. I announced it twice. The train did not move immediately after I called the first 'all aboard.' The rear door of this coach in question was locked. That is 'kept locked for the reason it is the requirement of the company for safety. \* \* \* It is to keep any one from getting on or off at that end of the coach with no protection at all. There is no employé of the company there at that end to look after them. After I gave the last 'all aboard,' I stepped on the rear platform of the car. The train had proceeded just about one car length, one passenger coach length, when Mr. Dick, our employé, who was standing on the outside, threw his hand up as a signal, and says, 'A woman is getting off,' and I immediately pulled the bell cord, and the train came to a stop. I saw the lady after the train stopped. \* \* \* I did not see the lady get off, and, of course, I can't say where she got off."

Other witnesses testified, but the foregoing statement embraces all the material facts necessary to an adjudication of the issues involved. The trial resulted in a verdict for the defendant. The plaintiff made a motion for a new trial, which was overruled, and she excepted.

Oliver & Oliver, of Savannah, for plaintiff in error.

H. W. Johnson, of Savannah, for defendant in error.

BLOODWORTH, J. (after stating the facts as above). In overruling the motion for a new trial the learned judge of the trial court wrote an opinion which covers all the grounds of the motion, and which is substantially correct. That opinion is as follows:

"The first, second, third, and fourth grounds of the amended motion require no special consideration. Reference to the charge will show that they are not well founded.

"On the fifth amended ground: There was no request to charge, and, even if there had been a request, it would not have been a proper charge. There was no evidence to justify the recital that the gong was broken. Some unknown man made such a statement not under oath. The statement was hearsay and had no probative value. Certainly I could not have charged as a fact that the company did not sound a warning of the train's departure. There was no evidence to justify it, and the evidence of the conductor was to the contrary. Neither could I have charged 'that the company did not intend to sound a warning of the train's departure as it had done for many years.' What had it done for many years? That charge which it is contended I should have given is not only confusing and misleading, but it assumed facts not proven.

"On the sixth ground of the amended motion: I charged: 'It must appear that the defendant was guilty of the alleged negligence set out in the petition, and that negligence must be shown to be the cause—the proximate cause—of the injury alleged to have been sustained.' I further charged: 'Now you take the case, and without prejudice look at it. See what the truth of it is, and, if the defendant is liable in the way set out in the petition, then you would be authorized to find a verdict in favor of the plaintiff.' I had previously charged in these words: 'She avers that she has sustained certain damages in the way set out in the petition, which you will have before you.' The complaint is that I should have singled out a particular ground of negligence, and then charged that if the company was guilty of negligence contributing to the plaintiff's injury she would be entitled to recover.' I hardly think that is the law.

"The seventh ground of amended motion cannot be considered. It is elementary that each ground of the motion must be complete within itself. This ground is singularly violative of this principle.

"The eighth ground complains of the strong language used in cautioning the jury to do 'exact justice between the lady on one side and the defendant on the other.' Reference to the evidence shows that the case was between a lady with a sprained ankle and a soulless corporation that sees as much beauty in a crowbar as in a pretty foot. The case afforded a field where the flowers of rhetoric grew wild. The plaintiff not only had a sprained ankle with all of its horrors, but she 'couldn't get a cook last summer, and had neighbors to come in and see about the children.' Doubtless the plaintiff suffered very much from not having a cook in Savannah in the summer, but that suffering, bodily or mental, could hardly be ascribed to Mr. Hines, the Director General of Railroads. Seriously, cases should be tried under the rules of law and evidence and without appeals to prejudice. No higher duty rests upon a judge than to see that a recovery is based on exact justice. Cautionary charges can only be judged of in the light of the trial. I do not think that the criticisms are well founded.

"I do not think that the eleventh to fourteenth grounds, both inclusive, require special consideration when the entire charge is read.

"In the fifteenth ground it is complained that I failed to charge, 'If the conductor knew that the gong was broken.' Certainly I should not have so charged. The only evidence on that point was the hearsay statement of some unknown man, alleged to have been made to the conductor after the accident. No charge should be given which is not authorized by the evidence."

Under the pleadings and the facts of this case, we think the verdict rendered was demanded by the evidence, and the motion for a new trial was properly overruled.

Judgment affirmed on main bill of exceptions; cross-bill dismissed.

BROYLES, C. J., and LUKE, J., concur.

(25 Ga. App. 197)

**WINOKUR v. STATE.** (No. 11295.)(Court of Appeals of Georgia, Division No. 1.  
April 18, 1920.)*(Syllabus by the Court.)***CRIMINAL LAW** ¶954(1)—**REFUSAL OF NEW TRIAL ON MOTION CONTAINING GENERAL GROUNDS NOT ERROR, WHERE EVIDENCE AUTHORIZED VERDICT.**

The only error assigned is the overruling of the motion for a new trial, which contained only the usual general grounds. The evidence amply authorized the verdict, and the court did not err in refusing a new trial.

Error from Superior Court, Bryan County; W. W. Sheppard, Judge.

Proceeding by the State against Sam Winokur. From the judgment, and the overruling of his motion for a new trial, defendant brings error. Affirmed.

J. Hartridge Smith, of Savannah, for plaintiff in error.

J. Saxton Daniel, Sol. Gen., of Claxton, for the State.

**BROYLES, C. J.** Judgment affirmed.

**LUKE and BLOODWORTH, JJ.,** concur.

(25 Ga. App. 190)

**ADAMS v. STATE.** (No. 11264.)(Court of Appeals of Georgia, Division No. 1.  
April 13, 1920.)*(Syllabus by the Court.)***CRIMINAL LAW** ¶552(3)—**WHERE CIRCUMSTANTIAL EVIDENCE DID NOT EXCLUDE EVERY OTHER REASONABLE HYPOTHESIS, CONVICTION WAS CONTRARY TO LAW AND EVIDENCE.**

Under the undisputed facts of this case, the circumstantial evidence relied upon to convict the defendant failed to exclude every reasonable hypothesis save that of his guilt, and therefore his conviction was contrary to law and the evidence.

Error from City Court of Brunswick; D. W. Krauss, Judge.

Willie Adams was convicted of an offense, and he brings error. Reversed.

Frank H. Harris, of Brunswick, for plaintiff in error.

F. M. Scarlett, Jr., Sol., of Brunswick, for the State.

**BROYLES, C. J.** Judgment reversed.

**LUKE and BLOODWORTH, JJ.,** concur.

(25 Ga. App. 164)

**LUCKEY v. DANIELS.** (No. 11315.)(Court of Appeals of Georgia, Division No. 2.  
April 8, 1920.)*(Syllabus by the Court.)***BROKERS** ¶82(1)—**PETITION ALLEGING CONTRACT FOR COMMISSION FROM FIRST PAYMENT AND A FIRST PAYMENT STATED A CAUSE OF ACTION.**

W. T. Luckey brought suit in the city court of Waynesboro against J. S. Daniels, alleging substantially the following: That in July, 1919, he entered into a contract with the defendant to sell a certain tract of land on a commission basis, the commission payable out of the first payment on the land when a sale was made. A copy of the contract was attached to the petition. He alleged, further, that in October, 1919, he sold the land, as agreed, to R. W. Hickman for \$5,800; said Hickman making a payment of \$164.27 to bind the sale. He alleged that the purchaser was able, ready, and willing to make the purchase, and that the terms were acceptable to the defendant. He alleged, further, that he turned over the purchaser to the defendant, and that the defendant agreed then and there to pay him \$150 as commission for his services already rendered for bringing together the vendor and the vendee. The defendant demurred to the petition, and thereupon the plaintiff filed an amendment, in which he set out that after the signing of the contract and up to the date of the alleged sale he advertised the land for sale in daily newspapers, in circulars, in advertising sheets, and in posters, and also by personally soliciting a purchaser for said land; that as a result of such efforts on his part he secured R. W. Hickman as a purchaser for said land; that on October 8, 1919, he took said purchaser to the defendant for the purpose of completing the sale; that at said meeting the defendant and R. W. Hickman stepped away from the plaintiff and talked over the sale privately, and upon returning to where plaintiff was they stated to him that they had fully agreed on the contract and terms of sale, provided plaintiff would agree to accept for his services already rendered in securing said purchaser the sum of \$150 as his commission, to be paid out of the first payment on the land. He alleged, further, that he agreed to accept this \$150, and thereupon defendant accepted from said Hickman a check for \$164.27, agreeing to pay plaintiff \$150 out of said amount, and gave said Hickman a receipt for said sum. A receipt for said amount was attached to the amended petition. This receipt showed that the purchaser of the land was to pay \$5,800 as the purchase price thereof, \$2,000 to be paid as soon as bond for title could be executed, and the balance in four equally divided payments, with interest at 8 per cent. per annum until paid, the \$164.27 to be credited on the first payment of \$2,000. To the petition as thus amended the defendant renewed his demurrer, and upon the hearing of the demurrer the court sustained the same and dismissed the suit. Held that the petition as amended set out a cause of action, and the court erred in sustaining the demurrer and dismissing the suit. See Civ. Code 1910, § 3587; *Humphries v.*

Smith, 5 Ga. App. 340, 63 S. E. 248; Kesler v. Stults, 15 Ga. App. 735, 84 S. E. 201.

Error from City Court of Waynesboro; Wm. H. Davis, Judge.

Action by W. T. Luckey against J. S. Daniels. Demurrer to petition sustained, and suit dismissed, and plaintiff brings error. Reversed.

C. N. Walker, of Waynesboro, for plaintiff in error.

E. V. Heath, of Waynesboro, for defendant in error.

SMITH, J. Judgment reversed.

JENKINS, P. J., and STEPHENS, J., concur.

(25 Ga. App. 114)

CHENEY v. BANK OF BREMEN.  
(No. 10863.)

(Court of Appeals of Georgia, Division No. 2.  
April 7, 1920.)

(Syllabus by the Court.)

1. TRIAL  $\S$  92—MOTION TO EXCLUDE TESTIMONY AS NOT RESPONSIVE TO QUESTION PROPERLY DENIED, WHEN NOT PROMPTLY MADE.

"When an admission is given in evidence, it is the right of the other party to have the whole admission and all the conversation connected therewith." Civ. Code 1910,  $\S$  5783. "In all cases where the personal representative of the deceased or insane party has introduced a witness interested in the event of a suit, who has testified as to transactions or communications on the part of the surviving agent or party with a deceased or insane party or agent, the surviving party or his agent may be examined in reference to such facts testified to by said witness." Civ. Code 1910,  $\S$  5858(6). The evidence which in this case thus forms the basis of the other testimony objected to by the plaintiff was given by the plaintiff himself, and in answer to a question by his own counsel; and while the plaintiff's counsel subsequently, during the cross-examination, moved to exclude the original testimony of the plaintiff, on the ground that it was not responsive to the question of his counsel, the court did not err in refusing to exclude such evidence as thus given by the plaintiff, when the motion to exclude was not promptly made. The first and second grounds of the amendment to the motion for a new trial are therefore without merit. See Birmingham Lumber Co. v. Brinson, 94 Ga. 517, 20 S. E. 437(1); also, as bearing upon the admissibility of the testimony of the cashier concerning the transaction had with the decedent, Ullman v. Brunswick Title Guarantee & Loan Co., 96 Ga. 625(1), 628, 24 S. E. 409; Rosser v. Georgia Pacific Ry. Co., 102 Ga. 164, 166, 29 S. E. 171(1); Maxwell v. Imperial Fertilizer Co., 103 Ga. 108, 29 S. E. 597; Cody v. First Nat. Bank, 103 Ga. 789, 30 S. E. 281(3); Holston v. Southern Ry. Co., 116 Ga. 656, 43 S. E. 29; Bank of South-

western Georgia v. McGarrah, 120 Ga. 944, 48 S. E. 393(5).

2. EVIDENCE  $\S$  220(7)—FAILURE OF DEPOSITOR TO OBJECT TO BANK'S STATEMENT HELD NOT ADMISSION OF CORRECTNESS.

"Acquiescence or silence, when the circumstances require an answer or denial or other conduct, may amount to an admission." Civ. Code 1910,  $\S$  5782. Thus, in a suit by a decedent's administrator against a bank for the recovery of a deposit claimed to be due the estate, where it appears that the decedent's passbook had been written up, showing the payment of the item in dispute and that the account stood balanced, which passbook had been delivered to, and was accepted by the decedent, several years prior to his death, and retained in his possession up to the time of his death, it was not error for the judge to instruct the jury that a failure of the depositor to make objection or complaint as to the statement thus rendered could be accounted as an admission on his part as to the correctness of the statement.

3. APPEAL AND ERROR  $\S$  1064(1)—BANKS AND BANKING  $\S$  154(6)—BILLS AND NOTES  $\S$  133—WORDS WRITTEN IN BODY OF CHECK CONTROL MARGINAL FIGURES; CHARGE ON BURDEN OF PROOF AS TO PAYMENT OF DEPOSIT; CHARGE HELD NOT REVERSIBLE ERROR.

The only issue of fact on the trial of this case was whether the payment made by the cashier to the decedent on a certain check from his admitted deposits was in the sum of \$11.50 or \$1,150. The check under which the payment was made was in form as follows:

"Bremen, Ga., Oct. 25, 1906.

"Bank of Bremen:

"Pay to cash or order, \$1150.00, eleven & 50/100 dollars. I. N. Cheney, M. D."

The court correctly charged the jury that in construing the instrument the words written into the body of the check would control the figures written in the margin, but that the real issue for their determination was the question as to which amount was actually paid thereon. He elsewhere charged them, however, that the burden of proof rested on the plaintiff depositor. Held, since the amount of the deposit is undisputed, the burden of proof to show payment shifted to the defendant bank; but in view of the facts set forth in the preceding paragraph, taken together with the clear and convincing evidence in favor of the defendant, which is substantially undisputed, save by the written portion of the check itself, the charge in reference to the burden of proof cannot properly be taken as reversible error. 2 Michie, Banking, 1343; Anderson v. Leverich, 70 Iowa, 741, 30 N. W. 39; Nat. Bank v. Tacoma Mill Co., 182 Fed. 1, 104 C. C. A. 441. See Lazenby v. Citizens Bank, 20 Ga. App. 53, 92 S. E. 391(2).

Error from Superior Court, Haralson County; F. A. Irwin, Judge.

Action by I. N. Cheney, Jr., administrator, against the Bank of Bremen. Judgment for defendant, and plaintiff brings error. Affirmed.

I. N. Cheney, Jr., of Bremen, and H. J. McBride, of Tallapoosa, for plaintiff in error.  
Griffith & Matthews, of Buchanan, for defendant in error.

JENKINS, P. J. Judgment affirmed.

STEPHENS and SMITH, JJ., concur.

(25 Ga. App. 146)

GEORGIA RY. & POWER CO. v. SHAW et al. (No. 11207.)

(Court of Appeals of Georgia, Division No. 2.  
April 8, 1920.)

(*Syllabus by the Court.*)

1. TRIAL  $\S$ 194(17), 241—CHARGE AS TO DUTY IS EQUIVALENT TO CHARGE THAT OMISION WOULD BE NEGLIGENCE; CHARGE IN EXACT LANGUAGE USED BY SUPREME COURT MAY BE IMPROPER.

In a suit by the husband and children against a street railway company to recover for the death of a wife and mother, alleged to have been caused by a collision between one of the defendant's street cars and a jitney bus in which the deceased was riding, it was error to charge the jury that "it is the duty of a motorman of a street railway car, in propelling a car through the public streets, to notice the presence of pedestrians, and at all times be watchful to see that the way is clear; and, where he has reason to apprehend danger, or should in the exercise of ordinary care be cognizant of danger, he should regulate the speed of his car so that it could be quickly stopped should the occasion require." Such a charge was tantamount to instructing the jury that the facts recited were sufficient to render the defendant negligent (West End & Atlanta Street Railway Co. v. Mozely, 79 Ga. 463, 4 S. E. 824(1); Richmond & D. R. Co. v. Howard, 79 Ga. 44, 53, 3 S. E. 426), for to charge that it was the duty of a person to do a specific thing was equivalent to an instruction that the omission to do that thing would be negligence. Macon Ry. & Light Co. v. Barnes, 121 Ga. 443, 446, 49 S. E. 282. Whether or not the defendant was negligent was a question for determination by the jury. See, also, Alabama, etc., Railroad Co. v. Brown, 128 Ga. 328, 75 S. E. 330 (3) and Macon, etc., Ry. Co. v. Holmes, 103 Ga. 655, 30 S. E. 563 (3).

(a) The fact that the charge complained of was in the exact language used by the Supreme Court in Perry v. Macon Con. St. R. Co., 101 Ga. 410, 29 S. E. 304, is insufficient to alter our ruling, since there are many things said by the Supreme Court and this court that are sound law, but which nevertheless would be grossly improper instructions to a jury. See Savannah Ry. Co. v. Evans, 115 Ga. 818, 41 S. E. 631, 90 Am. St. Rep. 116; Merritt v. State, 107 Ga. 679, 680, 84 S. E. 361; Florida, C. & P. R. Co. v. Lucas, 110 Ga. 127, 128, 35 S. E. 283; Hudson v. Hudson, 90 Ga. 582, 16 S. E. 349 (3).

2. APPEAL AND ERROR  $\S$ 1056(2)—WITNESSES  $\S$ 372(2)—INQUIRY AS TO INTEREST OF WITNESS MUST BE CONFINED TO CASE ON TRIAL; REJECTION OF EVIDENCE WILL NOT WORK A NEW TRIAL WHERE IT COULD NOT HAVE MATERIALLY AFFECTED JURY'S FINDING.

The court did not err in refusing to permit counsel for the defendant to elicit from a witness an answer to the question, "You had a lawsuit about this too, didn't you?" While it is generally competent to show by proper evidence the present interest of a witness in a case on trial, or its results, the inquiry as to interest must relate to the time when the testimony is given, and should be confined to the case on trial. Even if this evidence was competent, its rejection would not work a new trial (Van Winkle v. Wilkins, 81 Ga. 94, 7 S. E. 644 [9] 12 Am. St. Rep. 299), since it was not of such a character as would probably have materially affected the finding of the jury. Daughtry v. Savannah & Statesboro Ry. Co., 1 Ga. App. 393, 58 S. E. 230 (2).

3. APPEAL AND ERROR  $\S$ 1004(1)—DEATH  $\S$ 77—DIRECT EVIDENCE OF VALUE OF DECREASED WIFE'S DOMESTIC SERVICES UNNECESSARY; VERDICT WILL BE ALLOWED TO STAND IF NOT SO EXCESSIVE AS TO SHOCK THE MORAL SENSE.

In estimating the value of domestic service rendered by a wife and mother, the jury are authorized to take into consideration what may be the value of many services incapable of exact proof, but measured in the light of their own observation and experience. "There need be no direct or express evidence of the value of the wife's services, either by the day, week, month, or any other period of time, or of any aggregate sum." Metropolitan St. R. Co. v. Johnson, 91 Ga. 466, 471, 472, 18 S. E. 816, 817. See, also, Standard Oil Co. v. Reagan, 15 Ga. App. 600, 84 S. E. 69 (3), and numerous cases there cited. Applying these rules, the verdict will not be set aside as being excessive, since there is no direct proof of prejudice or bias, nor does the amount thereof appear to be so exorbitant, flagrantly outrageous and extravagant, as to shock the moral sense. Realty Bond & Mortgage Co. v. Harley, 19 Ga. App. 187, 188, 91 S. E. 254.

4. APPEAL AND ERROR  $\S$ 193(1)—LIABILITY OF STREET RAILROAD UNDER CHARTER AND ORDINANCES NOT PRESENTED WHERE NOT RAISED BELOW BY DEMURRER.

The other exceptions all refer to excerpts from the charge of the court. These instructions of which complaint is made state merely the provisions of several ordinances which were made a part of the plaintiff's petition and introduced in evidence. No ruling by demurrer was invoked to the paragraphs of the petition asserting liability for violation of the ordinances therein set forth; nor was any objection urged to their admission in evidence on the trial. In order to present for consideration of this court the question as to the liability of the defendant under the charter and ordinances of the city of Atlanta, the point should have been raised in the lower court by demurrer or other appropriate and timely exception.

**5. APPEAL AND ERROR ¶1064(1)—ERRONEOUS INSTRUCTION REQUIRING A NEW TRIAL.**

The verdict for the plaintiff not having been demanded, a new trial is required by the error pointed out in the first paragraph above.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by H. C. Shaw and others against the Georgia Railway & Power Company. Verdict and judgment for plaintiffs, and defendant brings error. Reversed and remanded for new trial.

Colquitt & Conyers, of Atlanta, for plaintiff in error.

Geo. F. Gober and Hines, Hardwick & Jordan, all of Atlanta, for defendants in error.

SMITH, J. Judgment reversed.

JENKINS, P. J., and STEPHENS, J., concur.

(25 Ga. App. 248)

TOOKE v. STATE. (No. 11294.)

(Court of Appeals of Georgia, Division No. 1  
April 14, 1920.)

(Syllabus by the Court.)

**1. CRIMINAL LAW ¶863(1)—TRIAL JUDGE MAY RECALL JURY AFTER RETIREMENT AND CHARGE ON A DEFENSE OF ALIBI.**

It is insisted that "the evidence in the case justified and demanded a charge of the court on the question of alibi, and in fact the reading of the record will disclose that the main defense relied upon by the defendant in this case was an alibi;" that in his original charge the judge did not refer to this defense, but after the jury had retired to their room they were recalled by the judge and charged on alibi. In a note to this ground of the motion for a new trial, the judge says: "The jury had entered the jury room, the door closed, but immediately [they were] brought back and the charge given of which complaint is made in this first amended ground." It is not claimed that the supplemental charge was given in the absence of the accused or his counsel. In *Davis v. State*, 122 Ga. 564, 50 S. E. 376 (3), it is held: "The judge in a criminal case may recall the jury and deliver further instructions upon the law of the case; and so doing will not be cause for a reversal when the prisoner is present at the time of such instructions, or his absence is not brought about by any act of the court, and when the instructions are legal and pertinent."

**2. CRIMINAL LAW ¶829(18) — REFUSAL TO CHARGE THAT EVIDENCE OF ALIBI MIGHT RAISE REASONABLE DOUBT HELD NOT ERROR IN VIEW OF GENERAL INSTRUCTION.**

"When the court had fairly and correctly charged the doctrine of reasonable doubt as applicable to all the evidence in the case and the statement of the defendant, there was no error in failing to charge the special proposition that

if the evidence offered in support of the defense of alibi, even though insufficient to establish that as a substantive defense, yet, when taken in connection with all the other evidence in the case, raised a reasonable doubt of guilt, the jury should acquit. Especially is this true when no request was made to the court to go instruct the jury. *Shaw v. State*, 102 Ga. 665 [27 S. E. 477]." *Bass v. State*, 1 Ga. App. 728, 57 S. E. 1054. This disposes of the second ground of the amendment to the motion for a new trial.

**3. CRIMINAL LAW ¶561(3)—CHARGE THAT, NOTWITHSTANDING PROOF OF GOOD CHARACTER, JURY MAY CONVICT IF CONVINCED OF GUILT BEYOND REASONABLE DOUBT, NOT ERROR.**

The court did not err in charging the jury as follows: "The defendant has a right, in all criminal trials, to offer testimony, or put in evidence as to his character. Wherever that is done, then that presents an issue to the jury, presents a question of fact to the jury, to determine what kind of character has been shown for the defendant; and I charge you that proof of good character may of itself generate in the minds of the jury a reasonable doubt of the guilt of the accused. While that is true, if the testimony in the case convinces the minds of the jury of the guilt of the accused, beyond all reasonable doubt—if the conviction has been carried to their minds to that extent—then they are authorized to convict, even though they find there is proof of good character shown for the defendant." See *Jackson v. State*, 76 Ga. 552 (9), 562 (8), 569 (9); *Shropshire v. State*, 81 Ga. 591, 8 S. E. 450; *Mills v. State*, 17 Ga. App. 116, 86 S. E. 280 (1).

**4. CRIMINAL LAW ¶921 — RULING THAT THERE HAD BEEN NO ILLEGAL ARREST HELD NOT TO WARRANT NEW TRIAL.**

While the sheriff was on the witness stand and after he had sworn that he had found defendant engaged in operating a still, he was asked by counsel for the accused if he had any warrant for the defendant. The sheriff answered: "I didn't have a warrant for him, I didn't need any." Upon objection by the solicitor general to this evidence as immaterial, the judge asked counsel for the defendant, "What is the purpose of that?" Counsel replied, "To show an illegal arrest." The court then said, "I will rule there was no illegal arrest." So far as the record shows, the attorney for the accused made no further statement. In what is stated above we find no error that would warrant the grant of a new trial, especially in view of the qualifying note of the judge, attached to this ground of the motion for a new trial.

**5. CRIMINAL LAW ¶1170½(1)—WITNESSES ¶302 — WHERE STATE'S WITNESS HAD PLEADED GUILTY AND HAD BEEN SENTENCED, REFUSAL TO CHARGE THAT HE NEED NOT TESTIFY TO INCRIMINATING MATTER WAS NOT ERROR.**

A witness for the state was placed upon the witness stand. Counsel for the accused "requested the court to instruct the witness that he was not compelled to testify in this case to any matter that would incriminate him, or bring reproach upon him." The judge asked the solic-

itor general, "Have you a charge against this defendant?" The solicitor general replied, "There is a charge to which he has entered a plea of guilty and been sentenced." The judge then said, "You can go ahead with the witness then," and refused to instruct the witness as requested. This ruling was not error for any reason alleged. For the state to show that the witness offered by it had pleaded guilty to a criminal charge certainly could not have injured the cause of the accused. This disposes of grounds 5, 6, and 7 of the motion for a new trial.

**6. CRIMINAL LAW §921, 1129(3)—ADMISSION OF IMMATERIAL EVIDENCE NOT GROUND FOR NEW TRIAL UNLESS PREJUDICIAL TO PARTY MOVING TO STRIKE OUT; ASSIGNMENT MUST SPECIFY ERROR.**

A witness for the defendant testified, in answer to a question of the solicitor general: "I have drank some; yes, sir, somewhat habitually." Counsel for the defendant objected to this evidence, and moved to rule it out as "immaterial and irrelevant." "The admission of testimony which is entirely immaterial and irrelevant to the issues being tried furnishes no ground for a new trial, unless the testimony is of such a nature as to prejudice the movant's cause before the jury." *Johnson v. State*, 128 Ga. 71, 57 S. E. 84 (2). We cannot say that this evidence is "manifestly prejudicial," and the assignment of error does not point out "wherein it is harmful." *Brown v. State*, 119 Ga. 572, 46 S. E. 833 (2).

**7. CRIMINAL LAW §1160—APPROVED VERDICT SUPPORTED BY EVIDENCE CANNOT BE DISTURBED.**

There is ample evidence to support the verdict; the trial judge, who saw and heard the witnesses, approved the verdict, and, as no error of law was committed, we are powerless to interfere.

Error from Superior Court, Macon County; Z. A. Littlejohn, Judge.

Lincoln Tooke was convicted of an offense under the liquor laws, and he brings error. Affirmed.

Shipp & Sheppard, of Americus, and J. J. Bull & Son, of Oglethorpe, for plaintiff in error.

Julie Felton, sol. Gen., of Montezuma, for the State.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(25 Ga. App. 240)

**MINSHEW v. STATE.** (No. 11247.)

(Court of Appeals of Georgia, Division No. 1. April 14, 1920.)

(Syllabus by the Court.)

**1. MARRIAGE §30 — MARRYING OFFICIAL'S CRIMINAL RESPONSIBILITY DEFINED.**

An indictment, under section 677 of the Penal Code of 1910, for performing a marriage

ceremony illegally, is fatally defective where it does not charge that the marriage ceremony was performed without a license or publication of banns, as provided by law, or that either of the contracting parties was, within the knowledge of the marrying official, an idiot or lunatic, or subject to some other disability which would render the marriage improper and illegal.

(a) The fact that the license was issued by the ordinary of a county in which the female did not reside, while improper and contrary to law, would not in itself render the marriage illegal; and therefore the knowledge of this fact by the marrying official would not constitute a violation of section 677 of the Penal Code of 1910. A marriage may be legal without any license at all. *Clark v. Cassidy*, 64 Ga. 663(4); *Dale v. State*, 88 Ga. 556, 15 S. E. 287. This being true, it clearly follows that a marriage may be legal, although the license was procured in the wrong county.

**2. DEMURRER TO INDICTMENT.**

Under the above ruling the court erred in overruling the demurrer to the indictment.

Error from Superior Court, Ben Hill County; O. T. Gower, Judge.

J. G. Minshaw was indicted for performing a marriage ceremony illegally, his demurrer to the indictment was overruled, and he brings error. Reversed.

Cutts & Nicholson, of Fitzgerald, for plaintiff in error.

J. B. Wall, Sol. Gen., and Jesse Grantham, both of Fitzgerald, for the State.

BROYLES, C. J. Judgment reversed.

LUKE, J., concurs.

BLOODWORTH, J. (concurring specially). I concur in the judgment of reversal in this case because I think that portion of the demurrer should have been sustained which attacked the indictment on the ground that it did not show where the woman resided at the time the license was issued. It is against the law of this state for a minister (or any official authorized to perform the ceremony) to join in matrimony any man or woman without a license as provided by law. Penal Code 1910, § 677. It is provided in section 2936 of the Civil Code of 1910 that—

"Marriage licenses shall be granted by the ordinaries, or their deputies, \* \* \* where the female to be married resides, if resident in this state, directed to any judge, justice of the peace, or minister of the gospel, authorizing the marriage of the persons therein named." (Italics mine.)

If the license was regularly and legally issued in the county where the woman resided at the time of the issuance thereof, then the minister or official could, without violating the law, perform the ceremony in any county in this state in which the woman might be at

the time of the marriage. But want of authority on the part of the minister or other official performing the ceremony does not affect the validity of the marriage. Civil Code 1910, § 2942.

(25 Ga. App. 250)

JONES v. STATE. (No. 11810.)

(Court of Appeals of Georgia, Division No. 1.  
April 14, 1920.)

(Syllabus by the Court.)

**1. HOMICIDE ¶268 — EVIDENCE HELD TO MAKE DEFENDANT'S IDENTITY A QUESTION FOR THE JURY.**

The defendant was convicted of assault with intent to murder. The motion for a new trial contains only the usual general grounds. In the brief of counsel for the plaintiff in error it is insisted that "there is no satisfactory evidence as to the identity of the defendant as a party who made the assault. \* \* \* In connection with this evidence, the testimony shows undoubtedly that the defendant was not the man, because 30 minutes after the alleged assault he was at work at the very place where the assault was made. \* \* \* Take this evidence in connection with the evidence offered by the defendant tending to show an alibi, and it must be conceded that there is no substantial or satisfactory evidence showing beyond a reasonable doubt that the defendant was the man who committed the assault." The question of the identity of the defendant was one to be settled by the jury under the evidence. The person who was assaulted testified: "I know he is the negro." The assault happened "about five minutes after 12 o'clock." At the place where the person assaulted was found, there was "about a hatful of blood." The accused was arrested "a little after 1 o'clock," and "there was fresh blood on his shirt." The officer who arrested the accused testified: The defendant "told me that he did this. I did not threaten him."

"Under the facts as disclosed by the record, this court cannot say that the verdict of the jury is without support from the testimony, or so far contrary to it as to authorize this court to determine that the trial judge abused his discretion in refusing to grant a new trial. The law allows him to refuse or grant new trials in the exercise of a legal discretion, but it does not give this court any discretion in the matter. It can only grant new trials when errors of law have been committed, or when the trial judge has abused his discretion in refusing a new trial." *Smith v. State*, 91 Ga. 188, 17 S. E. 68. See, also, *Bradham v. State*, 21 Ga. App. 510, 94 S. E. 618, and citations.

Error from Superior Court, Fulton County; Jno. D. Humphries, Judge.

Judson Jones was convicted of assault with intent to murder, his motion for a new trial was denied, and he brings error. Affirmed.

Fred E. Harrison and B. H. & Harvey Hill, all of Atlanta, for plaintiff in error.

John A. Boykin, Sol. Gen., and E. A. Stephens, both of Atlanta, for the State.

BLOODWORTH, J. Judgment affirmed.

BROYLES, O. J., and LUKE, J., concur.

(25 Ga. App. 194)

SPAULDING v. STATE. (No. 11288.)

(Court of Appeals of Georgia, Division No. 1.  
April 13, 1920.)

(Syllabus by the Court.)

**1. CRIMINAL LAW ¶915, 1050—INDICTMENT AND INFORMATION ¶162—ALLOWANCE OF AMENDMENT TO ACCUSATION BEFORE PLEADING TO THE MERITS SHOULD BE PRESERVED BY EXCEPTIONS PENDENTE LITE; SOLICITOR OF CITY COURT CAN AMEND ACCUSATION BEFORE A PLEA TO THE MERITS.**

The allowance by the court, over the objections of the defendant, and before the defendant had pleaded to the merits of the case, of an amendment to the accusation, cannot be made a ground of a motion for a new trial. The exception should have been preserved and brought up by exceptions pendente lite. However, there is no merit in such an assignment of error, as the solicitor of a city court can at any time, before the defendant has pleaded to the merits, amend the accusation in any particular, provided the affidavit upon which it is based will support the accusation as amended, and provided, further, that such amendment is not forbidden by the act creating the court or by any act amendatory thereof. *Bishop v. State*, 22 Ga. App. 784, 97 S. E. 251, and citations.

**2. CHARGE OF COURT.**

The excerpt from the charge of the court as complained of in the fifth special ground of the motion for a new trial is not erroneous for any reason assigned.

**3. ANIMALS ¶45—"MAIM" IMPLIES PERMANENT INJURY, DEPRIVING ANIMAL OF OR RENDERING USELESS SOME USEFUL ORGAN OR MEMBER.**

The word "maim," as used in section 752 of the Penal Code of 1910, implies the infliction of some injury which deprives the animal of, or renders useless or partially useless, some useful organ or member, an organ or member useful to its own locomotion or defense, or useful to its owner in the way in which the animal was employed. And such injury must be permanent. *Bailey v. State*, 65 Ga. 410; *Patton v. State*, 93 Ga. 111, 116, 19 S. E. 784, 24 L. R. A. 782; *Brown v. State*, 127 Ga. 287, 56 S. E. 405. See, also, in this connection, *Black's Law Dict.* p. 741; 3 *Words and Phrases*, Second Series, 208; 2 *Bouvier's Law Dict.* (Rawle's 3d Rev.) 2063. Under this ruling the charge of the court, as complained of in the sixth special ground of the motion for a new trial, was error.

[Ed. Note.—For other definitions, see *Words and Phrases*, First and Second Series, *Maim*.]

**4. CRIMINAL LAW §938(1)—DENIAL OF MOTION BASED ON NEWLY DISCOVERED EVIDENCE HELD ERROR.**

Under the particular facts of the case, the court erred in overruling the special ground of the motion for a new trial which was based upon alleged newly discovered evidence. This evidence is not merely cumulative and impeaching in its character, and is of such a character that it would probably cause a different verdict upon another trial.

**5. MOTION FOR NEW TRIAL.**

The court erred in overruling the motion for a new trial.

Error from City Court of Brunswick; D. W. Krauss, Judge.

Paul Spaulding was convicted of maiming an animal, his motion for new trial was overruled, and he brings error. Reversed.

J. T. Colson, of Brunswick, for plaintiff in error.

F. M. Scarlett, Jr., Sol., of Brunswick, for the State.

BROYLES, C. J. Judgment reversed.

LUKE and BLOODWORTH, JJ., concur.

(25 Ga. App. 108)

**GRUBBS v. ELROD. (No. 10755.)**

(Court of Appeals of Georgia, Division No. 2. April 7, 1920.)

*(Syllabus by the Court.)*

**1. PHYSICIANS AND SURGEONS §14(1)—FAILURE TO EXERCISE REASONABLE CARE AND SKILL IN OPERATION ACTIONABLE.**

Even though a physician or surgeon may be skilled in his profession, he is nevertheless under a duty to exercise reasonable care and skill in the performance of an operation, and his failure to do so is a tort for which a recovery may be had. *Akridge v. Noble*, 114 Ga. 949, 41 S. E. 78; *Hinkle v. Smith*, 12 Ga. App. 496, 77 S. E. 650.

**2. SUFFICIENCY OF PETITION.**

The petition set out a cause of action, and the general and special demurrers thereto were properly overruled.

Error from City Court of Americus; W. M. Harper, Judge.

Action by Blanche Elrod, by next friend, against L. F. Grubbs. Demurrers to petition overruled, and judgment for plaintiff, and defendant brings error. Affirmed.

Shipp & Sheppard, of Americus, for plaintiff in error.

Maynard & Williams, of Americus, and T. T. James, of Lumpkin, for defendant in error.

STEPHENS, J. Judgment affirmed.

JENKINS, P. J., and SMITH, J., concur.

(25 Ga. App. 226)

**STANFIELD et al. v. McCONNON & CO. (No. 11089.)**

(Court of Appeals of Georgia, Division No. 1. April 14, 1920.)

*(Syllabus by the Court.)*

**1. GUARANTY §82(3)—PRINCIPAL AND SURETY §6, 152—LIABILITY IS THE SAME WHERE TWO SIGN AS SURETIES AND TWO AS GUARANTORS; GUARANTOR CANNOT BE SUED JOINTLY WITH PRINCIPAL; SURETY MAY BE SUED SEPARATELY FROM PRINCIPAL.**

The demurrers to the petition as amended were properly overruled.

(a) "A surety may be sued separately from his principal (Civil Code 1910, § 3559), and it is immaterial, under the facts of this case, whether the defendant in the lower court be treated as a guarantor or as a surety."

(b) Where four persons sign an agreement, it can make no difference as to their liability that two of them sign as "sureties" and two as "guarantors." It is not what they call themselves in signing the paper, but what the agreement and the facts make them, that fixes their legal liability.

(c) A surety can be sued without joining his principal, and a guarantor cannot be sued jointly with the principal debtor.

**2. TRIAL §143—CONFLICTS IN TESTIMONY DO NOT NECESSARILY RENDER DIRECTED VERDICT ERRONEOUS.**

The court did not err in directing a verdict for the plaintiff.

*(Additional Syllabus by Editorial Staff.)*

**3. COURTS §488(1)—TRANSFER BY SUPREME COURT TO COURT OF APPEALS ELIMINATES CONSTITUTIONAL QUESTION.**

Where a constitutional question was sought to be raised and the case was for that reason originally transmitted to the Supreme Court, its order that the case be transferred to the Court of Appeals eliminates the constitutional question.

Error from Superior Court, Chattooga County; Moses Wright, Judge.

Action by McConnon & Co. against L. B. Stanfield and others. Judgment for plaintiff upon a directed verdict, and defendants bring error. Affirmed.

On March 31, 1915, a contract was entered into in which McConnon & Co. agreed to sell to George W. Parker certain "medicines, extracts and other articles manufactured by it." Attached to the contract was the following agreement:

"In consideration of the sum of one dollar to us severally in hand paid by McConnon & Company, the receipt whereof is hereby acknowledged, and the execution of the within agreement by said company, and the sale and delivery by it to the party of the second part, of its medicines and other articles, we, the undersigned, securities, do hereby jointly and severally promise and guarantee the full and com-



plete payment of said medicines, extracts and other articles, at the time and place and in the manner as in said agreement provided.

"L. B. Stanfield, [Seal.]

"M. A. Kellett, [Seal.]

"[Guarantors sign in ink on above lines.]

"L. M. Murphey. [Seal.]

"[Surety sign here.]

"D. P. Henley. [Seal.]

"[Surety sign here.]"

Plaintiff sued Stanfield, Kellett, Murphey, and Henley, alleging in part:

"Petitioner shows that heretofore, to wit, on the 31st day of March, 1915, your petitioner entered into a contract with one George W. Parker, then a resident of said state and county, under which your petitioner undertook to sell to the said Parker certain wares, goods, and merchandise, which the said Parker agreed to pay for in accordance with the terms of said contract, a copy of said contract being hereto attached, marked 'Exhibit A,' and made a part of this petition. Petitioner shows that the defendants hereinbefore named thereupon executed to your petitioner a contract of guaranty or securityship, guaranteeing to your petitioner the payment for all goods, wares, and merchandise sold to said Parker under said contract. A copy of said contract of guaranty or securityship being hereto attached, marked 'Exhibit B,' and made a part of this petition. Your petitioner shows that, acting upon said contract with said Parker and upon said guaranty and securityship of said defendants herein, your petitioner sold and delivered to said Parker goods, wares, and merchandise in the sum of \$202.63; that the said Parker has paid thereon the sum of \$18, leaving a balance due your petitioner in the sum of \$184.63, which said Parker fails and refuses to pay, and for which said amount said defendants are indebted to your petitioner under their said contract by reason of the default of the said Parker to pay said amount, a copy of said account being hereto attached, marked 'Exhibit C,' and made a part of this petition. Petitioner shows that it has fully complied with the terms of said contract with the said George W. Parker, and also with the defendants in this case; that it has made demand for the payment of said amount; but that said amount remains due and unpaid. Petitioner shows that it is thought that said Parker is not now a resident of said state and county and his whereabouts are unknown to your petitioner, though your petitioner is advised and believes that he is now a nonresident of the state of Georgia and without the jurisdiction of this court."

Demurrers both general and special were filed to the petition. After the petition had been amended to meet one of the special demurrers, the demurrers were overruled and the case proceeded to trial. Plaintiff tendered in evidence certain interrogatories executed in the state of Minnesota. To the reading of these interrogatories to the jury the defendants filed written objections, and also "orally objected to the introduction of said depositions, upon the following constitutional grounds: That the introduction of the same would contravene and deprive defendants of

their rights under Civ. Code 1895, sections 5699, 5700, 5701, and upon the general ground that the act providing for the taking of such depositions out of the state by notary public upon the mere notice to be present at the place in a foreign state and upon the day mentioned is contrary to public policy." These objections were overruled. When all the evidence was in, the court directed a verdict for the plaintiff. The defendants' exceptions.

Wesley Shropshire, of Summerville, for plaintiffs in error.

Jno. D. & E. S. Taylor, of Summerville, and Denny & Wright, of Rome, for defendant in error.

BLOODWORTH, J. (after stating the facts as above). [3] Because of the constitutional question sought to be raised, this case was originally transmitted to the Supreme Court. That court ordered that the case be transferred to this court. This eliminates the constitutional question and leaves for us the determination of two questions only.

[1] 1. Were the demurrers to the petition properly overruled? Yes. Only three points raised by the demurrers require consideration. The other grounds are all covered by these three, except what is set up in the amendment to the demurrer, and that embraces matter for plea and not for demurrer.

(a) The demurrer to the fourth paragraph of the petition alleges that "said paragraph falls to distinctly set forth whether the contract is one of guaranty or suretyship, but alleges that it is one or the other," and the "plaintiff should declare in his petition distinctly whether the said contract is one of guaranty or one of surety. It cannot be both." Suit was not brought against Parker, the party who signed the original contract, and who purchased the goods for which payment is being sought, but against those only who signed the agreement copied in the foregoing statement of facts. The question to be determined is whether the plaintiff is entitled to recover against the defendants upon the cause of action set forth in the petition. Under the facts of this case, it can make no difference whether those who signed the agreement be treated as guarantors or sureties.

"A surety may be sued separately from his principal (Civil Code, § 3559), and it is immaterial, under the facts of this case, whether the defendant in the lower court be treated as a guarantor or as a surety. *Small Co. v. Claxton*, 1 Ga. App. 83 (2) (57 S. E. 977)." *Amos v. Continental Trust Co.*, 22 Ga. App. 343, 95 S. E. 1025 (2).

In *Small v. Claxton*, supra, Chief Judge Hill said:

"Considering these excerpts from the opinions of these two able jurists, we are led to the con-

clusion, that while there is a distinction between these two classes of contracts, it is a distinction without a very substantial difference, in so far as liability is concerned. It makes no sort of difference whether the consideration of the contract is a benefit flowing to the maker, to the third party for whose benefit the contract was made, or results in an injury to the promisee. In either event the substance of the contract is the same, and the maker thereof undertakes to pay the debt if it is not paid by the party for whose benefit the contract was made, whether it be a guaranty or a suretyship. The contract in this case, following the distinctions above given, seems to combine some of the elements of suretyship and some of guaranty. It is entirely separate from the obligation of the principal debtors who bought the goods from the plaintiff, but it was made for a consideration flowing, not to the maker, but to the parties for whose benefit the contract was made. It is perfectly clear that the maker would be bound in either case, if the other allegations in the petition of the plaintiff are proved. *Sims v. Clark*, 91 Ga. 302 [18 S. E. 158]. We have little sympathy with artificial distinctions between principles of law which present no substantial difference as to matters of right and justice, which tend to confuse rather than to enlighten, and to furnish loopholes for technical escapes from contract obligations. The important question in the case now under consideration is whether the writing is a valid written obligation, it being wholly immaterial, in determining this question, whether the maker of the obligation is bound as surety or guarantor."

See, also, *Johnson v. Georgia Fertilizer & Oil Co.*, 21 Ga. App. 530, 94 S. E. 850 (3).

(b) It is further urged by demurrer that two of those who signed the agreement signed as "sureties" and two as "guarantors," and that in no event can they be sued jointly. It can make no difference in their liability that two of them designated themselves as "sureties" and two as "guarantors." It is not what they call themselves in signing the contract, but what the agreement and the facts make them, that fixes their liability. See, in this connection, *Callaway v. Harrold Johnson & Co.*, 61 Ga. 112 (2). In this case all four of the defendants signed the same agreement, and all are liable alike whether it be as surety or guarantor.

(c) The seventh ground of the demurrer is as follows:

"The contract as sued upon shows upon its face that plaintiff cannot recover of defendants without first securing a judgment and ascertaining as against said Parker what amount is due, and without first exhausting the principal, the said Parker."

There is no merit in this contention. If the defendants are sureties, it is well settled that a surety can be sued without joining the principal. See Civil Code 1910, §§ 3553, 3559; *Johnson v. Georgia Fertilizer & Oil Co.*, supra, and citations. If they are guarantors, it is fully as well settled that they cannot be sued jointly with the principal debtor,

*Sims & Achmuty v. Clark & Co.*, 91 Ga. 302, 18 S. E. 158 (1); *Holmes v. Schwab & Sons*, 141 Ga. 44, 80 S. E. 813 (3); *Ga. Casualty Co. v. Dixie Trust & Security Co.*, 23 Ga. App. 447, 98 S. E. 414 (2); that "it is not necessary that the creditor should obtain a judgment against the original debtor before suit against a guarantor," *Kalmon v. Scarborough*, 11 Ga. App. 547 (3), 552, 75 S. E. 846 (3), 848; and that the solvency or insolvency of the original undertakers in such a suit is not material, *Penn Tobacco Co. v. Leman & Co.*, 109 Ga. 428, 34 S. E. 679 (2).

[2] 2. Did the court err in directing a verdict for the plaintiff? This question we must answer in the negative.

"The mere fact that there are conflicts in the testimony does not render the direction of a verdict in favor of a party erroneous, when it appears that the conflicts are immaterial, and that, giving to the opposite party the benefit of the most favorable view of the evidence as a whole and of all legitimate inferences therefrom, the verdict against him is demanded." *Dorris v. Farmers' & Merchants' Bank*, 22 Ga. App. 514 (5), 518 (5), 96 S. E. 450 (5), 452, and cit.

Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(25 Ga. App. 84)

DIXON v. HYDE. (No. 10759.)

(Court of Appeals of Georgia, Division No. 2.  
March 18, 1920. Rehearing Denied April 7, 1920.)

(Syllabus by the Court.)

COURTS  $\S$  188(3)—CITY COURT OF SAVANNAH HAS NO JURISDICTION OF AN ACCOUNTING BETWEEN PARTNERS.

On the 4th day of June, 1917, James M. Dixon, W. C. Peebles, and E. A. Hyde entered into a general copartnership under a written agreement. The business to be conducted was wholesale and retail dealers in lumber. Dixon furnished the capital, and he was to receive 7 per cent. interest on all capital furnished by him in cash, and then the net profits were to be divided, one-half to Dixon, one-fourth to Peebles, and one-fourth to Hyde. The partnership was to commence on May 1, 1917, and continue only so long as it was agreeable to all parties, with the right to be terminated by any party upon 24 hours' notice. In the event of dissolution, Dixon was to have the option of buying the interest of Peebles and Hyde, either or both, at their book value. If he refused to do this, Peebles and Hyde, either or both, would have the same option of purchasing Dixon's interest. If this value could not be agreed upon, the matter was to be referred to statutory arbitration. Peebles voluntarily withdrew from the partnership in September, 1917. Hyde and Dixon continued the business until

the 11th day of February, 1918, without any agreement. On that date they executed an agreement adopting the original copartnership agreement, with the modification that Dixon was to receive 60 per cent. of the net profits and Hyde 40 per cent. of the net profits. On February 14, 1919, Hyde withdrew, and thereafter brought suit against Dixon, seeking to recover his share of the net profits between September, 1917, and February 11, 1918, and also the book value of his interest from the latter date up to the time that he withdrew from the partnership. The petition set out the contract and all of the above facts fully, and alleged a certain amount as the book value of the interest of Hyde, and also a fixed amount as his share of the net profits for the period of time between the withdrawal of Peeples and the agreement between Dixon and Hyde. To this petition both general and special demurrers were filed; the general demurrer insisting that the city court of Savannah did not have jurisdiction of the subject-matter of the suit, because it involved an accounting between partners. *Held*, upon a careful review of the petition as amended, it is apparent that this contention is well taken, and the court erred in overruling the general demurrer. See *Paulk v. Creech*, 8 Ga. App. 738(5), 742, 70 S. E. 145, and citations. This ruling renders it unnecessary to pass upon the questions raised by the special demurrers.

Error from City Court of Savannah; Davis Freeman, Judge.

Suit by E. A. Hyde against J. M. Dixon. General demurrer to petition overruled, and defendant brings error. Reversed.

Osborne, Lawrence & Abrahams, of Savannah, for plaintiff in error.

Hitch & Denmark, of Savannah, for defendant in error.

SMITH, J. Judgment reversed.

JENKINS, P. J., and STEPHENS, J., concur.

(25 Ga. App. 244)

HUMPHREY v. STATE. (No. 11277.)

(Court of Appeals of Georgia, Division No. 1 April 14, 1920.)

(Syllabus by the Court.)

CRIMINAL LAW §935(2) — CONVICTION FOR POSSESSING LIQUOR ON PROOF NOT CONNECTING DEFENDANT WITH OFFENSE WAS CONTRARY TO THE EVIDENCE.

The indictment in this case charged that on the 16th day of February, 1919, the accused "did have and control and possess spirituous, vinous, malted, fermented, and intoxicating liquors and prohibited liquors and beverages." The evidence for the state showed that, in the absence of the accused, the sheriff and another searched the dwelling and found no whisky therein, but they "found about one quart in a quart bottle in his corner." It was covered up

under the corn." They also "found a gallon jug, in the hogpen near the house, nearly full. It was covered with a little pine straw and pine tops." It was described as "a brown jug with a rope tied in the handle." This was on Sunday, February 16, 1919. The evidence for the defendant showed that he and his wife went visiting on Saturday, the 15th, and left a negro named John Williams, who had lived with him most of the year, in charge of his crib to feed his hogs and other stock Saturday night and Sunday morning. Two witnesses swore that they saw John Williams on Sunday morning, the 16th, with a brown jug with a handle and a rope tied in the handle, and the jug had whisky in it, and John Williams carried the jug of whisky towards the residence of the accused. Another witness swore that he went to the home of the accused late Saturday afternoon, and there was no one there except John Williams, who was "in the crib shucking corn and fixing to feed the mule and hogs. He had a quart bottle there in the crib, with some whisky in it. \* \* \* He sorter had it covered up with corn." In his statement the defendant said, in part: "Me and my family went off visiting on Saturday evening before, and I got back just as the sheriff and Mr. Ury were leaving. It was not my liquor they found. I didn't have any. I didn't know there was any on the place. I left a negro named John Williams in charge of everything to feed my hogs and stock."

The only circumstance connecting the defendant with the whisky is the fact that it was found upon his premises. Under the evidence in this case it is more reasonable to believe that the whisky belonged to John Williams than to the accused. "Where all the evidence in the case wholly fails to connect the defendant with the commission of the offense charged, but, on the contrary, presents reasonable hypotheses of his innocence, a verdict of guilty is without evidence to support it, and therefore contrary to law, and such verdict, on motion for a new trial, should be set aside on this general ground." *Johnson v. State*, 1 Ga. App. 129, 57 S. E. 934(2). The testimony in this case being entirely circumstantial, and the facts proved being consistent with the innocence of the defendant, and failing to connect him with the perpetration of the crime charged, the verdict was contrary to evidence; the court therefore erred in overruling the motion for a new trial. *Bailey v. State*, 104 Ga. 530, 30 S. E. 817. See, also, *Newman v. State*, 26 Ga. 633.

Error from Superior Court, Glascock County; B. F. Walker, Judge.

Hugh Humphrey was convicted of having and possessing intoxicating liquors, his motion for new trial was denied, and he brings error. Reversed.

J. C. Newsome, of Sandersville, for plaintiff in error.

R. O. Norman, Sol. Gen., of Washington, Ga., for the State.

BLOODWORTH, J. Judgment reversed.

BROYLES, C. J., and LUKE, J., concur.

(25 Ga. App. 230)

**GAINESVILLE GROCERY CO. v. BANK OF DAHLONEGA.** (No. 11108.)(Court of Appeals of Georgia, Division No. 1.  
April 14, 1920.)*(Syllabus by the Court.)***GARNISHMENT**  $\S$ 141 — **TIME**  $\S$ 9(3)—**GARNISHEE'S TIME FOR ANSWERING STATED; "UNTIL THE FIRST DAY."**

In the superior court the garnishee in all cases has until the first day of the second term after the service of the summons of garnishment in which to answer. The words "until the first day" include all of that day.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Until.]

Error from Superior Court, Lumpkin County; J. B. Jones, Judge.

Action by the Gainesville Grocery Company against J. W. Lunsford and the Bank of Dahlonega, garnishee. An order was entered refusing to strike garnishee's answer, plaintiff's motion for judgment against the garnishee was overruled, and plaintiff brings error. Affirmed.

W. S. Gaillard, of Dahlonega, for plaintiff in error.

O. J. Lilly, of Gainesville, for defendant in error.

**BLOODWORTH, J.** On January 29, 1919, an attachment was issued in favor of the Gainesville Grocery Company against J. W. Lunsford, and made returnable to the April term of court. On February 6 summons of garnishment was served upon the Bank of Dahlonega, directing the bank to answer at the April term of court, which was the appearance term of the attachment case; the trial term being the October term. The attachment case was entered on the docket, but in this entry there was no reference to the garnishment, and there was no separate entry of the garnishment case. A declaration in the garnishment case was filed. On the first day of the October term of the court, the attachment case was reached in its order on the call of the issue docket, and verdict and judgment were rendered against the defendant. Thereupon the attorney for the plaintiff presented to the court for his signature a judgment against the garnishee. Upon an examination of the docket, the judge discovered that the garnishment case was not on it, and thereupon entered it himself on the docket. When the judge inquired whether any one represented the bank, an attorney said that he did and asked for a short time in which to investigate. Time was allowed him, over the objection of counsel for plaintiff. During the day an answer was filed by the bank. On the next day a written motion was made by the plaintiff

to strike the answer of the bank, one of the grounds of which was that it was "not sworn to properly," and the substance of the other grounds was that the answer was filed too late. After argument the judge passed the following order:

"The within motion is overruled and disallowed for the following reasons: On the first day, of the October term, 1919, of this court, and immediately after a verdict and judgment against Lunsford in favor of plaintiff had been rendered, plaintiff's counsel presented to the court a prepared judgment against the defendant in garnishment (the bank), and, examining the docket, no such case appeared, and, calling attention to that fact, counsel for the bank asked for a short time to investigate the matter. The case was then entered on the court docket, after which, and during said first day of said term, the defendant in garnishment presented its answer as appears."

To this order, and also to the refusal of the judge to grant plaintiff's original and oral motion to enter judgment against the garnishee, the plaintiff excepted.

The court did not err in these rulings, for "in the superior court, under Civil Code, §§ 4551, 4709 [§§ 5097, 5289 of the Civil Code of 1910], the garnishee in all cases has until the first day of the second term after the service of the summons of garnishment in which to answer." *Averback v. Spivey*, 122 Ga. 18, 49 S. E. 748 (2). See, also, *Sanders v. Miller*, 60 Ga. 554 (1); *Liverpool, etc., Insurance Co. v. Savannah Grocery Co.*, 97 Ga. 746, 747, 25 S. E. 828; *Jarrell v. Guann*, 105 Ga. 141, 31 S. E. 149. Section 5097 of the Civil Code of 1910 is as follows:

"When any person summoned as garnishee fails to appear in obedience to the summons, and answer at the first term of the court at which he is required to appear, the case shall stand continued *until the next term of the court*; and if he should fail to appear and *answer by said next term*, the plaintiff may, on motion, have judgment against him for the amount of the judgment he may have obtained against the defendant in attachment, or so much thereof as shall remain unpaid at the time the judgment is rendered against the garnishee; and the court may continue the case until final judgment is rendered against the defendant in attachment." (Italics ours.)

In *Rogers v. Cherokee Iron, etc., Co.*, 70 Ga. 717 (1), it was held:

"Where, in a motion for new trial, the movant is allowed until a certain day, time or term to prepare and file the motion and approved brief of evidence, the word 'until' includes such day, term or time, and if proper action be taken at that time, it is in season. [*Board of Commissioners of Glynn County Academy v. Dart*] 67 Ga. 765."

In *Atlanta Journal v. Brunswick Publishing Co.*, 111 Ga. 722, 36 S. E. 929, Justice Little said:

"It is likewise true that the rights of the diligent creditor require a prompt compliance with the law on the part of the garnishee. It has, however, been repeatedly ruled by this court that circumstances may arise in which the garnishee ought not to have judgment rendered against him for failure to answer at the exact time required. Garnishment is but a substitute for a proceeding in equity."

See *Russell v. Freedman's Saving Bank*, of Macon, 50 Ga. 576.

The above rulings cover all that is insisted upon in the brief of plaintiff in error.

Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(25 Ga. App. 8)

WOODALL v. STATE. (No. 11161.)

(Court of Appeals of Georgia, Division No. 1.  
March 2, 1920. On Motion for Rehearing,  
April 13, 1920.)

(*Syllabus by the Court.*)

**1. CRIMINAL LAW §576(11) — DEMAND FOR TRIAL NOT CAUSE FOR DISCHARGE UNLESS QUALIFIED JURY IMPANELED FOR TERM.**

At the September adjourned term, 1918, the accused filed a demand for trial, which was allowed by the court and entered on the minutes. At the next June term his counsel filed a motion in which he alleged the filing of the demand, and that he had been present in court and ready for trial at every term since the demand was allowed, and he prayed the court "for a direction of a verdict of not guilty." Treating this as a motion for discharge under the demand, it was properly overruled. Neither the motion nor the evidence introduced on the trial thereof show that at the term when the demand was allowed and at the next succeeding term there were jurors impaneled and qualified to try the accused. "Demand for trial is not cause for discharge, unless at the term when the demand was made and at the next succeeding term, there were juries impaneled and qualified to try the prisoner. That there were such juries at both terms must appear to the Supreme Court affirmatively, in order for it to reverse a judgment of the superior court denying discharge." *Roebuck v. State*, 57 Ga. 154 (1, 2). See, also, *Pen. Code* 1910, § 963; *Adams v. State*, 65 Ga. 516, 517(1); *Hunley v. State*, 105 Ga. 688, 31 S. E. 543.

**2. OMISSION TO CHARGE ON CIRCUMSTANTIAL EVIDENCE.**

Under the facts of this case, and in view of the charge given, the court did not err in failing to charge on circumstantial evidence.

**3. CRIMINAL LAW §918(10, 11) — PREJUDICIAL REMARKS OF COURT NOT GROUND FOR NEW TRIAL UNLESS MOTION FOR MISTRIAL REFUSED.**

The sixth ground of the motion for a new trial alleges that the use of certain words by the court in the presence of the jury during the progress of the case was harmful error and prejudicial to the movant. No motion to de-

clare a mistrial was made on account of the alleged prejudicial remark. "Prejudicial remarks of the court in the presence and hearing of the jury are not ground for a new trial, unless a motion to declare a mistrial on that ground has been made and refused." *Harrison v. State*, 20 Ga. App. 157(6), 160(6), 92 S. E. 970, 971.

**4. CRIMINAL LAW §1160 — APPROVED VERDICT SUPPORTED BY EVIDENCE WILL NOT BE DISTURBED.**

There is evidence to support the finding of the jury, which was approved by the trial judge, and the verdict will not be disturbed by this court.

On Motion for Rehearing.

(*Additional Syllabus by Editorial Staff.*)

**5. CRIMINAL LAW §1028 — ONLY QUESTIONS PASSED UPON BELOW CAN BE REVIEWED.**

A question, neither raised nor passed upon in the lower court, cannot be considered by a reviewing court.

**6. CRIMINAL LAW §1129(3) — ASSIGNMENT OF ERROR TO REFUSAL TO DISCHARGE DEFENDANT HELD INCOMPLETE.**

An assignment of error to a refusal to discharge defendant under his demand for trial was incomplete, where, though alleging that at September term at which the demand was entered and at the December term "juries were present and qualified to try said defendant," it did not show that there was a jury present qualified to try the case when the demand was made, or that case was not continued by consent or that failure to try was not due to a voluntary act of accused.

**7. CRIMINAL LAW §576(5) — DEMAND FOR TRIAL WAIVED BY CONTINUANCE GRANTED.**

A waiver of a demand for a trial would result from a continuance granted on the motion of the accused, or from any other act on his part affirmatively showing that he consented to passing the case until a subsequent term.

Error from Superior Court, De Kalb County; John B. Hutcheson, Judge.

Otis Woodall was prosecuted for an offense, and from the judgment he brings error. Affirmed.

Paul L. Lindsay, of Atlanta, for plaintiff in error.

Geo. M. Napier, Sol. Gen., of Decatur, for the State.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

On Motion for Rehearing.

BLOODWORTH, J. In the motion for rehearing filed in this case, it is alleged that this court overlooked certain recitals in the bill of exceptions and certain decisions of this court and of the Supreme Court. Neither the recitals nor the decisions were overlooked. This court can review such questions only as the record shows were made and passed upon by the trial court. In this case

the record shows that a written application was made for the direction of a verdict of not guilty. The court had no right to direct a verdict of not guilty even though everything had been done necessary to the discharge of the defendant under his demand for trial. This court treated the application as one for a discharge of the defendant. The trial judge passed upon the motion as made and the evidence introduced thereon, and, as said in the original opinion—

"Neither the motion nor the evidence introduced on the trial thereof showed that at the term when the demand was allowed and at the next succeeding term there were juries impaneled and qualified to try the accused."

[5] The proposition urged in the motion for a rehearing was not presented to the trial judge, but appears for the first time in the bill of exceptions, and the principle is settled that a question neither raised nor passed upon in the lower court cannot be considered by a reviewing court. *Mewborn v. Weitzer*, 15 Ga. App. 668, 84 S. E. 141 (2); *Continental Aid Association v. Hand*, 22 Ga. App. 726, 97 S. E. 206, and cases cited; *Patterson v. Bank of Alapaha*, 148 Ga. 356, 357, 96 S. E. 863; *Bolton v. City of Newnan*, 147 Ga. 400, 94 S. E. 236.

[6, 7] In addition to the above the assignment of error in the bill of exceptions is incomplete. While it is alleged that at the September and December terms, 1918, "juries were present and qualified to try said defendant, and defendant was not given a trial," it does not appear that there was a jury present and qualified to try the case when the demand was made. *Hall v. State*, 21 Ga. 148 (2). Nor does it appear that the case was not continued by the consent, or the failure to try was not due to some voluntary act of the accused. "A waiver of the demand would result from a continuance granted on the motion of the accused, or from any other act on his part showing affirmatively that he consented to passing the case until a subsequent term." *Walker v. State*, 89 Ga. 482, 15 S. E. 553. See, also, *Flagg v. State*, 11 Ga. App. 37 (1), 38 (1, 2), 74 S. E. 562, and cases cited.

Rehearing denied.

BROYLES, C. J., and LUKE, J., concur.

(25 Ga. App. 237)

OLARK v. STATE. (No. 11229.)

(Court of Appeals of Georgia, Division No. 1.  
April 14, 1920.)

(Syllabus by the Court.)

1. INDICTMENT AND INFORMATION  $\S$  87(5)—  
TIME  $\S$  15—MONTH IS UNDERSTOOD TO BE  
OF THE CURRENT YEAR.

"Ordinarily, when a month is referred to, it will be understood to be of the current year,

unless from the connection it appear that another is intended."

2. CRIMINAL LAW  $\S$  1172(6)—INSTRUCTION AS TO TIME OF OFFENSE HELD HARMLESS.

There was no harmful error in the charge of which complaint is made.

3. INTOXICATING LIQUORS  $\S$  236(19)—EVIDENCE HELD TO SUSTAIN CONVICTION FOR UNLAWFUL MANUFACTURING.

There was evidence to support the verdict.

Error from Superior Court, Tattnall County; W. W. Sheppard, Judge.

Charlie Clark was convicted of unlawfully distilling and manufacturing intoxicating liquors, and he brings error. Affirmed.

An indictment was returned on July 10, 1919, which charged that on the 7th day of June, 1919, the accused "did unlawfully distill, manufacture, and make alcoholic, spirituous, vinous, malt, and mixed liquors and whiskeys, which, if drunk to excess, would produce intoxication." The accused was tried on the 15th day of July, 1919. The sheriff testified:

"I know the defendant, Charlie Clark. I recently arrested him at his home in Tattnall county. It was on Sunday I arrested him, in the afternoon. I saw a still right there on the place—as to how long ago I was at the home of Charlie Clark and arrested him, it was something right about the 1st of June, about the 6th or 7th, somewhere along there."

Wallace Clark, son of the defendant, testified:

"I know Charlie Clark. He is my father. I know about his having a whisky still there on his place. He had it on the edge of the branch there. I seen him operating that still. \* \* \* He was making whisky. \* \* \* I seen him making that whisky five or six times. I helped him make it. \* \* \* As to how long it was that my father was making whisky down there, it was about a week after he come home from the farm, Perry Jenkins' farm. As to whether that has been four or five months, he come home since the middle of March. It was since then that I seen him making the whisky."

The defendant was convicted and filed a motion for a new trial, the grounds of which, besides the usual general grounds, were as follows:

"Because the evidence in said case fails to show that the offense charged was committed since the passage of the act of March 28, 1917, under which the indictment was found, as shown in the charge of the court. Because the evidence fails to disclose that said offense was committed within the statute of limitations, and that it is not barred by the same. Because the court erred in charging the jury that if they found that the defendant had committed said offense 'at any time after the 28th of March, 1917,' they would be authorized to convict, when said charge should have limited the same to a date prior to the date of the indictment."

$\S$  For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

E. C. Collins, of Reidsville, for plaintiff in error.

J. Saxton Daniel, Sol. Gen., of Claxton, for the State.

**BLOODWORTH, J.** (after stating the facts as above). [1] 1. "Ordinarily, when a month is referred to, it will be understood to be of the current year, unless from the connection it appear that another is intended." *Tipton v. State*, 119 Ga. 304, 46 S. E. 436 (2). See, also, *Plair v. State*, 23 Ga. App. 574, 99 S. E. 61, and cit.

[2] 2. All the evidence showing that the offense was committed some time during the year 1919 and prior to the finding of the indictment, it was not error harmful to the accused for the judge to charge the jury that they would be authorized to convict the defendant if they found that the offense was committed at any time after the 28th of March, 1917 (Laws 1917, p. 7). See *Plair v. State*, supra, and cit.

[3] 3. There was sufficient evidence to support the verdict, and the court properly overruled the motion for a new trial.

Judgment affirmed.

**BROYLES, C. J., and LUKE, J., concur.**

(25 Ga. App. 170)

**DANZLEY v. STATE.** (No. 11027.)

(Court of Appeals of Georgia, Division No. 1.  
April 13, 1920.)

*(Syllabus by the Court.)*

1. **CRIMINAL LAW** §594(2) — CONTINUANCE FOR ABSENCE OF WITNESS WHO HAD LEFT THE STATE PROPERLY DENIED.

The court did not err in denying the defendant's application for a continuance, which was based on the absence of a witness who had not been subpoenaed and who was not shown to reside within the jurisdiction of the court, but who, according to the best information obtainable by the sheriff in seeking to serve the subpoena, had left this state and enlisted in the United States navy, *Park's Penal Code*, § 987.

2. **CRIMINAL LAW** §1064(4) — MOTION FOR NEW TRIAL COMPLAINING OF ADMISSIBILITY OF EVIDENCE, BUT NOT SETTING IT OUT, PRESENTS NOTHING FOR REVIEW.

A ground of a motion for a new trial complaining of the admissibility of certain evidence, but failing to set out the evidence as a part of the ground, or to annex it as an exhibit to the motion, presents no question for decision. See *Park's Penal Code*, § 1086, and citations on "Assignment of Error." The second ground of the amendment to the motion for a new trial comes within this rule.

3. **CRIMINAL LAW** §829(1) — REFUSAL OF INSTRUCTION ALREADY GIVEN IN SUBSTANCE IS NOT ERROR.

Where a proper instruction is duly requested in writing and is refused, but the judge, in

his own words, gives in full to the jury the substance of the requested charge, the refusal affords no cause for a new trial. See *Park's Penal Code*, § 1087, and citations on "General Charge" and on "Requests." The third, fourth, and fifteenth grounds of the amendment to the motion for a new trial in this case come within this rule.

4. **CRIMINAL LAW** §561(1), 784(1) — CHARGE AS TO REASONABLE DOUBT DOES NOT NECESSITATE INSTRUCTION ON WEIGHT OF CIRCUMSTANTIAL EVIDENCE.

The law of reasonable doubt, as defined by section 1013 of the *Penal Code* 1910, is applicable to every criminal case, whether dependent upon positive or circumstantial evidence; and the mere giving of this principle in charge to the jury can never, of itself alone, necessitate an instruction upon the weight of circumstantial evidence. *Smith v. State*, 125 Ga. 296, 54 S. E. 127. The fifth ground of the amendment to the motion for a new trial is therefore without merit.

5. **CRIMINAL LAW** §790 — FAILURE TO INSTRUCT JURY TO APPLY THE LAW TO THE TESTIMONY WAS NOT ERROR.

The court instructed the jury that they were the judges of the law and of the facts in the case, and that they should take the law as given them in charge and ascertain the facts from the testimony of the witnesses and from the statement of the defendant. There is no merit in the complaint that the court did not further instruct the jury to apply "the one to the other" and make their verdict accordingly.

6. **CHARGE AS TO ACCOMPLICE'S TESTIMONY.**

The charge complained of touching the weight to be given the testimony of an accomplice was full and fair, and was in accord with section 1017 of the *Penal Code* of 1910.

7. **CRIMINAL LAW** §553 — RULE AS TO CONFLICT IN TESTIMONY OF TWO WITNESSES FOR THE STATE WAS AS APPLICABLE AS IF ONE WAS OFFERED BY STATE AND THE OTHER BY ACCUSED.

The defendant introduced no witness. There was conflict in the testimony of two witnesses introduced by the state. The court gave in charge the usual rule touching conflicts in the testimony. Complaint is made that this rule was inapplicable, because the sole conflict in the testimony was between two witnesses for the state. *Held*, the rule was as applicable as if one of the witnesses had been sworn and introduced by the state and the other by the accused. *Skipper v. State*, 59 Ga. 63(3); *Sessions v. State*, 6 Ga. App. 336, 64 S. E. 1101(2).

8. **CHARGE ON CONSPIRACY.**

The charge on conspiracy (complained of in ground 9) is not subject to the criticism that it held this defendant responsible for a conspiracy solely between the other two defendants who were jointly indicted, but not tried, with him.

9. **CRIMINAL LAW** §59(4) — ACT OF EACH CONSPIRATOR BECOMES THE ACT OF ALL.

Where a conspiracy to commit the offense charged in the indictment is shown between two or more jointly indicted defendants, the act of

each conspirator in furtherance of the common purpose becomes the act of all, rendering each defendant as fully responsible therefore as if he had done the act himself. *Reeves v. State*, 135 Ga. 311, 69 S. E. 536 (1). The charge complained of in ground 10 was therefore not subject to the criticism made.

**10. CRIMINAL LAW §1064(7) — GROUND FOR NEW TRIAL COMPLAINING OF CHARGE PART OF WHICH IS ABSTRACTLY CORRECT NOT CONSIDERED.**

Where a ground of a motion for a new trial contains a lengthy excerpt from the charge of the court, at least a part of which is abstractly correct, and the only assignment of error is, "Movant contends that this is error because it is not a correct statement of the law," it affords no cause for a new trial. *Cobb v. State*, 76 Ga. 664(1); *Miller v. State*, 121 Ga. 135, 48 S. E. 904(2); *Graham v. State*, 125 Ga. 48, 53 S. E. 816(3). The eleventh and twelfth grounds of the amendment to the motion for a new trial come within this rule.

**11. LARCENY §27—A CONSPIRATOR REMAINING IN COUNTY WHERE CONSPIRACY FORMED WHILE LARCENY IS COMMITTED IN ANOTHER COUNTY IS RESPONSIBLE.**

Where two or more thieves conspire to steal an automobile, the fact that the conspiracy is formed in one county and the larceny committed in another does not lessen the responsibility of a conspirator who remains in the first county while the larceny instigated by him is being committed in the other. *Pen. Code 1910, § 45*; *Pinkard v. State*, 30 Ga. 757 (4); *Duckett v. State*, 93 Ga. 415, 21 S. E. 73 (1). The court therefore did not err in charging as complained of in ground 13.

**12. CRIMINAL LAW §780(2)—EVIDENCE HELD NOT TO AUTHORIZE AN INSTRUCTION AS TO WHETHER ONE WHO NOTIFIED SHERIFF OF FACTS AND TESTIFIED FOR THE STATE WAS AN ACCOMPLICE.**

Where the uncontradicted evidence showed that the three indicted defendants carried the stolen automobile to the home of a fourth person, that this person, upon learning of the larceny, advised the defendants to take the machine back to its owner at once, that he finally consented for them to leave it at his home, and that he promptly notified the sheriff of all of these facts, and then testified as a state's witness at the trial of those so indicted, the evidence neither required nor authorized an instruction to the jury upon the question as to whether or not the fourth person was an accomplice. *Penal Code 1910, § 47*. Ground 14 is therefore without merit.

**13. DENIAL OF NEW TRIAL.**

The evidence authorized the verdict, and the trial judge did not err in overruling the motion for a new trial.

Error from Superior Court, Crisp County; O. T. Gower, Judge.

A. C. Danzley was convicted of an offense, his motion for new trial was denied, and he brings error. Affirmed.

Jas. H. Dodgen, of Fitzgerald, and Jere M. Moore, of Montezuma, for plaintiff in error. J. B. Wall, Sol. Gen., and Jesse Grantham, both of Fitzgerald, and M. M. Eakes, of Cordele, for the State.

LUKE, J. Judgment affirmed.

BROYLTS, C. J., and BLOODWORTH, J., concur.

(25 Ga. App. 172)

**WEBSTER v. STATE. (No. 11028.)**

(Court of Appeals of Georgia, Division No. 1. April 13, 1920.)

(Syllabus by the Court.)

**COMPANION CASE.**

This case is controlled by the decision this day rendered in its companion case, *Danzley v. State*, 102 S. E. 915.

Error from Superior Court, Crisp County; O. T. Gower, Judge.

D. W. Webster was convicted of an offense, and he brings error. Affirmed.

Jas. H. Dodgen, of Fitzgerald, and Jere M. Moore, of Montezuma, for plaintiff in error. J. B. Wall, Sol. Gen., and Jesse Grantham, both of Fitzgerald, and M. M. Eakes, of Cordele, for the State.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(25 Ga. App. 251)

**MOORE v. STATE. (No. 11238.)**

(Court of Appeals of Georgia, Division No. 1. April 15, 1920.)

(Syllabus by the Court.)

**1. CRIMINAL LAW §594(1)—CONTINUANCE FOR ABSENCE OF WITNESS PROPERLY DENIED, WHERE EXPECTATION OF PROCURING TESTIMONY AND MATERIALITY NOT SHOWN.**

Upon the hearing of the defendant's motion for a continuance because of the absence of a witness, he failed to state that he expected to be able to procure the testimony of the witness at the next term of the court. It was not error, therefore, to deny the motion. *Jones v. State*, 128 Ga. 23, 57 S. E. 313 (1). Moreover, it appeared from the counter showing of the state, made upon the hearing of the motion for a new trial, that the testimony of the absent witness would not have materially benefited the defendant.

**2. INDICTMENT AND INFORMATION §167—ALLEGATION THAT BANK BURGLARIZED WAS GEORGIA CORPORATION NEED NOT BE PROVED.**

A ground of the motion for a new trial sets up that the allegation of the indictment, that



the bank burglarized "was a corporation and was chartered under the laws of the state of Georgia." was not supported by the proof. Under the ruling in *Crawford v. State*, 68 Ga. 822, the words quoted above were mere surplusage and did not have to be proved. See, also, *Mattox v. State*, 115 Ga. 212, 41 S. E. 709, where it is stated, in this connection: "It would seem, however, that if the name imported a corporation and raised a presumption of corporate existence for purposes of pleading, it would also raise such a presumption for purposes of evidence, and that it would be incumbent upon the accused to prove affirmatively that no such corporation existed." In the instant case there is no contention that any proof was submitted to show that the bank alleged to have been burglarized was not a corporation chartered under the laws of Georgia.

### 3. MOTION FOR NEW TRIAL.

Under the counter showing submitted by the state, there is no merit in the fifth special ground of the motion for a new trial, which complains of the refusal of the court to declare a mistrial, based upon the separation of the jury, during the trial, without the consent of counsel.

### 4. WITNESSES $\S$ 79(3)—WHETHER WOMAN TESTIFYING AGAINST DEFENDANT WAS HIS WIFE HELD FOR JURY.

Complaint is made in one or more grounds of the motion for a new trial that a certain woman was allowed to testify against the defendant, over his objection that she was his wife. It does not clearly appear from the evidence submitted on this question that she was in fact the defendant's wife. The testimony was in conflict and did not demand a finding that she was his wife. It was not error, therefore, for the court to submit this issue to the jury, with appropriate instructions thereon, or subsequently to refuse to rule out the testimony of the witness. See, in this connection, *Hoxie v. State*, 114 Ga. 22, 39 S. E. 944 (4); *Dowdy v. Watson*, 115 Ga. 42, 41 S. E. 266 (4); *Carroll v. Barber*, 119 Ga. 856, 47 S. E. 181 (2).

### 5. INSTRUCTIONS.

The court did not err in failing to instruct the jury upon the law of larceny from the house.

### 6. CHARGE OF COURT.

No material error appears in any of the excerpts from the charge of the court, as complained of in various grounds of the motion for a new trial.

### 7. CRIMINAL LAW $\S$ 867—FAILURE TO INCLUDE WITNESS BEFORE GRAND JURY IN LIST FURNISHED DEFENDANT HELD NOT ERROR, WHERE TESTIMONY RULED OUT.

The defendant demanded that he be furnished with a list of the witnesses who had testified before the grand jury, and the solicitor general inadvertently furnished him with a list that was incorrect, in that the name of one witness who had testified before the grand jury was not on it, and the incorrectness of the list was discovered during the trial and upon the cross-examination of the witness whose name was so omitted from the list. The defendant

moved for a mistrial of the case upon the ground that he had not been furnished with list of the witnesses who had appeared before the grand jury. The court overruled the motion for a mistrial, but, upon the motion of the solicitor general, ruled out all of the testimony of the witness and instructed the jury not to consider it in their deliberations. *Held*, the court did not err in overruling the motion for a mistrial.

### 8. MOTION FOR NEW TRIAL.

Under all the particular facts of the case, no substantial merit appears in any of the remaining special grounds of the motion for a new trial.

### 9. RULING ON MOTION FOR NEW TRIAL.

The verdict was amply authorized by the evidence, and for no reason assigned did the court err in overruling the motion for a new trial.

Luke, J., dissenting in part.

Error from Superior Court, Franklin County; W. L. Hodges, Judge.

J. C. Moore was convicted of an offense, his motion for new trial was denied, and he brings error. Affirmed.

Love & Fort, of Columbus, and Clay & Blair, of Marietta, for plaintiff in error.

A. S. Skelton, Sol. Gen., of Hartwell, Geo. L. Goode, of Toccoa, and W. R. Little, of Carnesville, for the State.

BROYLES, C. J. [1-9] An elaboration of the seventh headnote is considered desirable. Upon the trial, while R. S. Lenhardt, a witness for the state whose name was not upon the list of witnesses furnished to the defendant as those who had appeared before the grand jury, and who had been introduced and examined in chief by the state, was being cross-examined by the defendant's counsel, the defendant learned for the first time that this witness had testified before the grand jury. Thereupon the defendant moved for a mistrial of the case, upon the ground that he had not been furnished with a list of the witnesses who had appeared before the grand jury, after having demanded such a list. The court refused to declare a mistrial, but ruled out all of the evidence of the witness and instructed the jury not to consider it.

Every person charged with an offense against the laws of this state shall be furnished, on demand, with a list of the witnesses upon whose testimony the indictment against him was found. Constitution of the State of Georgia, art. 1, § 1, par. 5; Civil Code 1910, § 6361; Penal Code, §§ 8 (2), 970. It is well settled that this provision is mandatory, and not merely directory. Where, however, an incorrect list is furnished inadvertently by the state, what is the proper remedy to be applied by the court (it be-

ing presumed in this case, since nothing appears to the contrary, that the omission of the name of the witness from the list furnished the defendant was through an inadvertence of the solicitor general)? A direct answer to this question does not appear to have been given by either the Supreme Court or this court. In *Fears v. State*, 125 Ga. 739, 54 S. E. 667 (3), it was held merely that—

"The failure to furnish the accused or his counsel with a copy of the indictment and list of witnesses, in the absence of a demand therefor, does not constitute a valid ground for setting aside the verdict of guilty. Penal Code [1895], § 945."

It might be inferred from this ruling that, where the list of witnesses is demanded, a refusal to furnish it would constitute a good ground for a new trial; but the court was not passing on that question, nor especially in a case where the solicitor general had in good faith endeavored to comply by furnishing such a list, but through inadvertence had omitted to place thereon the name of one witness who had appeared before the grand jury. In *Inman v. State*, 72 Ga. 269, it was held that a witness, whose name was not upon the list furnished to the defendant, and who did not testify before the grand jury, was not incompetent to testify on the trial. There is a clear inference from this decision that if the witness had testified before the grand jury he would have been incompetent to testify on the trial. In *Regopoulos v. State*, 116 Ga. 596, 42 S. E. 1014, it was held that the furnishing of an incorrect list of the witnesses who had testified before the grand jury, where the defendant had demanded the list, was not cause for setting aside the judgment. And in the same case, in 115 Ga. 232, 41 S. E. 619, it was held that it was not a good ground to arrest the judgment. It is true that in the opinion in 115 Ga. 233, 41 S. E. 620, Chief Justice Simmons said:

"In our opinion, he [the defendant] could have moved for a mistrial of the case when he discovered that the list given him was incorrect."

This statement, however, was purely obiter. As has been stated, neither the Supreme Court nor this court has ever passed directly on this question.

Many other states have substantially similar statutes in force, and in perhaps the majority of them the ruling has been made that, where the provision of the statute requiring a list of witnesses to be served on the defendant is mandatory in its terms, a witness whose name is not on the list is incompetent to testify on the trial. 16 *Corpus Juris*, 800, and authorities cited in note 88. In some of the states, however,

it is held that under such circumstances it is nevertheless within the discretion of the court to permit the witness to testify where his name was omitted from the list inadvertently, and where his testimony was not of such a character as to surprise the defendant. See, in this connection, 2 *Jones & Addington*, Ill. Stat. Ann. pp. 2214, 2215; *Lutzow v. People*, 240 Ill. 612, 88 N. E. 1049; *United States v. Neverson*, 12 D. C. (1 Mackey) 152.

After diligent search, we have failed to find a single case in the books, and have been cited to none, where it has been held that the failure to give the defendant, under such circumstances, a correct list of the witnesses, is cause for a mistrial of the case. In our judgment the court in the instant case applied the proper remedy when he excluded the testimony of the witness and instructed the jury not to consider it, and it was not error to overrule the defendant's motion for a mistrial.

Judgment affirmed.

BLOODWORTH, J., concurs.

LUKE, J. (dissenting). I dissent as to the rulings in the third, fourth, and seventh headnotes.

(25 Ga. App. 154)

RIDLEY v. RIDLEY. (No. 11287.)

(Court of Appeals of Georgia, Division No. 2, April 8, 1920.)

(Syllabus by the Court.)

1. PLEADING  $\Leftrightarrow$  362(1)—TRIAL  $\Leftrightarrow$  109—OPENING STATEMENT AS TO WHAT PLAINTIFF EXPECTED TO PROVE HELD PROPERLY ALLOWED; DENIAL OF MOTION TO STRIKE PART OF PETITION NOT ERROR, WHERE NOT ATTACKED BY SPECIAL DEMURRER.

Mrs. Louise Gartrell Ridley brought an action of trover in the superior court of Heard county against her husband, William D. Ridley. The petition was in the usual form and sought to recover a diamond ring and a Buick automobile, the value of which was set out in the petition and the amendment thereto. The plaintiff elected to take a money verdict. The evidence developed that the contentions of the plaintiff were that she and the defendant were married in Atlanta about April 15, 1917; that a day or two before the marriage the defendant gave her the ring and the automobile in question; that after the marriage she went with him to his home in Heard county, and lived with him for a period of something like a year. She contended that he became dissatisfied and demanded that she return the ring to him, and that he either carried or sent the automobile away to some other place. She further contended that because of her failure to return the ring that he kept her under guard in the house and would not permit her to leave; that finally her father and mother

came to the place and an agreement was made that she should go home with her father and mother, the defendant sending a man along with them, she agreeing to turn over the ring to this man. She contended that she was the owner of the ring and the automobile, claiming that her husband had given them to her, and that she took possession of them, but that the defendant by threats and duress forced her to turn the ring over to his representative, and refused to deliver to her the ring or the automobile. The defendant admitted that he had married the plaintiff, but denied that he had given either the ring or the automobile to her, or that she had any title to either. He insisted that upon her persuasion he lent her the ring to be worn by her temporarily, and as to the automobile he contended that he bought it for himself to be used by both of them. He denied that the plaintiff had any title to either the ring or the automobile, and he denied that he had used any force or duress, or that he had driven her from his home. A verdict was rendered awarding the ring, with cost, to the defendant, and finding the value of the automobile in favor of the plaintiff, and judgment was entered thereon. The defendant filed a motion for a new trial upon the general grounds and also an amendment to the original motion, assigning error in the admission of certain testimony and the exclusion of other evidence, and upon the failure to charge by the court certain principles which the defendant insisted were material to the issues in the case, and should have been charged without any written requests therefor. *Held*, under the peculiar facts in this case, the court did not err, as contended in the motion for a new trial, in allowing counsel for the plaintiff in the opening statement of the case to the jury, and over objection of counsel for the defendant, to state that the plaintiff expected to show that she was driven from the home of the defendant, and guarded by two hired men and held for ransom for the ring, and that she was mistreated and allowed to go nowhere. The evidence of the plaintiff tended to support this statement of counsel, and the judge did not abuse his discretion in permitting counsel to state this contention. Nor was it error on the part of the court to deny an oral motion of counsel for the defendant to strike that part of the petition alleging that the plaintiff was driven from home by the defendant, no special demurrer having been filed attacking this allegation in the petition.

**2. HUSBAND AND WIFE ⇨232(2)—EVIDENCE SUPPORTING WIFE'S CONTENTION AS TO HUSBAND'S COERCION IN OBTAINING HER PROPERTY HELD ADMISSIBLE.**

The court did not err, as contended in the second, third, fourth, and twelfth grounds of the amendment to the motion for a new trial, in permitting the evidence set out therein to go to the jury, over the objection of the defendant's counsel. This evidence tended to support the contention of the plaintiff that she was coerced into delivering up the ring in question, and that the defendant refused to permit her to leave his house until she agreed to give up the ring.

**3. EVIDENCE ⇨158(16)—RETURN OF PROPERTY TO TAX RECEIVER INADMISSIBLE WHERE TAX RETURN NOT PRODUCED.**

The court did not err as contended in excluding oral testimony that after the separation

and after the suit was brought, the plaintiff made a return of the property in litigation to the tax receiver. The tax return was not produced, and that was the highest evidence.

**4. REJECTION OF EVIDENCE.**

The court did not err in rejecting the testimony set out in grounds 6, 7, 8, and 9 of the motion for a new trial. The evidence sought to be elicited was not relevant to the issues in this case.

**5. HUSBAND AND WIFE ⇨232(2)—EVIDENCE AS TO AUTOMOBILE TAG LICENSE IN WIFE'S NAME TO SUPPORT HER CLAIM OF TITLE HELD ADMISSIBLE.**

The court did not err in admitting in evidence the automobile tag license and the copy of the application therefor. This evidence tended to support the claim of title by the plaintiff, as the license was in her name, and she testified that the defendant told her to take out the license in her name.

**6. APPEAL AND ERROR ⇨843(3)—EXCEPTION TO REFUSAL OF NONSUIT NOT CONSIDERED, WHERE MOTION FOR NEW TRIAL COMPLAINS OF EVIDENCE IN SUPPORT OF VERDICT.**

An exception based upon the refusal to award a nonsuit will not be considered, where, subsequently, the case is submitted to the jury, and, a verdict being rendered against the defendant, a motion for a new trial is made, which presents the complaint that the verdict is contrary to the evidence and without evidence to support it. See *Dudley v. Isler*, 21 Ga. App. 615, 94 S. E. 827, and citations.

**7. ADMISSIBILITY OF EVIDENCE.**

There is no substantial merit in ground 13 of the motion for a new trial. The evidence admitted over the objection of defendant's counsel, even if not legally admissible, was not such as would require a reversal.

**8. APPEAL AND ERROR ⇨302(3)—GROUND OF MOTION FOR NEW TRIAL, NOT SETTING OUT EVIDENCE OBJECTED TO, WITHOUT MERIT.**

There is no merit in ground 14 of the motion for a new trial, as the answer of the witness nowhere appears, and it does not appear what the testimony of the witness would have been. This ground gives only the question, and fails to set out the evidence objected to.

**9. TRIAL ⇨259(1)—OMISSION OF CHARGES NOT ERROR, IN ABSENCE OF APPROPRIATE WRITTEN REQUEST.**

It was not error, in the absence of an appropriate written request, to fail to charge the jury in the terms set out in the fifteenth and sixteenth grounds of the amended motion for a new trial. The charge of the court, taken as a whole, fully, accurately, and fairly submitted to the jury all the substantial issues of the parties and the law applicable thereto.

**10. APPEAL AND ERROR ⇨1005(2)—APPROVED VERDICT ON CONFLICTING EVIDENCE NOT DISTURBED, WHERE THERE IS EVIDENCE TO SUPPORT IT.**

Though the evidence was conflicting, there is evidence to support the verdict, and, the trial judge having approved the same, this court will not disturb his judgment overruling the motion for a new trial.

**Error from Superior Court, Heard County; J. R. Terrell, Judge.**

Action of trover by Mrs. Louise Gartrell Ridley against her husband, William D. Ridley. Verdict for plaintiff in part, and judgment thereon, defendant's motion for a new trial overruled, and he brings error. Affirmed.

Frank S. Loftin, of Franklin, and Smith & Smith, of Carrollton, for plaintiff in error.

M. U. Mooty, of La Grange, and Jas. L. Anderson, of Atlanta, for defendant in error.

**SMITH, J.** Judgment affirmed.

**JENKINS, P. J., and STEPHENS, J., concur.**

(25 Ga. App. 168)

**SEABOARD AIR LINE RY. v. BREWTON.**  
(No. 9971.)

(Court of Appeals of Georgia, Division No. 1.  
April 13, 1920.)

*(Syllabus by the Court.)*

1. TRIAL  $\Rightarrow$  256(13)—FAILURE TO INSTRUCT AS TO MEASURE OF DAMAGES FOR TEMPORARY INJURY HELD ERROR, THOUGH NO REQUEST MADE.

"In an action for damages based on personal injuries, where under the pleadings and the evidence there was an issue whether the injuries were permanent or temporary in character, and the judge instructed the jury relatively to the measure of damages applicable to a case where the injury was permanent, but omitted to give instructions as to the measure of damages that would be applicable if the injury were not permanent, such omission, even without proper request for charge, would be cause for reversal. Central Railroad, etc., Co. v. Dottenheim, 92 Ga. 425, 17 S. E. 662; Central of Ga. Ry. Co. v. Johnson, 106 Ga. 139, 32 S. E. 78; Southern Ry. Co. v. O'Bryan, 112 Ga. 127, 37 S. E. 161; Western & Atlantic R. Co. v. Smith, 145 Ga. 276, 88 S. E. 983; A., B. & A. Ry. Co. v. Barnwell, 138 Ga. 569, 75 S. E. 645; Western & Atlantic R. Co. v. Knight, 142 Ga. 801, 83 S. E. 943; Western & Atlantic R. Co. v. Roberts, 144 Ga. 250, 86 S. E. 933. In the first four of the cases just cited the motions for new trial expressly alleged that the damages were excessive, but the rulings made did not in any wise refer to that fact. In the last four cases, where similar rulings were made, the motions for new trial did not allege that the damages were excessive."

2. APPEAL AND ERROR  $\Rightarrow$  1068(5)—ERROR IN MEASURE OF DAMAGES APPLIED REVIEWABLE EVEN IN ABSENCE OF COMPLAINT OF EXCESSIVE DAMAGES.

"In Central Railroad v. Harris, 76 Ga. 501 (only two of the three justices presiding), it was said: 'No complaint of excessive damages is made, and therefore it is immaterial what meas-

ured them.' This ruling has been followed and applied by the Court of Appeals in the following cases: Gainesville Midland Ry. v. Jackson, 1 Ga. App. 632, 57 S. E. 1007; Gainesville & Northwestern R. R. Co. v. Galloway, 17 Ga. App. 702, 703, 87 S. E. 1093 [5]. We do not concur in the correctness of the decision in 76 Ga. 501, and decline to follow it."

3. ERROR IN AFFIRMANCE BY COURT OF APPEALS.

"Applying the law as above announced, the Court of Appeals erred in affirming the judgment of the trial court, refusing to grant the railroad company a new trial on the ground of failure to instruct the jury as to the measure of damages when not permanent."

**Error from Superior Court, Bryan County; W. W. Sheppard, Judge.**

Action by J. A. Brewton against the Seaboard Air Line Railway. There was judgment for plaintiff which on error by defendant was affirmed by the Court of Appeals (23 Ga. App. 621, 99 S. E. 226), and on certiorari to the Supreme Court judgment was reversed (150 Ga. —, 102 S. E. 439). Former judgment of Court of Appeals vacated, and judgment of lower court reversed.

Anderson, Cann, Cann & Walsh, of Savannah, for plaintiff in error.

H. B. Strange, of Statesboro, and J. P. Dukes, of Pembroke, for defendant in error.

LUKE, J. A decision in this case was rendered by this court on April 19, 1919, and it was then held, under the ruling in Central Railroad v. Harris, 76 Ga. 501 (2), Gainesville Midland Ry. v. Jackson, 1 Ga. App. 632, 635, 57 S. E. 1007, and Gainesville & Northwestern R. Co. v. Galloway, 17 Ga. App. 702, 703, 87 S. E. 1093 (5), that even if the court erred in instructing the jury as to the measure of damages, the error was immaterial, since there was no specific complaint by the plaintiff in error that the verdict was excessive. The case was certioraried to the Supreme Court, which on February 24, 1920, reversed the judgment of this court (150 Ga. —, 102 S. E. 439); and its decision is set forth in the preceding headnotes. That decision, in effect, overrules their decision in the Harris Case, supra; and this court now, upon a review of the decisions in the Jackson and Galloway Cases, supra, overrules them as regards the question now under consideration.

It is ordered that the former judgment of this court be vacated; and the judgment of the lower court is reversed on account of the error in the charge upon the question of the measure of damages.

Judgment reversed.

**BROYLES, C. J., and BLOODWORTH, J., concur.**

(26 Ga. App. 186)

**KELLEY v. HINES, Director General.**  
(No. 11248.)(Court of Appeals of Georgia, Division No. 1.  
April 18, 1920.)*(Syllabus by the Court.)*

1. **MASTER AND SERVANT** §256(1) — WHERE PLEADINGS DO NOT SHOW THAT EMPLOYÉ AND RAILROAD WERE ENGAGED IN INTERSTATE COMMERCE, CASE IS GOVERNED BY STATE LAW.

This suit was brought under section 2782 of the Civil Code of 1910, for the homicide of an employé of the defendant railroad. There was nothing in the original petition, or as finally amended, which showed that at the time of the homicide the deceased and the defendant carrier were engaged in interstate commerce. The statement in the answer of the defendant that they were so engaged cannot be considered by this court in passing upon the question as to whether the petition was properly dismissed on general demurrer. Accordingly, upon this question the provisions of the Employers' Liability Act of this state (Civ. Code 1910, §§ 2782-2787), and not those of the federal act (U. S. Comp. St. §§ 8657-8665), are controlling.

2. **DEATH** §23—**NEGLIGENCE OF DECEASED DEFEATS RECOVERY FOR DEATH OF RAILROAD EMPLOYÉ.**

Under section 2782 of the Civil Code of 1910, a recovery for the homicide of an employé of a railroad company cannot be had, where the deceased employé brought about his death by his own carelessness amounting to a failure to exercise ordinary care, or where he, by the exercise of ordinary care, could have avoided the consequences of the defendant's negligence.

3. **NEGLIGENCE** §67—**ONE REQUIRED TO REMAIN IN THE PRESENCE OF DANGER MUST EXERCISE ORDINARY CARE.**

In cases of personal injuries, the plaintiff as a conscious human agent is bound to exercise ordinary care to avoid the consequences of the defendant's negligence, by remaining away, going away, or getting out of the way of a probable or known danger; and if his duty requires him to remain in the presence of danger, he must exercise the ordinary care required of a prudent man under the particular circumstances. *Mansfield v. Richardson*, 118 Ga. 250, 45 S. E. 209 (8).

4. **MASTER AND SERVANT** §236(8)—**NEGLIGENCE** §67 — **PERSON MUST APPREHEND NEGLIGENCE AND AVOID ITS CONSEQUENCE; RAILROAD TRACK PLACE OF KNOWN DANGERS TO EMPLOYÉ.**

If at the time of the injury an ordinarily prudent person, in the exercise of that degree of care and caution which such a person generally uses, would have reasonably apprehended that the defendant might be negligent at the time when and place where the injury occurred, and, so apprehending the probability of the existence of such negligence, could have taken steps to prevent the injury, then the person

injured cannot recover if he failed to exercise that degree of care and caution usually exercised by an ordinarily prudent person to ascertain whether the negligence which might have been reasonably apprehended really existed. If there is anything present at the time and place of the injury which would cause an ordinarily prudent person to reasonably apprehend the probability even, if not the possibility, of danger to him in doing the act which he is about to perform, then he must take such steps as an ordinarily prudent person would take to ascertain whether such danger exists, as well as to avoid the consequences to the same after its existence is ascertained; and if he fails to do this and is injured, he will not be allowed to recover, if by taking proper precautions he could have avoided the consequences of the negligence of the person inflicting the injury. A railroad track is a place of danger, and one who goes thereon is bound to know that he is going into a place where he is subject to the dangers incident to the operation of trains upon that track. *Western & Atlantic R. Co. v. Ferguson*, 113 Ga. 712, 718, 39 S. E. 306, 54 L. R. A. 802.

5. **MASTER AND SERVANT** §236(3)—**RECOVERY CANNOT BE HAD FOR DEATH OF SERVANT KILLED AS A RESULT OF HIS GROSS NEGLIGENCE IN SLEEPING ON TRACK.**

An employé of a railroad company, who voluntarily sits down by its tracks and falls asleep in such close proximity thereto as to cause him, while sleeping, to be struck and killed by a passing train, is guilty of such gross negligence as will prevent a recovery for his homicide, although the defendant carrier may be guilty of contributory negligence. *Parish v. Atlantic R. Co.*, 102 Ga. 285, 29 S. E. 715, 40 L. R. A. 364, and authorities there cited.

6. **CASE REVERSED.**

The decision in the case of *Gray v. Southern Ry. Co.*, 167 N. O. 433, 83 S. E. 849, cited and relied on by counsel for the plaintiff in error, was reversed by the Supreme Court of the United States (241 U. S. 333, 36 Sup. Ct. 558, 60 L. Ed. 1030).

7. **DISMISSAL OF PETITION.**

Under the above rulings, the plaintiff's petition showed no right of recovery against the defendant, and the court did not err in dismissing the petition on general demurrer.

Error from Superior Court, Wilkinson County; J. B. Park, Judge.

Action by J. R. Kelley, administrator, against W. D. Hines, Director General. Petition dismissed on general demurrer, and plaintiff brings error. Affirmed.

Victor Davidson, and J. F. Bloodworth, both of Irwinton, for plaintiff in error.

H. W. Johnson, of Savannah, for defendant in error.

BROYLES, C. J. Judgment affirmed.

LUKE, J., concurs. BLOODWORTH, J., disqualified.

(25 Ga. App. 177)

**WARD v. CANTRELL.** (No. 11226.)(Court of Appeals of Georgia, Division No. 1.  
April 13, 1920.)*(Syllabus by the Court.)***BILLS AND NOTES §—453—DEFENDANT'S REMEDY FOR FRAUD HELD AGAINST PLEDGEE, AND NOT PLAINTIFF.**

The verdict for the plaintiff was authorized by the evidence, and the court did not err in overruling the motion for a new trial.

Error from City Court of Carrollton; Jas. Beall, Judge.

Action by J. M. Cantrell against W. E. Ward. Verdict and judgment for plaintiff, motion for new trial denied, and defendant brings error. Affirmed.

Emmett Smith, of Carrollton, for plaintiff in error.

Smith & Smith, of Carrollton, for defendant in error.

**BROYLES, C. J.** The record makes the following case: J. M. Cantrell brought suit against W. E. Ward on two promissory notes, dated October, 1916, for \$60 and \$90, respectively. The note for \$60 was due November 15, 1916, and the note for \$90 was due December 15, 1916, and both notes bore interest at the rate of 8 per cent. per annum. The plaintiff introduced the notes sued on and rested. The defendant testified that the notes sued on were given for certain restaurant fixtures, which at the time of the purchase and the making of the notes were located in a storehouse on the south side of Newnan street in Carrollton, Ga.; that in the latter part of November, 1916, these fixtures, which were the consideration of the notes sued on, were levied on by virtue of an attachment returnable to the March term, 1917, of the city court of Carrollton; that the attachment was sued out by the First National Bank of Carrollton, Ga., as transferee, in the sum of \$150, against Ward, the defendant; that the notes had been put up as collateral by the plaintiff with the First National Bank to secure a note due by him (the plaintiff) to the bank; that the affidavit upon which the attachment was based was made by J. O. Newell, and recited that the amount was due "for the purchase money of one stock of goods with all fixtures, furniture, and

stove, and all kinds of goods now located in the storeroom on the south side of Newnan street, Carrollton, Ga., where said Ward is now doing business"; that at the time the attachment was levied only one of the notes was due; that a short time thereafter J. O. Newell, attorney of record for the First National Bank, came down to the defendant's place of business, and stated to him that, if he would not contest the attachment, and would turn over to the bank the fixtures, the bank would cancel the debt represented by the notes, and would turn over the notes to the defendant; that the defendant agreed to this proposition, and did turn over all the fixtures, and that the defendant immediately closed up his place of business and moved back to the country, some 12 miles from Carrollton; that the defendant does not know what became of the said fixtures; that Newell had the notes sued on in this case upon the day he made the proposition; and that defendant never did get back his notes. The original attachment sued out by the bank was then admitted in evidence. Upon this attachment were the following entries:

"Pd. on within January 11, 1917, \$13.96."  
"Bal. from sale of property." "All J. P. cost paid out of sale."

The plaintiff testified as follows, in rebuttal:

"I turned over the notes sued on in this case to the First National Bank as collateral for a note I was due the bank. The day the note became due that I owed the bank I paid it off, and got these notes I am suing on, before my note to the bank was due. I never at any time authorized the First National Bank, J. O. Newell, nor any one else, to sue on these notes. I have never been paid anything on these notes."

All of the above evidence was undisputed. The jury returned a verdict for the plaintiff for the full amount of the notes sued on, with interest and costs of suit.

We think, under the above-stated circumstances, the verdict was authorized. If the defendant has been defrauded in this case, his remedy is against the bank, and not against the plaintiff.

The amendment to the motion for a new trial shows no cause why the judgment below should be reversed.

Judgment affirmed.

**LUKE and BLOODWORTH, JJ., concur.**

—For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(25 Ga. App. 136)

**BINGHAM v. HAINES.** (No. 11178.)(Court of Appeals of Georgia, Division No. 2.  
April 3, 1920.)*(Syllabus by the Court.)*

1. LANDLORD AND TENANT ⇨157(4)—POSSESSORY WARRANT ⇨1—LIES ONLY FOR RECOVERY OF PERSONAL PROPERTY; CROP OF CORN, NOT DETACHED FROM SOIL, AND SHRUBBERY AND FLOWERS, NOT DETACHED, ARE "REALTY."

A possessory warrant lies only for the recovery of personal property, and not for the recovery of realty. *Gainous v. Martin*, 10 Ga. App. 210, 72 S. E. 1100.

(a) "A crop of corn, not detached from the soil, whether mature or immature, is a part of the realty." *Newton County v. Boyd*, 148 Ga. 761, 98 S. E. 347; and *cit.* Shrubbery and flowers planted by a tenant are, when not detached from the soil, realty, and cannot be removed by him. *Wright v. Du Bignon*, 114 Ga. 765, 771, 40 S. E. 747, 57 L. R. A. 669.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Real Property.]

2. APPEARANCE ⇨18—COURTS ⇨163—POSSESSORY WARRANT ⇨1—WILL NOT LIE FOR SHRUBBERY AND FLOWERS ATTACHED TO REALTY; MUNICIPAL COURT OF SAVANNAH HAS NO JURISDICTION OF POSSESSORY WARRANT SUIT; PARTY WAIVING JURISDICTION OF THE PERSON CANNOT SO CONFER JURISDICTION OF SUBJECT-MATTER.

It follows that a possessory warrant will not lie to recover shrubbery and flowers attached to the realty. Even had this been the proper remedy, the municipal court of Savannah did not have jurisdiction to entertain and try such a suit (*Acts 1915*, p. 124, § 3); and while jurisdiction of the person may be waived by appearance and pleading to the merits, a party to an action cannot thus confer jurisdiction upon a court which has no jurisdiction of the subject-matter of the suit. *Chapman v. Silver*, 18 Ga. App. 476, 89 S. E. 590 (2).

3. CERTIORARI ⇨70(7)—FIRST GRANT OF NEW TRIAL, ON CERTIORARI TO SUPERIOR COURT AFTER JUDGMENT OF MUNICIPAL COURT, CANNOT BE DISTURBED.

Moreover, the first grant of a new trial by a judge of the superior court, on certiorari to review a verdict and judgment of a municipal court, will not be disturbed, where the verdict was not demanded by the evidence. *Charles W. Tway Co. v. Hedenburg*, 24 Ga. App. —, 101 S. E. 199, and citations.

Error from Superior Court, Chatham County; P. W. Meldrim, Judge.

Action between Hattie Bingham and D. T. Haines. Verdict and judgment for the former, new trial granted on certiorari, and the former brings error. Affirmed.

Simon N. Gazan, of Savannah, for plaintiff in error.

Anderson, Cann, Cann & Walsh, of Savannah, for defendant in error.

SMITH, J. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(25 Ga. App. 166)

**AMERICAN NAT. BANK OF MACON v. ANDERSON.** (No. 9566.)(Court of Appeals of Georgia, Division No. 1.  
April 13, 1920.)*(Syllabus by the Court.)***RULING ON GENERAL DEMURRER TO PETITION.**

The court properly overruled the general demurrer to the first count of the plaintiff's petition but erred in overruling the general demurrer to the second count.

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

Suit by W. T. Anderson against the American National Bank of Macon. Judgment overruling a general demurrer to the petition, to which defendant brought error, was reversed by the Court of Appeals (23 Ga. App. 434, 98 S. E. 421), and on certiorari the judgment of the Court of Appeals was reversed by the Supreme Court (149 Ga. 798, 102 S. E. 534). Judgment of Court of Appeals vacated, and judgment of the lower court affirmed in so far as it overruled the general demurrer to the first count of the petition, and reversed in so far as overruling the demurrer to the second count.

Hardeman, Jones, Park & Johnston and Harry S. Strozler, all of Macon, for plaintiff in error.

Hall & Grice, of Macon, for defendant in error.

BROYLES, C. J. This case was first decided by this court on February 18, 1919, and it was then held that the plaintiff's petition (which consisted of two counts) showed no cause of action against the American National Bank, and the judgment of the trial court, overruling the general demurrer interposed to the petition was reversed (*American National Bank v. Anderson*, 23 Ga. App. 434, 98 S. E. 421). From the oral argument before this court, participated in by counsel for both the plaintiff in error and the defendant in error, we understood that counsel agreed that the single controlling question in the case was whether there had been a consolidation or merger of the two defendant banks, and that, unless there had been such a con-

solidation or merger, the plaintiff, under his petition as drawn, had no right of recovery against the American National Bank. And, as we recollect it, the arguments of all the counsel in the case were addressed to that question only. Upon a careful consideration of the pleadings and the authorities cited by counsel for both sides, this court was of the opinion, and so held, that the petition failed to show a consolidation or merger of the banks; and, under the agreement (as we understood it) of the learned counsel on both sides, we thought that this adjudication settled the entire case; and in the opinion rendered by this court it was said:

"The theory upon which the petition was drawn was that, under a certain written contract (a copy of which was attached as an exhibit to the petition), entered into between the two banks on August 11, 1914, a consolidation or merger of these banks resulted, and that the surviving bank—the American National Bank—was liable for the debts of the absorbed bank—the Commercial; and especially, as in this case, for services rendered upon the request of both banks, although the services were performed under employment by the absorbed bank. As the petition is drawn, there can be no recovery against the American Bank unless there was a consolidation or merger of the two banks."

The case thereafter was carried by certiorari proceedings to the Supreme Court, which sustained the judgment of this court that the plaintiff's petition did not show a consolidation or merger of the defendant banks. The Supreme Court further held, however, that while the second count of the petition (which was based upon the alleged consolidation or merger of the two banks) was subject to general demurrer, the plaintiff, under the first count of his petition, was entitled to recover from the American National Bank, notwithstanding there had been no merger or consolidation of the banks. Accordingly the judgment of this court that the plaintiff's petition set forth no cause of action against the American National Bank was reversed. See the opinion of the Supreme Court in this case rendered February 13, 1920, 149 Ga. 798, 102 S. E. 534.

It is therefore directed that the former judgment of this court in this case be vacated; and the judgment of the lower court is affirmed, in so far as it overruled the general demurrer to the first count of the petition, and reversed, in so far as it overruled the general demurrer to the second count.

Judgment affirmed in part and reversed in part.

LUKE and BLOODWORTH, JJ., concur.

(25 Ga. App. 174)

# SAYLOR v. STATE. (No. 11219.)

(Court of Appeals of Georgia, Division No. 1.  
April 13, 1920.)

(Syllabus by the Court.)

WEAPONS  $\Rightarrow$  17(4)—EVIDENCE HELD TO SUPPORT CONVICTION FOR CARRYING A PISTOL WITHOUT A LICENSE.

A conviction of the offense of carrying a pistol without a license was demanded by the prisoner's statement, as well as the testimony on behalf of the state.

Error from Superior Court, Calhoun County; W. M. Harrell, Judge.

Wyatt Saylor was convicted of carrying a pistol without a license in violation of the statute, and he brings error. Affirmed.

Chas. W. Worrill, of Cuthbert, for plaintiff in error.

R. O. Bell, Sol. Gen., of Cairo, and F. A. Hooper & Son, of Atlanta, for the State.

PER CURIAM. Wyatt Saylor was indicted for the offense of carrying a pistol without a license, in violation of section 348 (a) of Park's Penal Code. Two witnesses for the state testified positively to every fact essential to the state's case. These witnesses were unimpeached, and their testimony was not directly contradicted. The prisoner's statement to the court and jury was, in its material part, as follows: "On the first Saturday night in January I went to my home, and this Jesse Rogers, he come there. \* \* \* I went on with him. \* \* \* When we got in about 10 steps of Mr. Dread's home he handed me the pistol, and I takes the pistol in my hand and walks on in the kitchen, where Naomi Dread and them was, and I loaded it for Jesse Rogers." Upon being convicted, the accused moved for a new trial, on the usual general grounds only; and, the trial judge having overruled that motion, he brought the case here for review. His counsel, by brief in this court, "contends that the jury failed to give him the benefit of the doubt to which he was entitled under the law, and thereby rendered an erroneous and illegal verdict." The record discloses no legitimate cause for such a doubt.

Judgment affirmed.

BROYLES, C. J., and LUKE and BLOODWORTH, JJ., concur.



(25 Ga. App. 183)

**CORNELIUS v. ANDERSON et al.**  
(No. 11235.)(Court of Appeals of Georgia, Division No. 1.  
April 18, 1920.)*(Syllabus by the Court.)***1. OVERRULING OF CERTIORARI.**

The court did not err in overruling the certiorari.

*(Additional Syllabus by Editorial Staff.)***2. SALES ⇐8—CONSIGNER NOT NOTIFIED WHETHER GOODS SHIPPED ON CONSIGNMENT OR SALE MIGHT ELECT.**

Where defendant offered to accept plaintiff's potatoes, either on a consignment basis or a straight sale, and plaintiff shipped them without notifying defendant on which basis he wanted them handled, defendant might elect on which basis he preferred to handle them.

**3. SALES ⇐358(1)—WEIGHT OF POTATOES SHIPPED HELD IMMATERIAL, IN VIEW OF SUBSEQUENT CORRESPONDENCE.**

The issue as to whether weight of potatoes shipped to and handled by defendant on a commission basis and paid for on that basis was more than that reported by defendant was immaterial, where the correspondence between the parties after a controversy had arisen, as to whether shipment was on a straight sale or on a commission basis, showed that shipper virtually acquiesced in the weight as reported.

**4. ESTOPPEL ⇐63—GROUND OF CONTENTION TAKEN BEFORE LITIGATION CANNOT BE CHANGED THEREAFTER.**

Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot after litigation has been begun change his ground and put his conduct upon another and different consideration, as he is estopped to mend his hold.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by H. R. Cornelius against W. P. Anderson, executor, and others. Judgments for defendants on a directed verdict, certiorari overruled, and plaintiff brings error. Affirmed.

Holbrook & Corbett, of Atlanta, for plaintiff in error.

Geo. P. Whitman, of Atlanta, for defendants in error.

BROYLES, C. J. The controlling question in this case is whether the defendant was authorized to handle, on a consignment basis, the potatoes shipped to him by the plaintiff.

[1, 2] The record shows, without dispute, that the defendant offered to accept the potatoes, either on such a basis or on that of a straight sale, and that the plaintiff shipped them without notifying the defendant on which basis he wanted them handled. Under these circumstances the defendant had a right to elect on which basis he preferred to handle them, and the uncontradicted evidence is that he handled them on a commission basis, and paid the plaintiff what was due him on that basis. Upon the trial of the case there was no material issue of fact.

[3] The question whether the weight of the potatoes was more than as reported by the defendant was immaterial, since the correspondence between the parties, after the controversy had arisen as to whether the shipment was on a straight sale or on a commission basis, shows that the plaintiff virtually acquiesced in and agreed to the weights as reported to him by the defendant, and that the plaintiff's sole contention, prior to the filing of the suit, was that he had shipped the goods on a straight sale basis, and therefore that the check from the defendant (which he accepted and cashed) for an amount less than what would have been due him on that basis did not constitute an accord and satisfaction.

[4] "Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground and put his conduct upon another and different consideration. He is not permitted to thus mend his hold. He is estopped from doing it by a settled principle of law." *Fenn v. Ware*, 100 Ga. 563, 566, 28 S. E. 238, 239; *Bedingfield v. Bates Advertising Co.*, 2 Ga. App. 111, 58 S. E. 320, and citations.

It follows from what has been said that the trial judge did not err in directing a verdict for the defendant, and that the certiorari was properly overruled.

Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(36 W. Va. 233)

**STUMP et al. v. HITE.** (No. 3943.)(Supreme Court of Appeals of West Virginia.  
April 20, 1920.)*(Syllabus by the Court.)***1. EVIDENCE ¶434(11)—WHERE CONTRACT AMBIGUOUS, PAROL EVIDENCE ADMISSIBLE TO SHOW FRAUD IN REPRESENTATION OF ACREAGE.**

Where there has been a sale and conveyance of the timber only on a tract of land, and in the contract and deed there is a representation, not a warranty, that the tract described by metes and bounds contains a certain number of acres, and the purchaser claims an abatement of purchase money because of deficiency in acreage, parol evidence, because of the ambiguity in the contract and deed, is admissible on the question whether actual or constructive fraud was intended by the representation of acreage of timber sold.

**2. LOGS AND LOGGING ¶8(3)—WHERE BUYER HAD ESTIMATED TIMBER, EQUITY WOULD NOT DECREE AN ABATEMENT FOR DEFICIENCY IN ACREAGE.**

Where the consideration for the timber so sold and conveyed is a gross sum, and the evidence shows the purchaser did not rely on the representations of the vendor in the contract and deed, but had the timber on the land cruised and an estimate made of the kinds and quantity of lumber and tanbark that could be manufactured from the timber actually on the land, a court of equity should not decree any abatement of the purchase money on account of deficiency of acreage.

**3. LOGS AND LOGGING ¶8(15)—EQUITY WILL GIVE JUDGMENT FOR BALANCE OF PRICE, THOUGH, PENDING SUIT TO ENFORCE LIEN TIMBER HAS BEEN REMOVED.**

In a suit by a vendor of timber against his vendee to enforce his lien for unpaid purchase money, and pending the suit and before final decree the timber sold has all been removed from the land, equity nevertheless, having acquired jurisdiction in the beginning, will go on and give a final and personal decree against the defendant for the balance of the purchase money found due the plaintiff.

Appeal from Circuit Court, Hampshire County.

Suit by William B. Stump and others, administrators, etc., against John Y. Hite. Decree for plaintiff William B. Stump, and defendant appeals. Affirmed.

W. S. Meredith, of Fairmont, G. K. Kump and Robert White, both of Romney, and Geo. H. Williams, of Charleston, for appellant.

John J. Cornwell and J. S. Zimmerman, both of Romney, for appellee.

MILLER, J. The decree below denied defendant any abatement from the purchase money on account of the alleged shortage of acreage in the land on which the timber pur-

chased by him was situated, and adjudged against him in favor of plaintiffs the balance of purchase money remaining unpaid, amounting with interest to the date of the decree to \$9,636.05, with interest thereon from that date, with costs.

Neither the option contract pleaded nor the deed made pursuant thereto contained any warranty of acreage, but there was warranty of title and representation in the contract and deed that the tracts described aggregated about 7000 acres, and individually, the first, 6218 acres, the second, 258 acres, the third, 219 acres, the fourth, 122 acres, and the fifth, 218 acres, the first known as the Means tract and the other tracts described as the "Lochner Lands," the deed describing said tracts together by metes and bounds as an inclusive boundary.

The defendant alleges in his answer that at the time of the purchase of said timber the vendors represented to him that they owned about 7000 acres of land covered by valuable timber, and that he believed and relied thereon when he agreed to pay for said timber the sum of \$31,750.00, and that by a subsequent survey of said land it was found to contain not over 5770 acres, a difference of 1230 acres, and because of which he claims a proportionate abatement of the purchase money.

The evidence conclusively shows that defendant never met plaintiffs prior to the purchase and date of the deed, and that no agreements or representations as to the acreage were made to him other than are found in the contract and deed. Besides, the evidence is conclusive on another point, namely, that defendant did not rely on the representations in the deed or contract, for, after taking the option and before deed made or any of the purchase money paid, he employed two expert cruisers or estimators to go upon the land and estimate and report the amount and various kinds of timber and the amount of tanbark that could be gotten off the land. These cruisers were surveyors but did not make any survey of the entire acreage; they did estimate the actual number of acres on which there was any timber capable of being manufactured into lumber and made a report to defendant, their estimate of timber acreage being 4200 acres, not 7000 acres supposed to be contained in the outside boundaries, the estimate of timber of all kinds being 19,500,000 feet, and of chestnut bark, 13,500 cords. According to one of these estimators, the other not being produced as a witness, the estimate of timber was 4842 feet per acre; and the witness says he was told by defendant after he began operation on the land that he was getting between five and six thousand feet to the acre.

[1, 2] On this showing was defendant entitled to any abatement from the purchase price of the timber? We have to bear in

mind in this case that the subject matter of the contract and deed was the timber, not the land itself. Defendant knew that the whole of the tract was not covered with timber, and he knew through his estimators, if not from other sources, that only about three-fifths of the land had any kind of merchantable timber thereon. Nor is it anywhere alleged or proven that the amount of timber or tanbark on the land fell short of the estimate made and reported to defendant. The sole complaint is that the tracts of land so described by metes and bounds fell short in acreage. And the evidence shows that when the shortage of acreage was ascertained by defendant, and before he had done anything on the land to his prejudice, the plaintiffs proposed, if he was not satisfied, to rescind the contract and to return to him all the purchase money paid with interest thereon, but which offer defendant declined.

It is doubtful whether the general rules applicable to the sale and conveyance of land, whether in gross or by the acre, are pertinent and controlling when the subject of the sale and conveyance is the timber, or coal, or other substance of the land. It is rarely, if ever, that a tract of land is all covered by timber; it was not so in this case; and evidently defendant did not understand he was contracting for 7000 acres of timber, but for whatever timber was on the land and within the inclusive boundaries thereof. But if these general rules be applicable, according to our cases the deed and contract containing only representation as to quantity of land, was at most only ambiguous on its face, so as to let in parol evidence of the circumstances surrounding the parties and of their intentions when the deed was made, so as to determine whether an implied warranty of acreage of timber was intended. *Winton v. McGraw*, 60 W. Va. 98, 54 S. E. 506, and cases cited.

Applying this rule to the allegations and proof in this case, we can not say the decree below was erroneous in adjudging the issue in favor of plaintiffs. Indeed we are of opinion that it would have been error to decree otherwise. Apropos to the inquiry suggested as to the applicability of the general rule to sales and conveyances of timber, we decided in *Light v. Grant*, 73 W. Va. 56, 79 S. E. 1011, 51 L. R. A. (N. S.) 792, that the grantee of coal in place in a deed conveying all the coal in a tract of land can not rescind the sale merely because the coal area is not as large as he had hoped or expected to obtain, provided there is a substantial quantity of coal in the land; and if not permitted to rescind in such cases, it follows that a purchaser would not be entitled to an abatement of the purchase money. It is not claimed that the consideration for the timber, \$31,750.00, is the exact multiple of the number of acres of timber on the land or acreage called for in the deed. The consideration is a gross sum to be paid for the timber on the land, not for acres of land. The prior decisions of the court are so ample and complete on the only issue here involved that we deem it unnecessary to extend this discussion.

[3] The only other point we will notice is the question as to the jurisdiction of the court to pronounce the decree against defendant. The court in the beginning had jurisdiction of the suit to enforce the lien for purchase money; it did not lose that jurisdiction because pending the suit the timber, the subject of the lien, may have been removed from the land by defendant. The familiar rule that having once acquired jurisdiction for any purpose, equity will go on and do complete justice, is certainly applicable in this case.

For the foregoing reasons we will affirm the decree.

END OF CASES IN VOL. 102.









